NORTH CAROLINA COURT OF APPEALS REPORTS

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110 N.C. App.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JAMES ROGER EDWARDS v. JUDITH HURDLE EDWARDS

No. 922DC21

(Filed 4 May 1993)

1. Divorce and Separation § 117 (NCI4th)— equitable distribution—post-separation appreciation of corporation—no alternate method of classification

Defendant was not entitled to one half of the increased value of the marital interest in CSC, a corporation formed by plaintiff during the marriage and in which plaintiff and defendant were shareholders, where CSC was valued at 1.4 million dollars at the date of separation and increased in value to 2.5 million dollars on the date of distribution due to a contract which was signed after the separation but for which negotiations had begun while the parties were married. Although defendant concedes that the increase is not marital property as that term is defined in the equitable distribution context, defendant relies upon *Meiselman v. Meiselman*, 309 N.C. 279, and argues that she is entitled to share in the increase as a form of equitable relief. However, defendant did seek relief under N.C.G.S. § 55-14-30 and that statute and *Meiselman* do not provide the parties to an equitable distribution action with a means of circumventing the operation of

N.C.G.S. § 50-20 by creating an alternate method for classifying marital property.

Am Jur 2d, Divorce and Separation §§ 950 et seq.

2. **Divorce and Separation § 158 (NCI4th)— equitable distribution—two parcels of land—post-separation appreciation**

An equitable distribution action was remanded for clarification where defendant contended that she was entitled to one half of the post-separation appreciation of two parcels of land. Merely qualifying the appreciation as a distributional factor under N.C.G.S. § 50-20(c) does not entitle defendant to half the appreciation. However, it was not clear from the judgment whether the court considered the appreciation of one parcel as a distributional factor under N.C.G.S. § 50-20(c). The division of the property on remand will lie in the discretion of the court after appreciation of the property is properly considered.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

3. **Divorce and Separation § 129 (NCI4th)— equitable distribution—corporate bonuses—not vested—not marital property**

The trial court did not err in an equitable distribution action by finding that bonuses were not marital property where the parties separated on 14 March, the corporation (CSC) made the decision to pay bonuses in July, the priority was to ensure that CSC showed a profit, bonuses and profit sharing were paid out of what was left over, and plaintiff and the vice-president determined the amount set aside for profit-sharing and the amount of each employee's bonus based upon their opinion of the contribution of each employee to profits. A bonus based upon work performed during the marriage is not necessarily marital property; the bonus must also be vested. Defendant did not direct the Court of Appeals to any evidence indicating that plaintiff's or defendant's right to receive a bonus was vested on or before the date of separation and, in fact, it appears that a situation may arise where no employee will receive a bonus, so that the bonus certainly could not have vested before CSC decided to pay it.

Am Jur 2d, Divorce and Separation §§ 905 et seq.

4. Divorce and Separation § 119 (NCI4th)— equitable distribution—debt incurred to paint rental house—marital

The trial court did not err in an equitable distribution action by classifying a debt incurred to paint a rental house as marital where defendant argued that the debt was incurred for plaintiff's benefit because he lived in the house for several months after separation. The court heard testimony that the parties purchased the house during the marriage so that they could receive rental income from it, that the painting was required before it could be rented, and that the painting debt was incurred before separation. Marital debt is a debt which is incurred during the marriage for the joint benefit of the parties and the findings of the trial court are binding when supported by competent evidence.

Am Jur 2d, Divorce and Separation § 880.

5. Divorce and Separation § 158 (NCI4th)— equitable distribution—rental property—rental value after separation

There was no error in an equitable distribution action in the distribution of the rental value of a house for the period between separation and distribution where defendant contended that she was entitled to one half the fair rental value of the house during that period. The rental value of property after separation is not marital property and defendant is not entitled to a division of the marital property on that basis. The record discloses that the trial court considered plaintiff's post separation use of the rental house under N.C.G.S. § 50-20(c)(11a) and the court ordered an equal distribution which was completely within its discretion.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

6. Divorce and Separation § 148 (NCI4th)— equitable distribution—marital debts—burden of establishing error

Defendant did not meet her burden of establishing error in an equitable distribution action where she contended that the court correctly calculated the amount of a credit to her for paying certain marital debts, but failed to factor the credit into the final distribution.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

7. Divorce and Separation § 148 (NCI4th)— equitable distribution—payment of debts—necessities

The trial court correctly ruled in an equitable distribution action that defendant was not entitled to credit for payment of certain debts incurred after separation where defendant claimed that the debts were incurred for necessities. Some of the payments were for child support. Other debts paid by defendant were a house cleaning bill, grocery bills, a clothing bill, a telephone bill, dry cleaning bills, etc. Even if the payments were for necessities, *Beightol v. Beightol*, 90 N.C. App. 58, does not require a spouse to receive credit for paying for necessities after separation.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

8. Divorce and Separation § 158 (NCI4th)— equitable distribution—life insurance policies—post-separation payments

Defendant wife was not entitled to a credit in an equitable distribution action for post-separation premiums which she paid on life insurance policies insuring herself and the children even though she contended that the contracts were entered into during the marriage and were continuing marital debts. The cash value of the policies on the date of separation was marital property and the court should determine and distribute that amount on remand. Defendant paid the premiums from the date of separation forward, the policies belonged to her, and she is not entitled to a credit for paying those premiums.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

9. Divorce and Separation § 148 (NCI4th)— equitable distribution—post-separation mortgage payments—distributional factor rather than credit—no abuse of discretion

The trial court did not abuse its discretion in an equitable distribution action by treating defendant's post-separation payments toward mortgages as a distributional factor rather than a credit. The appropriate treatment of post-separation payments made by one spouse toward marital debt will vary depending upon the facts of the particular case and the trial court is in the best position to determine the most equitable treatment of those payments. *Haywood v. Haywood*, 106 N.C. App. 91, will not be interpreted as limiting the treatment which

a trial court may give to post separation payments toward marital debt.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

10. Divorce and Separation § 136 (NCI4th)— equitable distribution—valuation of land—economic life—no supporting evidence

The valuation of two parcels of land in an equitable distribution action was remanded for clarification or recalculation where the court relied upon an appraiser who determined that each parcel had a forty-year economic life, the court chose to use that appraiser's formula but substituted a thirty-year economic life, and plaintiff did not direct the court on appeal to any supporting exhibits or transcript pages among nearly two thousand pages of material.

Am Jur 2d, Divorce and Separation §§ 937 et seq.

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

11. Divorce and Alimony § 165 (NCI4th)— equitable distribution—distributive award—payment schedule—within six years of cessation of marriage

A payment schedule for a distributive award in an equitable distribution action was within the six-year period established by *Lawing v. Lawing*, 81 N.C. App. 159, where plaintiff was ordered to pay an initial sum to defendant and the balance in three installments due on 1 June 1992, 1 June 1993, and 1 June 1994, but defendant argued that the clock started running on 20 November 1987, when an order for alimony *pendente lite* and child support was entered. However, neither an order allowing alimony *pendente lite* nor a child support order constitutes a cessation of the marriage. The order granting divorce was entered 3 June 1988 and the schedule falls within the six-year period.

Am Jur 2d, Divorce and Separation §§ 870 et seq.

12. Divorce and Alimony § 158 (NCI4th)— equitable distribution—equal distribution—factors—loss of rental income

An equitable distribution action was remanded for clarification where defendant contended that the trial court erred by ordering an equal distribution but the court's findings under

N.C.G.S. § 50-20(c) reflect that the court considered the factors argued by defendant, except perhaps one. The court was to clarify this issue on remand, specifically determining if defendant is losing rental income, and consider either result as a factor in determining whether to order an equal division. The decision to order an equal or unequal division remains in the discretion of the court.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

Appeal by defendant from judgment entered 12 July 1991 by Judge Hallet S. Ward in Beaufort County District Court. Heard in the Court of Appeals 9 December 1992.

Plaintiff, James Roger Edwards, filed for divorce on 12 May 1988. Defendant, Judith Hurdle Edwards, answered and counterclaimed for equitable distribution. Judgment of divorce was entered on 3 June 1988, preserving the equitable distribution claim for later determination. The trial court ordered an equal division of property and entered judgment accordingly. From this judgment defendant appeals.

Harris, Mitchell, Hancox & VanStory, by Ronnie M. Mitchell, for plaintiff appellee.

Blount & Crisp, by Nelson B. Crisp; and Glover & Petersen, P.A., by James R. Glover, for defendant appellant.

ARNOLD, Chief Judge.

[1] Plaintiff and defendant were shareholders in Charcoal Services Corporation (CSC), a corporation formed by plaintiff during the marriage. On the date of separation, CSC was valued at 1.4 million dollars and increased in value to 2.5 million dollars on the date of distribution. The increase in value was due to the signing of a contract known as the "Peace Shield" Saudi Contract (the contract). Negotiations for the contract began while the parties were married, but the contract was not final until it was signed in June of 1987, approximately 3 months after the date of separation. On appeal, defendant argues that she is entitled to one half of the increased value of the marital interest in CSC.

Apparently defendant concedes that this increase is not marital property as that term is defined in the equitable distribution context. Nonetheless, defendant argues that she is entitled to share

in the increase as a form of equitable relief. She relies upon *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983) for that proposition. However, *Meiselman* is not applicable to this case. In *Meiselman*, our Supreme Court set out "the analysis a trial court is to apply in determining whether relief should be granted to a complaining shareholder *seeking relief under N.C.G.S. § 55-125(a)(4)* [now 55-14-30(2)(ii)]." *Meiselman*, 309 N.C. at 296, 307 S.E.2d at 562 (emphasis added). Defendant points out that, according to *Meiselman*, a minority shareholder is entitled to alternative forms of relief other than dissolution. *Meiselman*, 309 N.C. at 301, 307 S.E.2d at 564. From that standpoint defendant argues that, as an alternative form of relief, she is entitled to share in the post-separation appreciation of CSC.

This argument is of no avail. Defendant did not seek relief under N.C. Gen. Stat. § 55-14-30, and therefore *Meiselman* does not apply. Furthermore, we do not believe that N.C. Gen. Stat. § 55-14-30 and *Meiselman* provide the parties to an equitable distribution action with a means of circumventing the operation of N.C. Gen. Stat. § 50-20 by creating an alternative method for classifying marital property.

[2] Defendant also claims, in argument IV, that she is entitled to one half of the post-separation appreciation of two parcels of land labelled CSC 1 and CSC 2. CSC 1 and CSC 2 are the parcels on which CSC is located. Both parcels were classified as marital property and distributed to plaintiff in the final judgment. Also included in this argument is another attempt by defendant to share in the post-separation appreciation of CSC itself. If defendant is arguing that all of the appreciation should be considered as a factor under G.S. § 50-20(c), and as a result of this consideration should be divided in half, she is mistaken. Merely qualifying this post-separation appreciation as a distributional factor under G.S. § 50-20(c) does not entitle defendant to half of the appreciation. The factors under G.S. § 50-20(c) are used by the court to determine if an equal award is not equitable. N.C. Gen. Stat. § 50-20(c) (Cum. Supp. 1992). Nowhere in G.S. § 50-20(c) is the court instructed to divide post-separation appreciation. In fact, the court is not permitted to divide the appreciation on a particular asset because that appreciation is not marital property. *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988).

The court was required to consider the appreciation as a distributional factor. "Where there is evidence of active or passive appreciation of the marital assets . . . the court must consider such appreciation as a factor under G.S. § 50-20(c)(11a) or (12), respectively." *Mishler v. Mishler*, 90 N.C. App. 72, 77, 367 S.E.2d 385, 388, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). The court apparently found that CSC 2 appreciated in value, but it is not clear from the judgment if the court considered the appreciation as a factor under G.S. § 50-20(c). The court did not list this post-separation appreciation among the other factors it considered under G.S. § 50-20(c), therefore we remand for clarification or for the court to consider the appreciation of the property. *See Locklear v. Locklear*, 92 N.C. App. 299, 306, 374 S.E.2d 406, 410 (1988), *disc. review allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989). As for the appreciation of CSC itself, the judgment clearly recites that this appreciation was considered under G.S. § 50-20(c)(12).

Defendant also contends in this argument that the trial court erred by ordering an equal distribution in light of these factors. As stated above, we are not sure that the trial court considered the appreciation of CSC 1 and CSC 2. At this point we can only note that the trial court is granted wide discretion in equitable distribution cases. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* On remand the court must consider the appreciation of CSC 2, no matter if it is active or passive. If there is any appreciation of CSC 1, the court must consider that as well. After properly considering these factors, along with the others, the division of property will lie in the discretion of the trial court.

[3] In argument V, defendant challenges the trial court's classification of bonuses paid to her and plaintiff by CSC. Defendant argues that the trial court erred in finding that the bonuses were not marital property. We disagree.

The evidence produced at trial establishes that the parties separated on 14 March 1987, that CSC's fiscal year ended 30 April 1987, and that the decision to pay bonuses was made in July 1987. The practice of CSC was for plaintiff and the vice president of CSC to receive CSC's year-end books by the first week in July,

and, based upon the figures in those books, decide what amount of money to set aside for bonuses and profit sharing. The first priority was to ensure that CSC showed a profit—bonuses and profit sharing were paid out of what was left over. After an amount was set aside for bonuses, the amount of each employee's bonus was determined. The determination was based upon plaintiff's and the vice president's opinions of what the employee contributed to CSC's profits.

We agree with the trial court that defendant did not meet her burden of proving the bonuses were marital property. The bonuses were based upon the employee's performance over the previous year and were therefore a form of deferred compensation. N.C. Gen. Stat. § 50-20(b)(1) defines all vested pension, retirement, and other deferred compensation rights as marital property. However, the statute goes on to state that "the expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property." N.C. Gen. Stat. § 50-20(b)(2) (1987 & Cum. Supp. 1992).

"Vesting is crucial in distinguishing between marital and separate property under N.C.G.S. §§ 50-20(b)(1) and (2)." *Boger v. Boger*, 103 N.C. App. 340, 344, 405 S.E.2d 591, 593 (1991). Defendant's evidence on this issue is the testimony outlined above wherein plaintiff describes the time and method for determining bonuses. Defendant does not direct us to any evidence indicating that plaintiff's or defendant's right to receive a bonus was vested on or before the date of separation. In fact, it appears from the evidence that a situation may arise where no employee will receive a bonus, for example, if CSC shows no profit. If this is the case, the bonus certainly could not have vested before CSC decided to pay it.

A bonus based upon work performed during the marriage is not necessarily marital property. The bonus must also be vested. *See Johnson v. Johnson*, 74 N.C. App. 593, 328 S.E.2d 876 (1985) (expectation of nonvested rights considered separate property), and *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), *disc. review improvidently allowed*, 324 N.C. 245, 376 S.E.2d 739 (1989) (Proceeds from husband's life insurance policy on couple's son did not vest until the son's death, after the date of separation, and therefore were not marital property even though policy was purchased with marital funds.). We find no error in the court's classification of the bonuses.

[4] In argument VI, defendant argues that the trial court erroneously classified a debt incurred to paint a rental house owned by the parties. The trial court determined that the debt was marital and credited plaintiff for paying it. Defendant argues that plaintiff should not have been credited for paying the painting bill because he did not meet his burden of proving the debt was marital. In further support, defendant argues that because plaintiff lived in the rental home for several months after separation, the painting debt was incurred for his benefit and should be classified as his separate debt.

Marital debt is a debt which is "incurred during the marriage for the joint benefit of the parties." *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). The trial court heard testimony tending to prove that the parties purchased the house during the marriage so they could receive rental income from it, that painting was required before the house could be rented, and that the painting debt was incurred before separation. In equitable distribution, findings by the trial court are binding on the appellate court when supported by competent evidence. *Patton v. Patton*, 78 N.C. App. 247, 255, 337 S.E.2d 607, 612 (1985), *rev'd on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986). The trial court had before it competent evidence to support its finding that this debt was marital. The finding will not be disturbed.

[5] In argument XI, defendant contends that she is entitled to one half the fair rental value of the rental house for the period between separation and distribution. After the parties separated, plaintiff used the rental property for storage and rented it at various times for between $175.00 and $250.00 per month. Plaintiff received the rental house in the final judgment.

The rental value of the property after separation is not marital property. *Becker v. Becker*, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988). Plainly then, defendant is not entitled to a division of the rental value of the property on the basis that it is marital property. If defendant claims the right to one half the rental value of the property on the basis that it is a factor under G.S. § 50-20(c), we have already clarified that this is not a proper ground for division of a particular item of property.

The record discloses that the trial court did consider, pursuant to N.C. Gen. Stat. § 50-20(c)(11a), plaintiff's post-separation use of the rental house. Even considering that factor, the court ordered

an equal distribution which was completely within its discretion. We find no error on this issue.

[6] Defendant contends in argument IX that she was not credited for paying certain marital debts, which she paid out of her separate funds. The trial court determined that defendant was entitled to a credit and calculated the amount of that credit. Defendant agrees with the court's calculation, but she argues that the court failed to factor the credit into the final distribution. After reviewing the calculations, we are not convinced that the trial court failed to credit the defendant. Defendant's argument on this point is brief and difficult to follow. Therefore we hold that she did not meet her burden of establishing error, and we affirm on this argument.

[7] In argument VII, defendant argues that she should be credited for payment of certain debts incurred after separation. Defendant claims the debts were incurred for necessities. Some of the payments for which she seeks reimbursement were payments for child support. As such, they were properly excluded from consideration. N.C. Gen. Stat. § 50-20(f) (1987 & Cum. Supp. 1992). *See also Wiencek-Adams v. Adams*, 331 N.C. 688, 693, 417 S.E.2d 449, 452 (1992).

The other debts paid by defendant appear to be separate debts incurred by her after separation. Defendant claims she is entitled to credit for paying a house cleaning bill, grocery bills, a clothing bill, a telephone bill, dry cleaning bills, etc. Defendant relies upon *Beightol v. Beightol*, 90 N.C. App. 58, 63-64, 367 S.E.2d 347, 350-51, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) as support for the proposition that she should be credited for payments she made for necessities. Even if the payments in question were for necessities, we do not read *Beightol* as requiring a spouse to receive credit for paying for necessities after separation. Defendant does not argue that these were marital debts, so she is not entitled to credit on that ground. We agree with the trial court that defendant is not entitled to a credit.

[8] In argument VIII, defendant claims she is entitled to a credit for premiums she paid on life insurance policies after the date of separation. She is seeking credit only for payments made on the policies insuring her and the parties' children. Defendant argues that because the contracts were entered into during the marriage, they are continuing marital debts for which plaintiff is jointly liable. The only case cited in support of this proposition is *Bowman v.*

Bowman, 96 N.C. App. 253, 385 S.E.2d 155 (1989), wherein this Court held that taxes on maritally owned property after separation are a joint debt for which both parties are liable. *Bowman*, 96 N.C. App. at 256, 385 S.E.2d at 157.

We disagree with defendant's argument. We rely instead upon *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), *disc. review improvidently allowed*, 324 N.C. 245, 376 S.E.2d 739 (1989). Although that case did not decide the issue before us now, it offers an analysis which we choose to follow. In *Foster*, the parties owned a life insurance policy on their child. The policy was acquired during marriage and continued in effect after separation. The husband paid the premiums after separation. Before distribution, the child died and the right to receive the insurance proceeds vested. The wife contended that the proceeds from a policy purchased with marital funds were marital property to the extent marital funds were used to pay the premiums. In *Foster*, we stated that at separation, the cash value of the policy was marital property, but that the proceeds were the separate property of the husband because he was paying the premiums at the time the proceeds vested. *Foster*, 90 N.C. App. at 268, 368 S.E.2d at 28.

Likewise, in this case the cash value of the policies on the date of separation was marital property. On remand, the trial court should determine the value of the policies on the date of separation and distribute that amount. From the date of separation forward, defendant paid the premiums, so the policies belonged to her and she is therefore not entitled to a credit for paying those premiums.

[9] In defendant's third argument, she contends the trial court should have credited her with the amount by which she decreased mortgage debt on CSC 1 and CSC 2 after separation. Between the date of separation and the date of final judgment, the parties made equal payments on both mortgages. In the final judgment, plaintiff received both CSC 1 and CSC 2, and was ordered to take sole responsibility for paying the remaining debt on those two parcels. The trial court considered defendant's post-separation payments toward the mortgages as a distributional factor under G.S. § 50-20(c)(11a) rather than crediting defendant for those payments.

We find no error in the trial court's treatment of the post-separation payments toward the mortgage debt. The trial court is required to consider all debts of the parties in determining an

equitable distribution. *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). If the debt is separate, it is a factor to be considered under G.S. § 50-20(c)(1). If the debt is marital, the court has discretion to apportion or distribute the debt in an equitable manner. *Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429-30. In determining how to apportion marital debt, the trial court must decide how to treat post-separation payments made toward the debt. This Court has approved of: ordering one spouse to reimburse the other spouse for post-separation payments made toward marital debt, *Bowman v. Bowman*, 96 N.C. App. 253, 385 S.E.2d 155 (1989), *Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989), considering the post-separation payments as a distributional factor, *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991), *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990), and crediting a spouse in an appropriate manner for post-separation payments, *Hendricks v. Hendricks*, 96 N.C. App. 462, 386 S.E.2d 84 (1989), *cert. denied*, 326 N.C. 264, 389 S.E.2d 113 (1990), *McLean v. McLean*, 88 N.C. App. 285, 363 S.E.2d 95 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988), *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987). In addition, our Supreme Court has impliedly approved of crediting a spouse for post-separation payments made toward marital debt. *Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992).

The appropriate treatment of post-separation payments made by one spouse toward marital debt will vary depending upon the facts of the particular case. Accordingly, the trial court is not bound to treat these payments the same way in every case. The trial court is in the best position to determine the most equitable treatment of post-separation payments toward marital debt; therefore, the determination is left to the discretion of the trial court.

We are mindful that this Court's recent opinion in *Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565 (1992), *rev'd on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993), suggests that post-separation mortgage payments must only be treated as a distributional factor. Giving *Haywood* this interpretation is tantamount to overruling some of the earlier opinions of this Court addressing the same issue, and is therefore impermissible. *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Therefore, *Haywood* will not be interpreted as limiting the treatment which a trial court may give to post-separation payments toward marital debt.

In this case, the trial court decided to treat the post-separation payments toward the mortgages as a distributional factor, and we cannot say that this was an abuse of the court's discretion. Therefore, we affirm the court's treatment of these payments as a distributional factor.

[10] Defendant contends in argument II that the trial court erroneously valued CSC 1 and CSC 2. The value of each parcel was based in part on its economic life. The court relied upon an appraiser who determined that each parcel had a forty year economic life. The court chose to use this appraiser's formula, but substituted a thirty year economic life in its value calculation. Defendant assigns error to the thirty year figure because it is not supported by the evidence.

The court's valuation must be supported by evidence in the record. *Hall v. Hall*, 88 N.C. App. 297, 308, 363 S.E.2d 189, 196 (1987). The judgment states that the thirty year figure was based upon plaintiff's financial statement, in which he uses thirty years as the proper economic life. Defendant points out that the financial statements provided to this Court do not contain evidence of a thirty year economic life figure. Plaintiff does not direct us to any exhibits or transcript pages which support the thirty year figure; he merely relies upon the recital in the trial court's judgment. We will not comb through the transcript and exhibits, which consist of nearly two thousand pages, to find support for this finding.

Plaintiff cites *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986) for the proposition that when there is conflicting testimony as to value, the trial court may choose a middle figure after considering the factors involved in the various appraisals. Plaintiff's proposition is correct, but it is no help here. We do not see how the court arrived at the thirty year figure, even though the judgment states it came from plaintiff's financial statement. Without being directed to evidence which supports the thirty year figure, we cannot say the court properly arrived at a figure different from the appraiser's figure.

The judgment states that the court also relied upon "the testimony of both expert appraisers as to the construction and utility of the improvements" on CSC 1. This statement is too vague to support a finding of a thirty year economic life. *See Patton v. Patton*, 318 N.C. 404, 348 S.E.2d 593 (1986).

Because we are not directed to any evidence in the record which supports the finding of a thirty year economic life, we remand to the trial court for clarification or recalculation.

[11] In argument X, defendant assigns error to the payment schedule chosen for the distributive award. Plaintiff was ordered to pay an initial sum to defendant, and the balance was due in three equal installments due 1 June 1992, 1 June 1993, and 1 June 1994. Defendant argues that this schedule violates N.C. Gen. Stat. § 50-20(b)(3) and our holding in *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

In *Lawing*, we held that N.C. Gen. Stat. § 50-20(b)(3) authorized "the court to make distributive awards for periods of 'not more than six years after the date on which the marriage ceases'. . . ." *Lawing*, 81 N.C. App. at 184, 344 S.E.2d at 116. Defendant argues that the clock started running on 20 November 1987, when an order for alimony pendente lite and child support was entered. However, neither an order allowing alimony pendente lite nor a child support order constitutes a cessation of the marriage. *Lawing* contemplates the date the marriage ceases as the starting point of the six year period. The order granting divorce in this case was entered 3 June 1988. Accordingly, the schedule set out in the judgment, which ends 1 June 1994, falls within the six year period established in *Lawing*. Therefore, defendant's argument fails.

[12] In her final argument, defendant once again contends the trial court erred in ordering an equal distribution. She lists a variety of factors which she claims support an unequal distribution. The court's findings under G.S. § 50-20(c) reflect that the court considered the factors argued by defendant except perhaps one. It is unclear from the order if the trial court considered that defendant was losing all of her rental income from CSC 1 and CSC 2, if in fact she is losing that income. Plaintiff was awarded CSC 1 and CSC 2 in the judgment, but in its findings under G.S. § 50-20(c)(1), specifically 67(f), the court states that defendant's current income consists partly of CSC rents. It is unclear from the court's language whether the court considered that defendant would receive rental income from CSC up to the date of distribution, or that defendant would continue to receive CSC rents in the future. On remand, the court should clarify this issue, specifically determining if defendant is losing this income, and consider either result

under G.S. § 50-20(c)(1) as a factor in determining whether or not to order an equal division. The decision to order an equal or unequal division remains in the discretion of the court.

Reversed and remanded.

Judges JOHNSON and ORR concur.

BOBBY THOMAS MITCHELL v. NATIONWIDE INSURANCE COMPANY

No. 9210SC96

(Filed 4 May 1993)

1. Insurance § 528 (NCI4th)— stacking—underinsured motorist coverage—interpolicy—nonowner under both policies—policy provisions

Policy language could have prevented a plaintiff from interpolicy stacking of underinsured motorist coverage where plaintiff was injured while riding as a passenger in a vehicle owned and operated by Stewart; the Stewart vehicle was insured by defendant with $50,000 per person of uninsured/underinsured motorist coverage; plaintiff's medical expenses alone were in excess of $90,000; defendant paid plaintiff $25,000, representing the $50,000 UIM coverage under the Stewart policy less the $25,000 paid under the tortfeasor's liability policy; plaintiff was a member of his mother's (Ms. Baker's) household; Ms. Baker owned a vehicle insured by defendant under a policy which provides $50,000 of UIM coverage; and plaintiff in this action sought the $50,000 under the Baker policy. Both of the policies which the party seeks to stack must have been issued to the "named insured" or "the spouse if a resident of the same household." Plaintiff's status as a "family member" does not prevent his recovery under the policy in general; however, here the policies were not issued to the same named insured nor the spouse of the named insured.

Am Jur 2d, Automobile Insurance § 322.

Combining or stacking uninsured motorist coverages provided in separate policies issued by same insurer to different insureds. 23 ALR4th 108.

2. Insurance § 528 (NCI4th)— stacking—underinsured motorist coverage—interpolicy—nonowner under both policies—statutory provisions

The trial court did not err by permitting a twenty-five-year-old non-owner plaintiff to stack UIM coverages where plaintiff was injured while a passenger in a vehicle owned by Stewart and insured by defendant; the Stewart policy provided underinsured motorist coverage; defendant paid plaintiff pursuant to his rights under that policy; plaintiff was a member of his mother's household; she owned a vehicle insured by defendant with an underinsured motorist provision (the Baker policy); and plaintiff brought this action seeking recovery under the Baker policy. Although defendant contends that N.C.G.S. § 20-279.21 does not require interpolicy stacking of UIM coverage for the benefit of a non-owner family member, the facts in this case support the existence of a benefit to plaintiff's mother when plaintiff is allowed to stack in that there is no evidence that plaintiff had his own car or had purchased his own insurance; moreover, his mother clearly benefits from stacking where plaintiff received severe closed head injuries resulting in permanent impairment for which he requires intensive home care. Permitting plaintiff to stack UIM coverages under the Baker and Stewart policies comports with the avowed purpose of the Financial Responsibility Act; the statute is remedial and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished.

Am Jur 2d, Automobile Insurance § 322.

Combining or stacking uninsured motorist coverages provided in separate policies issued by same insurer to different insureds. 23 ALR4th 108.

3. Insurance § 530 (NCI4th)— stacking—underinsured motorist coverage—interpolicy—no credit for amount paid under first policy

Although defendant insurance company contended that it was entitled to a credit for amounts already paid to plaintiff, the trial court's reasoning and mathematics were correct when

it concluded that there was a total of $100,000 in underinsured motorist coverage available from stacked policies, that plaintiff had been paid $50,000 under the tortfeasor's liability policy and the policy of the driver of the car in which plaintiff was riding, and that the balance was $50,000.

Am Jur 2d, Automobile Insurance § 322.

Combining or stacking uninsured motorist coverages provided in separate policies issued by same insurer to different insureds. 23 ALR4th 108.

Judge ORR dissenting.

Appeal by defendant from Judgment entered 5 November 1991 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 5 January 1993.

Farris & Farris, by Robert A. Farris, Jr. and Thomas J. Farris, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for defendant-appellant.

WYNN, Judge.

This appeal was brought pursuant to N.C.G.S. § 1-253 for a declaration of the rights of plaintiff, Bobby Thomas Mitchell, under a policy of insurance issued to Mitchell's mother, Peggy Wiggs Baker, by the defendant, Nationwide Mutual Insurance Company (Nationwide). A non-jury trial was held and tried on the stipulated facts. The trial court took the matter under advisement and entered judgment in favor of plaintiff for $50,000 plus costs.

In this case we are presented with yet another first impression insurance stacking issue—namely, whether the underinsured motorist (UIM) coverage for a non-owner Class I insured under one policy may be stacked with the UIM coverage under another policy in which the party is also a non-owner insured? We hold that it can.

This action arises out of an automobile accident which occurred in Johnston County, North Carolina on 31 August 1986. Plaintiff was riding as a passenger in a vehicle owned and operated by Ronnie Stewart. The Stewart vehicle was insured by defendant Nationwide under a policy providing $50,000 per person of unin-

sured/underinsured motorist (UM/UIM) coverage (Stewart policy). The Stewart vehicle was struck by an automobile driven by James Lopez, the tortfeasor. Lopez's vehicle was insured by North Carolina Farm Bureau under a policy providing bodily injury liability limits of $25,000 per person (Lopez policy).

Plaintiff sustained injuries resulting in medical expenses alone in excess of $90,000. N.C. Farm Bureau paid plaintiff the $25,000 policy limit under the Lopez policy. Defendant paid plaintiff $25,000 representing the $50,000 UIM coverage under the Stewart policy less the $25,000 already paid to plaintiff under the Lopez policy.

Plaintiff is the twenty-five year old son of Peggy Wiggs Baker and at the time of the accident was a member of her household. Ms. Baker owns a vehicle insured under a policy issued by defendant which provides $50,000 of UIM coverage (Baker policy). Plaintiff, in this action sought recovery of the $50,000 of UIM coverage under the Baker policy. The trial court made findings of fact and concluded that plaintiff was a "covered" person under the Baker policy. The trial court further concluded that there was a total of $100,000 in UIM coverage available to plaintiff at the time of the accident, representing $50,000 from the Stewart policy stacked with the $50,000 from the Baker policy. The trial judge deducted from the $100,000 total, the $50,000 that had already been paid to plaintiff under the Lopez and Stewart policies and held that the plaintiff should recover from defendant the excess $50,000. Defendant appeals.

I.

Defendant contends by its first assignment of error that plaintiff is not entitled to interpolicy stack the $50,000 of UIM coverage under the Baker policy with the $50,000 in UIM coverage provided in the Stewart policy because language in the Baker policy prohibits such stacking by a non-owner and N.C.G.S. § 20-279.21(b)(4) does not require interpolicy stacking for the benefit of one who is not the owner of the Baker policy.

In determining "whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). In the present case, the type of

coverage at issue is UIM coverage. The relevant statute is N.C.G.S. § 20-279.21(b)(4) and supplements in effect in 1986. Both the Stewart policy and the Baker policy provide for UIM coverage and the parties stipulated to the fact that plaintiff is a "covered" person under *both* the Baker and the Stewart policies. Defendant contends however, that whereas the plaintiff is neither the "owner" of the policy, nor of the vehicles insured, he is not entitled to stack the UIM coverage provided under the two policies. We disagree.

Policy Provisions

[1] The Baker policy contains definitions of certain terms used throughout the policy, including:

> "you" and "your" refer to:
>
> 1. The "named insured" shown in the Declaration; and
>
> 2. The spouse if a resident of the same household.
>
> "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household.

Part D, the UM and UIM coverage section of the Baker policy provides:

> We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an [underinsured] motor vehicle because of:
>
> 1. Bodily injury sustained by a **covered person** and caused by an accident.
>
> "**Covered person**" as used in this Part means:
>
> 1. You or any **family member**.
>
> 2. Any other person **occupying**:
>
> a. ***your covered auto***; *or*
>
> b. any other auto operated by you.

Plaintiff is "covered" under the Baker policy because he is a family member living in the same household as his mother, Ms. Baker. He is "covered" under the Stewart policy because he was "occupying" Stewart's "covered auto" at the time of the accident.

The "Uninsured/Underinsured Motorist Coverage Endorsement" 1676B, found in both policies, provides for interpolicy stacking as follows:

> If this policy and any other policy *issued to you* apply to the same accident, the maximum limit of liability for your or a **family member's** injuries shall be the sum of the limits of liability for this coverage under all such policies.

(Emphasis added).

Defendant argues that where the plaintiff is neither the "named insured" nor the named insured's "spouse," he is not "you" as defined by the Baker policy and therefore may not stack the coverages because he does not fall within the meaning of the phrase "issued to you" in the above policy clause. Plaintiff argues in response that as a "family member" and therefore, a "covered" person, he may stack the policies despite the fact that he is neither the named insured nor the insured's spouse.

The North Carolina Supreme Court addressed this exact issue in *Smith v. Nationwide* and held that the above quoted endorsement language "clearly allows the stacking of UM/UIM coverages *for a family member*, when the family member is covered by more than one policy *issued to the named insured*." 328 N.C. at 146, 400 S.E.2d at 49 (emphasis added). *Smith* involved two separate policies of insurance, one issued to the plaintiff-father individually and the other issued to both the father and his deceased daughter for whom he sought recovery. Where the plaintiff's decedent was "covered" under both policies; one as a "named insured" and the other as a family member living in the household, stacking was permissible. However, a crucial factor distinguishes *Smith* from the subject case. In *Smith*, both policies were "issued" to the individual plaintiff-father.

The policy language permits stacking of "this policy and *any other policy issued to you*." Thus, *both* of the policies which the party (whether a "family member" or the named insured), seeks to stack, must have been issued to the "named insured" or "the spouse [of the named insured] if a resident of the same household." Plaintiff's status as a "family member" does not, therefore, in general, prevent his "recovery" under the policy. However, in this case, one policy is issued to Baker as the named insured and the other policy is issued to Stewart as the named insured. Thus, where

these policies are not issued to the same named insured, nor the spouse of the named insured, under the guidance of *Smith* we can conclude that the *policy* language prevents this plaintiff from interpolicy stacking the two separate policies.

Statutory Provisions

[2] Defendant contends further that N.C.G.S. § 20-279.21 of the Motor Vehicle Safety and Financial Responsibility Act also does not require interpolicy stacking of UIM motorist coverage for the benefit of a non-owner family member. The provisions of the Financial Responsibility Act are written into every automobile insurance policy issued for delivery in this State as a matter of law. *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 555, 340 S.E.2d 127, 130, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). In the event that a provision of an insurance policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. *Nationwide Mut. Ins. Co. v. Cantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977). The Financial Responsibility Act is a "remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

The statute essentially establishes two "classes" of "persons insured." See N.C.G.S. § 20-279.21(b)(3). A Class I insured includes "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . ." *Crowder*, 79 N.C. App. at 554, 340 S.E.2d at 129. A Class II insured is "any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle." *Id.* at 554, 340 S.E.2d at 129-30. In the subject case, plaintiff was a non-owner, non-family member passenger in the Stewart vehicle and is thus, a Class II insured under the Stewart policy. As a non-owner family member living in his mother's household, plaintiff is a Class I insured under the Baker policy.

We note that our courts have clearly established that pursuant to the language of N.C.G.S. § 20-279.21(b)(3), a Class I insured, albeit a non-owner family member, living in the household of a policy holder, may recover under the UIM provisions of a policy "even where the insured vehicle is not involved in the insured's injuries." *Id. See also Grain Dealers Mut. Ins. Co. v. Long*, 322

N.C. 477, 421 S.E.2d 142 (1992); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992); *Smith*, 328 N.C. 139, 400 S.E.2d 44. This coverage is based upon the theory that while "liability insurance is essentially vehicle oriented, UM/UIM insurance is essentially person oriented." *Smith*, 328 N.C. at 148, 400 S.E.2d at 50. Therefore, as a Class I insured, plaintiff "qualifies" for recovery under the Baker policy. Further, there is no dispute that plaintiff also "qualifies" for recovery under the Stewart policy, as evidenced by the fact the defendant has already paid the plaintiff pursuant to his rights under that policy. The only issue is whether plaintiff can stack the UIM coverages under the two policies.

The stacking provision of the statute provides in relevant part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the *total limits of the* **owner's** *underinsured motorist coverages provided in the* **owner's** *policies of insurance; it being the intent of this paragraph to provide to the* **owner**, *in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies . . .*

N.C.G.S. § 20-279.21(b)(4) (1985) (emphasis added). Defendant contends that the repeated references to "owner" in the statute indicate that only the owner of a policy of insurance or owner of the insured vehicle is entitled to the benefits conferred by the statute, namely stacking.

As a threshold matter, we note that Nationwide does not argue, nor do we find, that this type of interpolicy stacking is prohibited when the injured insured is the "owner" of a policy. *See Sproles v. Greene*, 100 N.C. App. 96, 103, 394 S.E.2d 691, 695 (1990), *aff'd in part, rev'd in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991) ("Our law is . . . that an insured may collect under multiple [UIM] policies . . . and that a carrier having accepted a premium for [UIM] coverage may not deny coverage on the ground that other such insurance is available to the insured.") *See also Sutton*, 325 N.C. 259, 382 S.E.2d 759 (N.C.G.S. § 20-279.21(b)(4) requires that multiple UIM coverage available to an innocently injured accident victim be stacked or aggregated); *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 107 N.C. App. 26, 418 S.E.2d 680 (1992), *disc. rev. denied*, 333 N.C. 346, 426 S.E.2d 709 (1993)

(plaintiff permitted to stack UIM coverages under two separate policies even though neither plaintiff, nor his deceased wife, for whom he sought recovery, was the "owner" of both policies). Rather, the issue argued by defendant is whether the statute requires such *interpolicy* stacking by *this* plaintiff as a *non-owner* of the Baker policy.

Nationwide made the same argument in *Harris v. Nationwide*, contending that the non-owner plaintiff, a minor family member living in the same household as the named insured, could not *intrapolicy* stack the limits of liability for three separate vehicles insured under a single policy owned by her parents. The North Carolina Supreme Court, relying on *Sutton*, held that the injured minor, an insured of the first class, was entitled to *intrapolicy* stack the UIM coverages under her parent's insurance policy in determining Nationwide's limit of liability.

In reaching its conclusion in *Harris*, the Supreme Court reasoned:

> When one member of a household purchases first-party UIM coverage, it may fairly be said that he or she intends to protect all members of the family unit within the household. The legislature recognized this family unit for purposes of UIM coverage when it defined "persons insured" of the first class as "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . ." These *persons insured of the first class are protected*, based on their relationship, whether they are injured while riding in one of the covered vehicles or otherwise. Certainly the policy owner "benefits" when a spouse or family member residing in his or her household can stack UIM coverages. We conclude that the principles enumerated in *Sutton* which allow UIM stacking when the owner is injured also allow *intrapolicy stacking of UIM coverages when the injured party is a person insured of the first class.*

332 N.C. at 193-94, 420 S.E.2d at 130 (citations omitted) (emphasis added). A number of cases following *Harris* have permitted *intrapolicy* stacking of UIM coverage by a non-owner Class I insured. See *Davis v. Nationwide Mutual Ins. Co.*, 106 N.C. App. 221, 415 S.E.2d 767, *disc. rev. denied*, 332 N.C. 343, 421 S.E.2d 146 (1992); *Manning v. Tripp*, 104 N.C. App. 601, 410 S.E.2d 401 (1991), *aff'd*, 332 N.C. 341, 420 S.E.2d 123 (1992); *Amos v. North Carolina Farm*

Mut. Ins. Co., 103 N.C. App. 629, 406 S.E.2d 652 (1991), *aff'd*, 332 N.C. 340, 420 S.E.2d 123 (1992).

Defendant argues that the *Harris* holding is limited in that the statute permits a non-owner family member to stack only where it results in a benefit accruing directly to the owner of the policy. This Court recently read *Harris* to require that a benefit accrue to the owner of the policy. In *Harrington v. Stevens*, 107 N.C. App. 730, 421 S.E.2d 605 (1992), our Court in interpreting *Harris*, stated that

> if the non-owner is a (1) spouse or relative of the policy owner, (2) resides in the same household as the policy owner, and (3) the policy owner benefits if the non-owner is allowed to *stack UIM coverages in the owner's policy, stacking of the policy owners UIM coverages by the nonowner is permitted.*

107 N.C. App. at 732, 421 S.E.2d at 606 (citing *Harris*, 332 N.C. at 193-94, 420 S.E.2d at 130) (Wells, J., dissenting). In *Harrington*, the plaintiff, a first class insured, residing in the same household as his brother and father sought *interpolicy* stacking of the UIM coverages under his brother's and father's policies. This Court held that where the plaintiff was an independent adult with his own children and own insurance, he could not *interpolicy* stack the UIM coverages because there was no evidence that the brother and father [policy owners] would benefit by the stacking. The Court concluded that if there is "no 'benefit' running to the owner, there is no stacking of UIM coverages." *Id.* at 733, 421 S.E.2d at 607.

After thoroughly reviewing Justice Frye's well-reasoned opinion in *Harris*, we have concerns as to whether *Harrington* represents a proper interpretation of the Supreme Court's ultimate holding. In discussing the resulting benefit which accrued to the child's parents in *Harris* by permitting her to stack the coverages, the Supreme Court stated:

> *Assuming, without deciding, that Nationwide is correct in interpreting the statute to mean that only "owners" are intended to benefit from the stacking of UIM coverages*, there is no factual dispute that Mr. and Mrs. Harris "benefit" when their child Michelle is allowed to stack. To accept Nationwide's argument would be to say that the legislature intended for Michelle's parents, the policy owners, to benefit from their UIM coverage when **they** are injured by an underinsured motorist, but did

> not intend for them to benefit financially when their minor daughter, a member of their household, is injured by an underinsured motorist. Clearly the legislature "did not intend [such] an unjust or absurd result."

Harris, 332 N.C. at 193, 420 S.E.2d at 129-30 (citation omitted) (emphasis added).

Moreover, the Supreme Court has since affirmed the holdings of this Court in two other cases which held that *intrapolicy* stacking by a non-owner family member is permissible. *See Manning*, 332 N.C. 341, 420 S.E.2d 123 (*intrapolicy* stacking permitted for a non-owner family member and non-named insured injured while riding as a passenger in an insured vehicle); *see also Amos*, 332 N.C. 340, 420 S.E.2d 123 (*intrapolicy* stacking permitted by a non-owner family member for injuries sustained while riding as a passenger in a non-owned vehicle). Both *Manning* and *Amos*, were affirmed "for the reasons stated in the [Supreme] Court's decision in *Harris*." *Id.* In affirming those cases, the Supreme Court did not perform or recognize any necessary benefit analysis. However, our conflict with the reasoning in *Harrington* isn't significant in this case because the facts here indicate that a benefit exists. There is no evidence that the plaintiff had his own car or had purchased his own insurance in this case. Moreover, where the plaintiff received severe closed head injuries resulting in permanent impairment for which he requires intensive home care, his mother clearly benefits by permitting stacking. Thus, as in *Harris*, even if we "assum[e] without deciding" that only "owners" are intended to benefit from stacking of UIM coverages, the facts in this case support the existence of a benefit to plaintiff's mother when plaintiff is allowed to stack.

Permitting the plaintiff in this case to stack the UIM coverages under the Baker and Stewart policies comports with the avowed purpose of the Financial Responsibility Act. Namely, "to compensate the innocent victims of financially irresponsible motorists." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. This objective will not be achieved if insurance carriers are permitted to limit an injured insured's recovery to the maximum amount under one of the applicable policies of insurance. The statute is remedial in nature and is to be "liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Id.* (citation omitted). In keeping with that purpose, we find that the trial court did not err in permitting the non-owner plaintiff to stack the UIM coverages under the Baker and Stewart policies.

II.

[3] Defendant secondly contends that it is entitled to a credit against the $50,000 in UIM coverage provided under the Baker policy for the $50,000 already paid to plaintiff under the Lopez and Stewart policies. Defendant argues that when the $50,000 UIM coverage under the Baker policy is offset by the $50,000 already paid to the plaintiff, plaintiff is entitled to no further payments.

The trial judge herein, concluded in his judgment that

> [t]here was a total of $100,000 underinsured motorist coverage available from the Stewart policy and from the Baker policy at the time of the accident. To date, the Plaintiff has been paid the sum of $50,000 under the tortfeasor Lopez's policy and under the Stewart policy, which sum should be deducted from the aggregate total leaving a balance of $50,000.

We agree with the reasoning and the mathematics employed by the trial judge, and therefore affirm his judgment on this issue.

Affirmed.

Judge EAGLES concurs.

Judge ORR dissents in a separate opinion.

Judge ORR dissenting.

Based upon the majority opinion in *Harrington v. Stevens*, 107 N.C. App. 730, 421 S.E.2d 605 (1992), I respectfully dissent. Despite the effort to distinguish *Harrington* by the majority in the case *sub judice*, it is my view that the law as articulated by Judge Greene in *Harrington* controls the decision in this case.

HOWARD L. FREESE v. GEORGE R. SMITH

No. 9226SC45

(Filed 4 May 1993)

1. **Pleadings § 33.3 (NCI3d)— motion to amend—additional claim—denial not abuse of discretion**

The trial court did not abuse its discretion in the denial of plaintiff's motion to amend his complaint in an action arising from the sale of corporate stock on the ground that defendant would be unduly prejudiced by the amendment where plaintiff sought to add a claim under N.C.G.S. § 78A-56(a)(2); a claim under this statute would shift the burden of proof to defendant; plaintiff's amendment was more than two years after the contract of sale and was thus outside the limitation contemplated by N.C.G.S. § 78A-56(f); and discovery had been completed and the case had been scheduled for trial at least once.

Am Jur 2d, Pleading §§ 306 et seq.

2. **Fraud, Deceit, and Misrepresentation § 14 (NCI4th)— sale of corporate stock—concealment of facts—common law fraud—sufficiency of evidence**

Plaintiff investor's evidence was sufficient for the jury on the issue of common law fraud by defendant majority shareholder in the sale of company stock to plaintiff where it tended to show that plaintiff invested $250,000 in the company in exchange for a 45 percent ownership interest; defendant failed to disclose to plaintiff (1) a consultant's recommendation against selling the irrigation portion of the business to defendant's son and that the company needed an infusion of $1.5 million to remain solvent, (2) a settlement which included a confession of judgment for $500,000, a return of inventory, a cash payment of $50,000 and monthly payments of $10,000, (3) an agreement for the company to indemnify defendant for any loss on his personal guaranty of a loan from NCNB, (4) that continuation of the NCNB loan was contingent upon the injection of $500,000 into the company from outside investors, and (5) the final version of the accountant's report; the irrigation division sold to defendant's son lost less money than represented by defendant to plaintiff; and although plaintiff investigated the company, he did not know the status of the

critical transactions because they were handled exclusively by defendant.

Am Jur 2d, Fraud and Deceit §§ 144 et seq.

Duty to disclose material facts to stock purchaser. 80 ALR3d 13.

3. Frauds, Statute of § 32 (NCI4th)— statute of frauds—affirmative defense—failure to plead

Defendant may not assert on appeal the statute of frauds set forth in N.C.G.S. § 25-8-319 as a defense to plaintiff's action for breach of contract in the sale of corporate stock where defendant neither pled nor otherwise raised the statute of frauds as a defense in the trial court.

Am Jur 2d, Statute of Frauds §§ 589 et seq.

4. Corporations § 126 (NCI4th)— director-majority shareholder—breach of fiduciary duty to minority shareholder

Plaintiff minority shareholder's evidence was sufficient for the jury on the issue of defendant director-majority shareholder's breach of fiduciary duty by repaying himself loans he made to the corporation, preferentially repaying a corporate debt that he guaranteed, and repaying debts to a company he predominantly owned while the corporation was experiencing financial difficulties and after plaintiff had invested $250,000 in the corporation for a 45 percent interest therein.

Am Jur 2d, Corporations §§ 728 et seq.

5. Costs § 36 (NCI4th)— costs and attorney's fees—existence of justiciable issues

The trial court's award of costs and attorney's fees to defendant pursuant to N.C.G.S. § 6-21.5 is vacated where the appellate court held that plaintiff's evidence was sufficient for the jury on issues of fraud, breach of contract and breach of fiduciary duty so that justiciable issues did exist.

Am Jur 2d, Costs §§ 72-86.

Appeal by plaintiff from order entered 8 November 1990 by Judge Shirley Fulton, and orders entered 23 July 1991 and 26

July 1991 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 December 1992.

Horack, Talley, Pharr & Lowndes, P.A., by Neil C. Williams, for plaintiff-appellant.

Weinstein & Sturges, P.A., by Thomas D. Myrick and James P. Crews, for defendant-appellee.

LEWIS, Judge.

The facts of this case arise out of a stock purchase agreement between Howard Freese (the "plaintiff") and George Smith (the "defendant") for shares in E. J. Smith & Sons Company ("EJS"), a company owned almost exclusively by defendant. EJS was a wholesale distributor of turf maintenance and irrigation equipment. However, in 1987, EJS was in financial difficulty and the defendant began to seek new capital for EJS. Defendant employed the services of Ronald Norelli to conduct a strategic feasibility study. It was the opinion of Mr. Norelli that EJS needed an infusion of $1.5 million in capital to survive, and contrary to the defendant's plan the irrigation division of EJS should not be sold to defendant's son. Mr. Norelli also recommended that if EJS did not receive the $1.5 million infusion of capital then an orderly dissolution of EJS would be necessary. Unhappy with these recommendations, defendant discharged Mr. Norelli and hired the Finley Group for further consultation. Late in 1987, seeking to generate more capital for EJS, Tim Finley of the Finley Group approached plaintiff to see if he was interested in investing in EJS. After doing extensive independent research, plaintiff invested $250,000 in EJS in February of 1988 in exchange for a 45% ownership interest in the company and assumed the duties of President of EJS.

After plaintiff's investment the business prospects of EJS declined drastically and on 7 November 1988, defendant terminated plaintiff's employment. Eventually, EJS was forced into involuntary bankruptcy by three of its creditors. Plaintiff seeks damages for breach of duty of good faith, fraud, breach of fiduciary duty, breach of contract, rescission, unjust enrichment, and unfair and deceptive trade practices. After numerous pretrial motions and volumes of discovery, this matter came to trial on 15 July 1991. At the conclusion of plaintiff's evidence defendant moved for and was granted a directed verdict on all claims. Plaintiff appeals.

I.

[1] In his first assignment of error, plaintiff claims that the trial court erred in denying his motion to amend his complaint approximately 9 months prior to trial. We do not agree. When the complaint in this action was originally filed, plaintiff was represented by the law firm of James, McElroy & Diehl, P.A. Sometime after defendant's answer, but prior to trial, they were allowed to withdraw and plaintiff engaged the services of Horack, Talley, Pharr & Lowndes. On 12 October 1990, plaintiff's new attorney filed a motion to amend plaintiff's complaint to include a cause of action under N.C.G.S. § 78A-56(a)(2) which provides in pertinent part:

> (a) Any person who: . . .
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), *and who does not sustain the burden of proof that he did not know*, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him . . . .

N.C.G.S. § 78A-56(a)(2) (Cum. Supp. 1992) (emphasis added).

When plaintiff's new counsel filed the motion to amend, almost two years had elapsed since the filing of the original complaint. During those two years all of the pretrial discovery, which consisted of over 3000 documents and many days of depositions, had been completed and the case had already been scheduled for trial at least once. At the request of plaintiff and with the consent of defendant, the original trial date of 11 June 1990 was rescheduled for the week of 1 October 1990. Again at the request of plaintiff, on 13 September 1990 the parties entered into a consent order to move the trial to 19 November 1990. However, no Civil Session of Superior Court was scheduled in Mecklenburg County for the week of 19 November 1990 and the trial was reset for the next available date which was 15 April 1991.

Plaintiff's motion to amend was not actually heard until 2 November 1990, two weeks prior to the scheduled trial date of 19 November 1990. The record is not clear whether plaintiff's motion was made before or after the trial date was moved to 15

April 1991, but based upon the evidence available, the trial court denied plaintiff's motion to amend and made detailed findings of fact in support of its conclusion. The trial court noted that plaintiff's amended complaint sought to add a cause of action under N.C.G.S. § 78A-56(a)(2), but that § 78A-56(f) provided that no person could sue under that section more than two years after the contract of sale. There is no doubt that plaintiff's amendment was outside the two years contemplated by N.C.G.S. § 78A-56(f). In addition, the trial court noted that a cause of action under § 78A-56(a)(2) would have the effect of shifting the burden of proof to the defendant. The trial court also found as fact that the relief sought in the proposed amendment could be attained by proving the other allegations contained in the complaint. Given this information and the late date at which the amendment was sought, the trial court denied plaintiff's motion on the basis that it would be unfairly prejudicial to the defendant.

Amendments to pleading are governed by N.C.G.S. § 1A-1, Rule 15(a) (1990) which provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. *Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.*

(Emphasis added). It is clear that plaintiff did not file his amended complaint before the defendant answered. Therefore the only way in which the plaintiff could have amended his complaint was with the written permission of the defendant which was not granted, or by leave of court.

"A motion 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." *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d 885, 887 (1991) (citation omitted). Although the trial court is not required to state reasons for its denial of a motion to amend, orally or in writing, the trial court here chose to do so. Therefore, we will be guided by the factors the trial court considered in denying plaintiff's motion.

In its order, the trial court specifically noted that undue prejudice would result to the defendant if the amendment was allowed. Given the vast amount of discovery that had taken place and the potential that the burden of proof would have shifted to the defendant, we agree that undue prejudice would have resulted. Plaintiff argues that his amendment did not change the facts of the case, but instead merely applied the proper legal theory to the facts. According to plaintiff since the facts are the same no prejudice would result to defendant even though the period for discovery had passed. We do not agree because the addition of a new legal theory may well have changed defendant's approach to discovery. Plaintiff's first assignment of error is overruled.

II.

For his second assignment of error, plaintiff argues that it was error for the trial court to grant defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. As to this assignment of error, we do agree. Unlike the trial judge who denied plaintiff's motion to amend, the trial judge who granted defendant's directed verdict did not provide us with specific findings of fact as to why the defendant's motion for a directed verdict was granted. Instead, the trial court simply said in open court: "The motion made by the Defendant for a directed verdict is granted." When asked by plaintiff's counsel if the ruling applied to all counts of the complaint, the trial court responded in the affirmative. In his brief, plaintiff has only argued the propriety of the trial court's ruling as to three of his claims: common law fraud, breach of contract and breach of fiduciary duty. Therefore, we will only consider the appropriateness of the trial court's order as to these three theories and plaintiff's remaining theories for recovery are deemed abandoned.

The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985), *disc. rev. denied*, 316 N.C. 376, 342 S.E.2d 893 (1986). The trial court, in deciding on a motion for a directed verdict, must determine whether the evidence in the light most favorable to the nonmovant is sufficient to take the case to the jury. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991). In making this determination a directed verdict should be denied if there is more than a scintilla

of evidence supporting each element of the nonmovant's case. *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991). To decide whether there is more than a scintilla of evidence on a defendant's motion for directed verdict, all of the plaintiff's evidence must be taken as true, and the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn from the evidence. *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 398 S.E.2d 641 (1990), *disc. rev. denied*, 328 N.C. 569, 403 S.E.2d 506 (1991).

On appeal, in reviewing the trial court's decision to grant a directed verdict, this Court's scope of review is limited to those grounds asserted by the moving party at the trial level. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991); *Warren v. Canal Indus., Inc.*, 61 N.C. App. 211, 300 S.E.2d 557 (1983). The only indication which we have of the grounds asserted by defendant in favor of his directed verdict comes from the portion of the transcript where defendant made his motion. When the defendant moved for directed verdict, he stated that the evidence failed to show any basis upon which the jury could find that the defendant was in any way responsible for plaintiff's loss. Defendant's argument addresses the sufficiency of plaintiff's evidence, particularly the element of causation so we will examine the sufficiency of plaintiff's evidence in light of the causes of action which plaintiff has raised on appeal.

A.

Common Law Fraud

[2] Our Supreme Court has said that in order for a cause of action for fraud to exist, a plaintiff must show:

> (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989) (citation omitted). In North Carolina, scienter embraces both knowledge of falsity and an intent to deceive. *Id.* Not only are affirmative misrepresentations actionable but also material omissions when there is a duty to disclose. *See Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974). In addition, even if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses. *Id.*

Plaintiff has cited in his brief to five pieces of information that were not disclosed to him:

1. Norelli's recommendation against selling the irrigation portion of the business to defendant's son and that EJS needed an infusion of $1,500,000 to remain solvent.

2. A settlement with Shindaiwa which included a Confession of Judgment in the amount of $500,000, return of inventory, immediate cash payment of $50,000 and monthly payments of $10,000.

3. An indemnity agreement between EJS and defendant indemnifying defendant for any loss on his personal guaranty of a loan to NCNB.

4. That the continuation of the NCNB loan was contingent upon the injection of $500,000 capital into EJS from outside investors.

5. That the final version of the accountant's report dated 29 December 1987 was withheld.

In addition, plaintiff claims that several facts were affirmatively misrepresented by defendant. Plaintiff claims that defendant told him that the sale of the portion of the business to his son was an unprofitable part of the company. When plaintiff did finally see the accountant's report, it indicated that the portion of the business transferred to defendant's son had lost less money than originally was represented.

In contrast, defendant claims that since plaintiff conducted his own investigation, he was aware that EJS was heavily in debt and would require good management and good luck to succeed.

Therefore, it was the absence of good luck that led to the downfall of EJS and not plaintiff's lack of information. We cannot agree.

Many of the facts which plaintiff claims were omitted or misrepresented were things that he would not have discovered during his own investigation. It is clear that defendant, as the majority shareholder in EJS, was in a far superior position to have access to information concerning the financial status of EJS. Plaintiff's right to rely on defendant for an accurate picture of EJS's financial status was not destroyed by his own investigation. *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E.2d 522 (1965). Even though plaintiff did investigate, he still did not know the status of several critical transactions such as the settlement with Shindaiwa and the filing of the collateral reports to NCNB, because they were handled exclusively by defendant.

Therefore, taking the evidence in the light most favorable to plaintiff and giving him the benefit of every reasonable inference, we hold that it was improper for the trial court to have granted a directed verdict in favor of defendant on the common law fraud claim. There is no doubt that plaintiff suffered damages as a result of his investment. However as to the other elements of fraud, such as falsity, scienter and reasonable reliance, the evidence is in dispute. We note that the elements in dispute often are not capable of direct proof and are best decided by a jury. *See Olivetti Corp. v. Ames Business Sys. Inc.*, 319 N.C. 534, 356 S.E.2d 578, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987) (question of reasonable reliance is ordinarily for finder of fact); *Woodward v. Pressley*, 39 N.C. App. 61, 249 S.E.2d 471 (1978) (evidence sufficient to raise jury question on issue of falsity); *Douglas v. Doud*, 95 N.C. App. 505, 383 S.E.2d 423 (1989) (sufficient evidence presented for jury to conclude defendant had knowledge of falsity). We find that sufficient evidence existed to go to the jury as to the elements of common law fraud. The directed verdict on the issue of common law fraud was error.

B.

Breach of Contract

[3] The second cause of action addressed in plaintiff's brief is breach of contract. As defendant pointed out, however, there was never a signed contract between plaintiff and defendant. Such being the case, plaintiff's claim would seem to be barred by N.C.G.S.

§ 25-8-319 (Cum. Supp. 1992) which provides: "A contract for the sale of securities is not enforceable by way of action or defense unless (a) [t]here is some writing signed by the party against whom enforcement is sought . . . ." However, § 25-8-319 is Article 8's version of the statute of frauds, and since the statute of frauds is an affirmative defense it may not be raised for the first time on appeal. *Sanders v. Walker*, 39 N.C. App. 355, 250 S.E.2d 84 (1979). Therefore, since defendant neither pled nor otherwise raised the statute of frauds during the trial below, he is precluded from doing so now on appeal.

We have found no basis, other than the statute of frauds, upon which the trial court could have granted defendant's motion for a directed verdict. Therefore the question of whether or not a contract was intended or whether or not there was a breach of any contract is best left for the jury. We hold that it was error for the trial court to grant a directed verdict on plaintiff's claim for breach of contract.

C.

Breach of Fiduciary Duty

[4] The third cause of action which plaintiff has raised on appeal is breach of fiduciary duty. Plaintiff claims that after 26 February 1988, the date of his investment in EJS, he was owed a duty of good faith as a minority shareholder. We agree.

As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation. Robinson, *North Carolina Corporation Law*, § 11.4 (1990). However this rule is not without exception. In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders. *See Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951). Once a minority shareholder challenges the actions of the majority, the burden shifts to the majority to establish the fairness and good faith of its actions. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). The trial court's decision to grant a directed verdict at the conclusion of the plaintiff's evidence precluded plaintiff from shifting the burden to the defendant to prove that his actions were fair. In essence the trial court decided as a matter of law that no fiduciary duty was owed to the plaintiff. We cannot agree.

When plaintiff invested his $250,000 in EJS he acquired 45% of the stock. The remaining and majority shares were controlled by defendant. Therefore, plaintiff was a minority shareholder and as such he was owed a fiduciary duty by the defendant. Plaintiff alleged in his brief that defendant breached this fiduciary duty by repaying himself loans he made to EJS, repaying debts to Delmar Corporation, a corporation owned predominately by defendant, and preferentially repaying a corporate debt which he had personally guaranteed. We have reviewed the record and have found that several of these preferential payments occurred after plaintiff's investment in EJS, when defendant's fiduciary duty was owed.

In reaching our decision that plaintiff has established a prima facie case for breach of fiduciary duty, we are guided by *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). There, a minority shareholder (25%) sued the other three shareholders for transferring assets of the corporation to another corporation owned by the three majority shareholders for no consideration. On those facts, this Court held that the majority had undertaken a fundamental change in the corporate structure without complying with statutory mandates and that such constituted a breach of a director's fiduciary duty as well as a breach of the majority shareholders' duty to the minority shareholder.

In the present matter, defendant served as both a director and as Chairman of the Board of Directors. As such, defendant was under a statutory mandate to act in good faith and not to engage in any self dealing. *See* N.C.G.S. § 55-8-30 (1990). Plaintiff has alleged and proved sufficient facts which taken in the light most favorable to plaintiff constitute a breach of defendant's duty of loyalty to the corporation, a violation of statutory mandates. We hold that this evidence is sufficient to establish a breach of defendant's fiduciary duty to plaintiff as a minority shareholder. We therefore hold that it was error for the trial court to grant defendant's motion for a directed verdict on the claim of breach of fiduciary duty.

III.

[5] In his third assignment of error, plaintiff claims that it was error for the trial court to grant defendant's motion for costs and attorney's fees pursuant to N.C.G.S. § 6-21.5. This section provides:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C.G.S. § 6-21.5 (1986). After granting defendant's motion for a directed verdict, the trial court awarded defendant $88,560.00 in attorney's fees and costs on the basis that plaintiff's claim was void of any justiciable issue. Since we have ruled that the trial court erred in granting defendant's motion for a directed verdict on the issues of fraud, breach of contract and breach of fiduciary duty, we necessarily find that justiciable issues did exist. Therefore, we need not address this issue and we hereby vacate the trial court's award of attorney's fees and costs.

In conclusion, the disposition of this appeal shall be as follows: (1) the denial of plaintiff's motion to amend is affirmed, (2) the directed verdict in favor of defendant is reversed and remanded for a new trial on the issues of fraud, breach of contract and breach of fiduciary duty, and (3) the award of costs and attorney fees pursuant to N.C.G.S. § 6-21.5 is vacated.

Affirmed in part; reversed in part; and vacated in part.

Judges WELLS and EAGLES concur.

JEROME DICKENS, PLAINTIFF v. J. O. THORNE AND THE COUNTY OF EDGECOMBE, DEFENDANTS

No. 917SC920

(Filed 4 May 1993)

1. Appeal and Error § 118 (NCI4th)— sovereign immunity— denial of summary judgment—immediate appeal

The denial of a motion for summary judgment on the ground of sovereign immunity is immediately appealable.

Am Jur 2d, Appeal and Error § 104.

2. State § 4 (NCI3d)— action against county—libel and willful statutory violation—liability insurance—exclusion from coverage—no waiver of sovereign immunity

Defendant county did not waive its sovereign immunity by the purchase of liability insurance where plaintiff alleged that defendant county commissioner made untrue statements about plaintiff's resignation from his county job to a newspaper reporter who wrote a libelous article based on these statements, and that the commissioner's actions constituted a willful violation of N.C.G.S. § 153A-98 and the county personnel ordinance, since the county's liability policy specifically excluded coverage for claims arising from defamation and claims arising from the willful violation of a statute or ordinance by covered persons.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 5-41, 177, 178.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

3. State § 4.1 (NCI3d)— county commissioner—malicious actions—official capacity—sovereign immunity

Plaintiff's allegations of malicious actions by defendant county commissioner did not preclude entry of summary judgment in favor of defendant commissioner on the ground of sovereign immunity since a public official is liable for malicious acts only when sued in his "individual" capacity; the caption of the complaint failed to designate in what capacity defendant commissioner was being sued; and the allegations of the complaint and plaintiff's brief show that defendant commissioner was being sued only in his official capacity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 5-41, 177, 178.

4. State § 4.1 (NCI3d)— action for defamation—employment contract—no waiver of sovereign immunity

Defendant county did not waive its sovereign immunity by entering into an employment contract with plaintiff where plaintiff is suing the county for defamation and not for breach of the contract.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 5-41, 177, 178.

Application of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 U.S.C.S. § 2680(h)). 79 ALR Fed 826.

Appeal by defendants from order entered 13 May 1991 in open court and signed on 30 June 1991 by Judge James R. Strickland in Edgecombe County Superior Court. Heard in the Court of Appeals 23 September 1992.

On 17 December 1990, plaintiff Jerome Dickens ("Dickens") filed a libel action against J.O. Thorne ("Thorne") and the County of Edgecombe (the "County") seeking compensatory and punitive damages. The complaint alleges that Thorne communicated libelous statements concerning Dickens in violation of N.C. Gen. Stat. § 153A-98 and Art. 9, § 3 of the Personnel Ordinance for the County. Thorne is a member of the Board of Commissioners of the County (the "Board"), and Dickens alleges the County is liable for defendant's statements based on a *respondeat superior* theory.

On 17 January 1991, Thorne and the County filed an answer to the complaint denying these allegations and asserting the defense of governmental immunity. On 1 February 1991, Thorne and the County filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 13 May 1991, Judge James R. Strickland denied this motion in open court, and on 30 June 1991, he signed the order to that effect. From the order denying their motion for summary judgment, Thorne and the County appeal. For the reasons stated below, we reverse the order of the trial court and grant summary judgment for defendants.

Baker, Jenkins & Jones, P.A., by R. B. Daly, Jr. and Roger A. Askew, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr.; and Taylor & Brinson, by Herbert H. Taylor, Jr., for defendant-appellants.

ORR, Judge.

Prior to this action, Dickens was an employee of the County. In his complaint, Dickens alleges Thorne made untrue statements and divulged confidential information that had been discussed at a Board meeting about Dickens' resignation from his job with the County to a local reporter from The Daily Southerner. Dickens

alleges the reporter published a libelous article about him based on these statements. The defendants make two assignments of error in support of their contention that they are entitled to summary judgment in this action based on their defense of governmental immunity. Before we can address the defendants' assignments of error, we must first address the threshold question of whether an appeal lies from the order of the trial judge denying their motion for summary judgment.

I.

[1] N.C. Gen. Stat. § 1-277 "in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a *substantial right* which he would lose if the ruling or order is not reviewed before final judgment." *Pruitt v. Williams*, 288 N.C. 368, 371, 218 S.E.2d 348, 350 (1975) (citations omitted). Generally, orders denying motions for summary judgment do not affect a substantial right and are not appealable. *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978). The denial of a summary judgment motion " 'on the grounds of sovereign and qualified immunity,' " however, " 'is immediately appealable.' " *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991) (citation omitted).

In the case *sub judice*, Thorne and the County are appealing the trial court's denial of their motion for summary judgment, claiming they are entitled to immunity in this case under the doctrine of governmental immunity. The order denying this motion is, therefore, immediately appealable.

II.

We now turn to defendants' first assignment of error, that the trial court erred by denying their motion for summary judgment on the ground that there is no genuine issue of material fact that the defendants are shielded from liability by governmental immunity.

Summary judgment is the device whereby judgment is rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "Thus a defending party is entitled to summary judgment

if he can show that claimant cannot prove the existence of an essential element of his claim, . . . or cannot surmount an affirmative defense which would bar the claim." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981) (citation omitted). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986).

[2] Dickens does not dispute that Thorne and the County would be entitled to summary judgment under the doctrine of governmental immunity. Instead, Dickens argues the County has waived its governmental immunity by purchasing liability insurance which covers this action and that Thorne has waived his immunity as a public official by acting maliciously.

N.C. Gen. Stat. § 153A-435(a) states:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. . . .
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. . . .

Thus, a municipality may waive its governmental immunity for civil liability in tort for negligent or intentional damage by purchasing liability insurance, but only to the extent of the insurance coverage. *Edwards v. Akion*, 52 N.C. App. 688, 691, 279 S.E.2d 894, 896, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981).

In the case *sub judice*, the County purchased a liability insurance policy (the "Policy"), Part I of which states:

> Coverage B: All Public Officials/Employees, Except Law Enforcement Employees
>
> > The Fund will pay on behalf of the . . . Covered Person(s) all sums which the . . . Covered Person(s) shall become legally obligated to pay as money damages because of any civil claim or claims made against the . . . Covered Person(s)

> arising out of any Wrongful Act of any Covered Person(s) acting in their capacity as an Employee of the Participant named in the Declarations and caused by the Covered Person(s) while acting in their regular course of duty.

Under the Policy, the term "Covered Persons" includes "Members of commissions, boards or other units operating by and under the jurisdiction of such PUBLIC ENTITY. . . ." A "Wrongful Act" is defined as "any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty . . . by an employee while acting within the scope of his professional duties or Fund approved activities." Dickens contends these terms cover the action in this case. Exclusionary clauses contained in the Policy, however, apply to deny coverage of this action.

The Policy excludes claims for any injury arising from "defamation including but not limited to libel" and for claims "arising from the willful violation of any statute, ordinance or regulation committed by or with the knowledge or consent of any Covered Person(s)."

Dickens' complaint against the defendants is based on allegations that statements made by Thorne to a newspaper reporter constitute a "libel" and that "[t]he statements made by . . . Thorne . . . are in violation of law and particularly Article 9, Section 3 . . . of the Personnel Ordinance for the County . . . and of N.C.G.S. 153A-98." Additionally the complaint states, "said statements made by . . . Thorne, constitute a reckless indifference to the rights of others and are wanton and willful misconduct . . . ." The language of the Policy specifically excludes this action from coverage. Because the Policy excludes this action from coverage, the County has not waived its governmental immunity as to this action by purchasing the Policy. *See, Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 23, 348 S.E.2d 524, 526 (1986) ("[W]aiver of immunity extends only to injuries which are specifically covered by the insurance policy.")

[3] Next, Dickens argues that allegations of "malicious official behavior" against Thorne preclude summary judgment. Dickens relies on the rule stated in *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1951) that,

> a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect

> thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious (citations omitted), or that he acted outside of and beyond the scope of his duties. (Citations omitted.)

Dickens fails to note, however, that this rule applies to actions against a public official in his "individual" capacity, not to actions against a public official in his "official" capacity.

It is a well-settled rule 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." *Whitaker v. Clark*, 427 S.E.2d 142, 143-44, 109 N.C. App. 379 (citing, *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 *Whitaker*, plaintiff filed a wrongful death action against employees of the Davie County Department of Social Services. The defendants asserted the defense of governmental immunity. Nowhere in the complaint did the plaintiff specify that she had sued defendants in both their individual and official capacities. The complaint never employed the words "individual" or "individual capacity," but it did use the phrases, "in the performance of their official duties," and "in their official capacity". Additionally, the overall tenor of the complaint indicated that the allegations were centered solely on the defendants' official duties as employees of the Department of Social Services. Subsequently, this Court held that defendants were being sued solely in their official capacities and that governmental immunity applied to shield these defendants from liability. Additionally, this Court stated, "if defendants are found to have been sued only in an official capacity, the doctrine of sovereign immunity would be applicable." *Whitaker*, at 145.

In the present case, because we have already held that the County is entitled to governmental immunity, Thorne is entitled to the same governmental immunity if we find that Dickens sued him only in his official capacity. *See, Whitaker, supra.; See also, Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990).

At the outset, an examination of the complaint reveals a failure of Dickens to designate in what capacity he is suing Thorne. Dickens at no time makes specific allegations against Thorne "individually."

He does not indicate in the caption of the complaint whether he is suing Thorne in his "official" or "individual" capacity, as is the general practice. *See, Whitaker, supra.*

Because Dickens has made no distinction as to what capacity he is suing Thorne, we must examine the complaint to determine whether Dickens is suing Thorne in his official or individual capacity. *Lynn v. Clark*, 254 N.C. 460, 119 S.E.2d 187 (1961). Nowhere in Dickens' complaint does he refer to Thorne "individually". He does, however, allege that "[a]t all times relevant to this action, . . . Thorne, was an officer and employee of the . . . County . . ., and the . . . County . . . is responsible for the actions of its said officer and employee . . . ."

Further, the answer filed by defendants to Dickens' complaint recognizes the fact that Dickens is suing Thorne in his official capacity. *See, Lynn*, 254 N.C. at 462, 119 S.E.2d at 188 (considering defendant's answer as a factor to determine whether he was sued in his representative capacity). The answer states as defendants' fourth defense, "Governmental immunity is . . . applicable to the defendant County and the defendant Commissioner in his *official capacity*, and is pleaded in bar of any recovery." (Emphasis added.) Additionally, the answer states as defendants' fifth defense, "Punitive damages are not recoverable in this State against a County or its *public officials* in the absence of a statute authorizing same, ..." (Emphasis added.)

We also note that Dickens' brief is void of any arguments against Thorne in his "individual" capacity. In fact, when he refers to Thorne's liability in his brief, Dickens refers to "the liability of J.O. Thorne as a public official. . . ." Further, Dickens' argument in his brief for punitive damages in no way indicates that he is suing Thorne in an individual capacity. In this section, Dickens argues, "While no statute expressly provides for punitive damages against a *county*, the wanton, reckless and flagrant disregard of state law and its own internal personnel ordinances warrants the implication that *counties* should be held accountable by the imposition of actual and punitive damages where appropriate." (Emphasis added.) Dickens does not seek punitive damages from Thorne individually in this section of his brief.

Based on our review of the record and briefs, we find that Dickens is suing Thorne in his official capacity alone. Thus, this

action against Thorne in his official capacity cannot be maintained due to governmental immunity. *See, Whitaker, supra.*

[4] Finally, Dickens argues that a genuine issue exists as to whether the County waived immunity by entering into a contract with Dickens and that, based on this argument, the denial of the defendants' summary judgment motion on the issue of immunity was proper. Dickens bases this argument, however, on an overly broad interpretation of the holding in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). This argument is, therefore, without merit.

Dickens contends that our Supreme Court held in *Smith* that sovereign immunity would not be a defense when the state enters into a valid contract with another. The actual holding in *Smith*, however, is that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for *damages on the contract in the event it breaches the contract.*" *Id.* at 320, 222 S.E.2d at 423-24 (emphasis added).

The present case is not a suit for damages based on a breach of contract. Dickens even admits in his brief that "the record is void of any evidence on the contractual nature of the Appellee's employment. . . ." Dickens' argument is, therefore, without merit.

We hold, therefore, that the defendants did not waive their governmental immunity, and no genuine issue of material fact exists as to whether they are shielded from liability. Based on this holding, we need not address defendants' second assignment of error. We hold summary judgment was proper for defendants and accordingly reverse the order of the trial court denying defendants' motion for summary judgment.

Reversed and remanded for entry of summary judgment for the defendants.

Judges WELLS and GREENE concur.

WILLIAM H. JONES, IV; PATRICIA P. JONES AND WILLIAM H. JONES, III, PLAINTIFFS v. TRESSA H. SHOJI, DEFENDANT, AND THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF FAYETTEVILLE, NORTH CAROLINA, INC., DEFENDANT-APPELLEE, AND THE MOST REVEREND F. JOSEPH GOSSMAN, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA AND HIS SUCCESSORS IN OFFICE; AND THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA, DEFENDANT, CROSS-CLAIMANT, APPELLANT

No. 9212SC453

(Filed 4 May 1993)

1. **Appeal and Error § 340 (NCI4th) — broadside attack — ineffective**

Appellant failed to comply with Rule 10 of the North Carolina Rules of Appellate Procedure where appellant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law and correctly referenced the assigned errors to the excepted findings, but failed to direct the Court of Appeals to specific findings it challenges, arguing instead the general denial of its claim for contribution and indemnification. This broadside attack renders individual exceptions and assignments of error ineffective to challenge particular findings of fact and the only question left is whether the findings of fact support the conclusions of law and the conclusions support the judgment.

Am Jur 2d, Appeal and Error §§ 417 et seq., §§ 648 et seq.

2. **Indemnity § 7 (NCI4th) — joint venture — settlement of claim by insurance company — assets of joint venture — no indemnity**

The trial court correctly denied the cross-claim of defendant Good Shepherd Catholic Church against the defendant YMCA where plaintiff was injured in an automobile accident with a van owned by the Church and used by the Church and the YMCA in an after school day care program; the Church and the YMCA had entered into a joint venture to run the program; there was a written agreement under which the Church agreed to carry insurance on its vans for the YMCA; plaintiff's claims against all defendants were settled and the settlement sums were paid by the insurer of the van; no money was paid by the Church toward the settlement; and the Church filed cross-claims against the YMCA for indemnity or contribution. The insurance was purchased because of the joint venture and was therefore an asset of the joint venture because the

benefit of having insurance naturally accrued to both parties. The insurance was obtained for the purpose of insuring the YMCA and its personnel who would be using the Church's vans in furtherance of the joint venture. Because the sums paid to plaintiff by the insurance company were paid out of an asset of the joint venture and not out of assets of the Church, the Church is not entitled to indemnity or contribution from the YMCA.

Am Jur 2d, Indemnity §§ 15 et seq.

Judge GREENE dissenting.

Appeal by defendant the Most Reverend F. Joseph Gossman and the Roman Catholic Diocese of Raleigh, North Carolina from judgment entered 7 February 1992 in Cumberland County Superior Court by Judge Orlando F. Hudson. Heard in the Court of Appeals 13 April 1993.

Plaintiffs instituted this personal injury action against defendants seeking damages for injury sustained by plaintiff William H. Jones, IV as a result of an automobile accident on 12 October 1987. The facts and circumstances giving rise to this cause of action are as follows:

The Most Reverend F. Joseph Gossman and the Roman Catholic Diocese of Raleigh, North Carolina, through the Good Shepherd Catholic Church of Hope Mills, North Carolina (hereinafter collectively called "the Church") entered into a joint venture with the Young Men's Christian Association of Fayetteville, North Carolina, Inc., (hereinafter "the YMCA") to run an after school day care program. Under the written agreement, the YMCA undertook the duties and responsibilities to oversee and operate the program on the Church premises while the Church made available its facilities and vans, for use by the personnel employed in the after school program, to transport the children to its facility. In the contract, the YMCA agreed to reimburse the Church for any damage to buildings or equipment which might be caused by YMCA personnel or program participants, and the Church agreed to carry insurance coverage on its vans for the YMCA.

The written agreement, by its terms, expired in December 1986, but the Church and the YMCA continued to follow its terms in all respects until the date of the accident, 12 October 1987.

On that day, employees of the after school program had taken the children to a local park to play. Afterwards, the children were loaded on one of the Church's vans for the return trip to Good Shepherd Church. Defendant Tressa Shoji, an employee of the after school program, was the operator of the van.

On the way back to Good Shepherd Church, defendant Shoji took her eyes off the road to look in the rear view mirror at some of the children. When she looked back up, she realized she had run off the road and was about to strike a sign. She pulled the steering wheel to the left causing the van to cross the center line and strike an automobile head on, injuring plaintiff William H. Jones, IV.

As a result of the accident, William H. Jones, IV and his parents instituted this action against defendant Shoji, the YMCA and the Church. The complaint alleged active negligence on the part of defendant Shoji and imputed negligence on the part of the YMCA and the Church. The complaint also alleged the YMCA and the Church entered into a joint venture by which defendant Shoji was employed, and that they were jointly and severally liable for William Jones' injuries.

By a consent order dated 10 July 1991, the plaintiffs' claims against all defendants were dismissed following settlement between the Church and plaintiffs. The settlement included a release of all defendants. The settlement sums were paid by Aetna, the insurer of the van used by the parties in the joint venture. No money was paid by the Church toward settlement of the claim.

The Church filed cross-claims against the YMCA asking for indemnity or contribution based upon plaintiffs' allegations of negligence. At a bench trial on 7 February 1992, the court heard and denied the Church's cross-claims against the YMCA. The Church appeals.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for defendant-appellee YMCA.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael W. Mitchell and Nigle B. Barrow, Jr., for defendants-appellants.

WELLS, Judge.

[1] We note initially that the appellant has failed to comply with Rule 10 of the North Carolina Rules of Appellate Procedure. While appellant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law and also correctly referenced the assigned errors to the excepted findings, it failed to direct this Court to specific findings it challenges, instead arguing the general denial of its claim for contribution and indemnification. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). This "broadside" attack renders individual exceptions and assignments of error ineffective to challenge particular findings of fact. Therefore, the only question left for our review is whether the findings of fact support the conclusions of law and the conclusions support the judgment. *Id.* N.C.R. App. P. 10(a).

[2] In the present case, the trial court found that the Church and the YMCA were engaged in a joint venture, and as such were both derivatively negligent in causing plaintiff's injuries. The court also determined that the Church was not entitled to indemnity or contribution from the YMCA for settlement sums paid by the insurance carrier. The Church assigns error to this latter conclusion, arguing various legal theories in support thereof. Because the Church does not assign error to the court's finding that the parties were engaged in a joint venture, we need only address the issues of indemnity and contribution as they relate to the facts in this case.

A joint venture or joint enterprise is a business association like a partnership but narrower in scope and purpose. Reuschlein and Gregory, Handbook on the Law of Agency and Partnership, 442 (1979). "A joint [venture] is in the nature of a kind of partnership, and although a partnership and a joint [venture] are distinct relationships, they are governed by substantially the same rules." *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968). *See also Rushing v. Polk*, 258 N.C. 256, 128 S.E.2d 675 (1962) (applying law as to partnerships and joint enterprises interchangeably). As in the case of partnerships, the nature of a joint venture is such that any negligence on the part of one party may be imputed to the other. *Slaughter v. Slaughter*, 93 N.C. App. 717, 379 S.E.2d 98 (1989), *disc. rev. improvidently allowed*, 326 N.C. 479, 389 S.E.2d

803 (1990). We find partnership law, as codified in the Uniform Partnership Act, and North Carolina case law to be instructive.

Under the Uniform Partnership Act (UPA), G.S. § 59-48(2), the general rule regarding a partner's right to indemnity is as follows:

> The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

Thus, if an individual partner satisfies a judgment out of his own pocket or his personal assets, then he has a right to indemnification from the partnership. *See* Handbook, *supra*, at 270. Likewise, where a party to a joint venture satisfies a claim against the joint venture with individual assets, he is entitled to indemnity from the joint venture assets. If, however, a partner's individual assets are not used to pay the obligation, then no right of indemnity accrues. *Id.* If the partnership, or the joint venture, has insufficient assets to satisfy a claim against it or to indemnify the partner satisfying the judgment, then that partner has a right of contribution against his co-partners; that is, he may force them to share in the loss. *See id.* Where there are sufficient resources in partnership or joint venture funds to meet a claim against the venture, there will be no contribution between partners, absent an agreement to the contrary.

Here, the Church and the YMCA entered into a written contract in which each party agreed to pool their resources and assume certain responsibilities in furtherance of the mutual goal of establishing an after school day care program. In this joint venture case, the issue of whether the Church is entitled to indemnification or contribution from the YMCA hinges upon the question of source of the settlement funds: were the Aetna insurance policy proceeds, used to pay the settlement, assets of the Church or the joint venture?

Under the UPA, G.S. § 59-38, all property purchased on account of the partnership is partnership property unless a contrary intention appears. *Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 412 S.E.2d 1 (1992). Partnership property may be bought, held, and conveyed by fewer than all partners in a partnership. *Id. See also Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985) (recognizing that parties to a contract may allocate risk through insurance or indemnity agreements). Similarly, property purchased

by one partner, but which is agreed to be used for partnership purposes, may be deemed partnership property. *See* Handbook, *supra*, at 392.

Under the agreement, the Church assumed responsibility for purchasing insurance "for the YMCA," which the circumstances clearly show included liability insurance. The insurance was purchased pursuant to the agreement and on account of the voluntary association between the parties. It is clear that in a joint venture arrangement, the parties may agree to shift the allocation of risk or liability by a promise to insure or indemnify the other party. *See McLean Trucking Co. v. Occidental Casualty Co.*, 72 N.C. App. 285, 324 S.E.2d 633, *cert. denied*, 313 N.C. 603, 330 S.E.2d 611 (1985) (recognizing that parties to a contract may allocate risk through insurance or indemnity agreements). The benefit of having insurance, as bargained for in the agreement, naturally accrued to both parties and it was obtained for the purpose of insuring the YMCA and its personnel who would be using the Church's vans in furtherance of the joint venture. These circumstances compel the conclusion that such insurance was purchased on account of the joint venture and was therefore an asset of the joint venture.

Because the sums paid to plaintiff by Aetna insurance were paid out of an asset of the joint venture and not out of assets of the Church, following the UPA mandate, we hold that the Church is not entitled to indemnity or contribution from the YMCA.

Affirmed.

Judge GREENE dissents in a separate opinion.

Judge MARTIN concurs.

Judge GREENE dissenting.

I agree with the majority that the dispositive issue is whether the Aetna insurance policy proceeds were assets of the Church or the joint venture. If the insurance proceeds were assets of the Church, the Church is entitled to either indemnification or contribution from the YMCA.

Contrary to the majority, however, I believe that the Aetna insurance proceeds were the assets of the Church. The fact that

the Church may have agreed to provide liability insurance on the vans "for the YMCA" is not determinative of the issue. The question remains whether the Church in fact did provide such insurance, and there is nothing in the record to support that it did. To the contrary, as noted in the 10 July 1991 "Order Approving Settlement," the Aetna policy provided "coverage for [the Church]," not the YMCA. Therefore, the proceeds from the Aetna policy were not assets of the joint venture, but instead were assets of the Church.

Accordingly, the findings of the trial court cannot support a conclusion that the Church is not entitled to indemnity or contribution, and, in fact, support the contrary conclusion. Indeed, the 10 July 1991 consent order provided that the Church retained and would pursue "rights of contribution and indemnity" against the YMCA. I would therefore reverse the order of the trial court and remand for an award to the Church of either contribution or indemnity.

LAURA G. BALDWIN, PLAINTIFF v. GTE SOUTH, INCORPORATED, DEFENDANT

No. 9214SC331

(Filed 4 May 1993)

1. **Negligence § 5 (NCI4th); Highways, Streets, and Roads § 2 (NCI4th) — placing telephone booth on highway right-of-way — no negligence per se**

A Department of Transportation regulation prohibiting the placement of telephone booths on highway rights-of-way is not designed to protect pedestrians using telephone booths from injury caused by vehicular traffic, and defendant telephone company was thus not negligent *per se* in placing on a highway right-of-way the telephone booth plaintiff was using when she was struck by a dump truck.

Am Jur 2d, Negligence §§ 727, 728, 730.

2. **Highways, Streets, and Roads § 2 (NCI4th) — placing telephone booth on highway right-of-way — insufficient evidence of negligence**

Defendant telephone company was not negligent in placing on a highway right-of-way a telephone booth plaintiff was using

when she was struck by a vehicle where the evidence showed that the booth was located in a grocery store parking lot, and before the booth was installed the owners of the grocery store represented and warranted to defendant's employees who installed the booth that it was located on the grocery store's property.

Am Jur 2d, Highways, Streets, and Bridges §§ 1, 10.

Judge ORR dissenting.

Appeal by defendant from judgment entered 10 December 1991 in Durham County Superior Court by Judge Coy E. Brewer, Jr. Heard in the Court of Appeals 9 March 1993.

Plaintiff originally instituted this personal injury action against defendants Essell Day, Earl J. Latta, GTE South, Incorporated (hereinafter "GTE South"), and GTE Corporation, to recover compensatory damages for injuries sustained from defendants' alleged negligence. The record reveals the following facts and circumstances:

On 19 November 1988, a collision occurred at the intersection of Hillsborough Road and Sparger Road in Durham between Linda Taylor, who was driving south on Sparger Road, and Essell Day, who was driving a dump truck, owned by Latta, west on Hillsborough Road. There was a stop sign at Sparger Road but no stop sign on Hillsborough Road. Ms. Taylor ran the southbound Sparger Road stop sign at a speed of approximately 35 m.p.h. As Ms. Taylor entered the intersection of Sparger and Hillsborough Roads, the Latta dump truck collided with the Taylor vehicle. As a result of the collision, the bumper on the Latta dump truck was pinned against its right tire. Day then traveled in a southwesterly direction toward the parking lot of the Durham Food Land store. He then crossed the center line of Hillsborough Road, left the roadway, drove into and out of the southern ditch of Hillsborough Road, and struck plaintiff, who was using a telephone booth located in the Durham Food Land's parking lot. Day traveled 130 feet before hitting the telephone booth and a total of 177 feet from the impact with the Taylor vehicle before his vehicle came to a stop. During that time, Day was unable to steer and he did not try to apply his brakes prior to striking the plaintiff.

The GTE phone booth which plaintiff was using was a pedestal-style booth with no doors. A person using the booth would face

north toward Hillsborough Road. The telephone booth was located on a portion of the Hillsborough Road right-of-way, 25 feet 5 inches from the southern edge of Hillsborough Road, and approximately 36 feet 5 inches from the center line of Hillsborough Road. The dimensions of the right-of-way for Hillsborough Road vary depending on the portion of the road in question. For this particular section of Hillsborough Road, the right-of-way extended 50 feet on either side of the center line.

Plaintiff filed a voluntary dismissal without prejudice as to defendant GTE Corporation. Plaintiff settled her claims against Taylor, Day, and Latta for $450,000.00 and filed a voluntary dismissal with prejudice as to these defendants, leaving GTE South as the sole defendant. A jury verdict was returned against GTE South in the amount of $482,670.00. The trial court allowed plaintiff a recovery from GTE South in the amount of $32,670.00, which represents the difference in the jury verdict and the $450,000.00 allowed by the court in set-off sums previously paid to plaintiff in settlements. The trial court also awarded plaintiff $33,799.61 in prejudgment interest from GTE South. Defendant GTE South appeals.

Kirby, Wallace, Creech, Sarda & Zaytoun, by Robert E. Zaytoun and Patricia L. Wilson, for plaintiff-appellee.

Faison, Fletcher, Barber & Gillespie, by O. William Faison and Gary R. Poole, for defendant-appellant.

WELLS, Judge.

On 1 October 1991, the trial court ruled, *in limine*, that a Department of Transportation regulation prohibiting placement of commercial telephone booths in rights-of-way was a safety regulation. The court also ruled that pedestrians using such installations are within the class of persons protected by the regulation. At trial, GTE South moved for a directed verdict both at the end of plaintiff's evidence and at the close of all evidence. Both motions were denied. During its charge, the court instructed the jury on the issue of negligence per se.

[1] Although defendant sets forth seven individual assignments of error for our review, the sole issue before us is whether the trial court erred in denying defendant's motion for directed verdict. Specifically, defendant contends the trial court erred in determining

(a) that the Department of Transportation's (DOT) policy prohibiting telephone booths on highway rights-of-way is a public safety regulation, and (b) that plaintiff, a pedestrian using the telephone booth, is in the class of persons the regulation was designed to protect, making a violation of such regulation negligence per se.

The DOT has adopted the following regulation pursuant to its statutory authority under G.S. § 136-18(10):

TELEPHONE BOOTHS

> Telephone pay-station booths or other commercial telephone installations are not permitted on highway rights-of-way, except in rest areas or truck weigh stations.

Plaintiff contends that this regulation is aimed at protecting pedestrians using telephone booths from injury caused by vehicular traffic. We disagree.

It is well settled by our courts that violation of a public safety statute is negligence per se. *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 423 S.E.2d 444 (1992). "A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant." *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992). Defendant's violation of a statute, however, will not constitute negligence per se unless plaintiff belongs to the class of persons which the statute was intended to protect. *Belk v. Boyce*, 263 N.C. 24, 138 S.E.2d 789 (1964). Where a statute or regulation is designed to promote safety and creates a specific duty for the protection of others, its violation is negligence per se. *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983). Such safety statutes create a minimum standard of care and conduct inconsistent with statutory mandate will be deemed unreasonable.

A court may determine that a legislative enactment either explicitly or implicitly creates a minimum standard of care required to avoid liability for negligence. However, not every statute purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation. Instead, a court should look at the statute's purpose in determining whether to adopt the statutory mandate as the reasonable man standard.

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
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> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Hutchens, supra, (quoting Restatement of Torts § 286). We therefore must first examine the purpose of the adoption of the DOT telephone booth regulation.

"The general purpose of the laws creating the Department of Transportation is that said Department of Transportation shall take over, establish, construct, and maintain a statewide system of . . . highways . . . ." N.C. Gen. Stat. § 136-45. "The State Highway Commission [now DOT] was created by the General Assembly . . . as [a] . . . State agency or instrumentality, and is charged with the duty of exercising certain administrative and governmental functions for the purpose of constructing and maintaining State . . . public roads." *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965). "All the other powers it possesses are incidental to the purpose for which it was created." *Id., (quoting DeBruhl v. Highway Commission*, 245 N.C. 139, 95 S.E.2d 553 (1956)).

N.C. Gen. Stat. § 136-18 sets forth the many powers of the DOT, broadly and specifically. These powers include, *inter alia*, the authority to acquire and maintain rights-of-way for roads and highways, including the authority to regulate the use of such rights-of-way, pertinent to the case now before us, under the provisions of G.S. § 136-18(10):

> To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles, signboards, fences, gas, water, sewerage, oil, or other pipelines, and other similar obstructions that may, in the opinion of the Department of Transportation, contribute to the

> hazard upon any of the said highways or in any wise interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Department of Transportation shall require the removal of, or changes in, the location of telephone, telegraph, or other poles, signboards, fences, gas, water, sewerage, oil, or other pipelines, or other similar obstructions, the owners thereof shall at their own expense move or change the same to conform to the order of said Department of Transportation. Any violation of such rules and regulations or noncompliance with such orders shall constitute a misdemeanor.

It is clear that in this legislative scheme, the authority and powers set forth in G.S. § 136-18(10) are intended to allow the DOT to protect the integrity of its rights-of-way, which are there to begin with to accommodate the construction and maintenance of roads and highways.

These circumstances lead us to the conclusion that the DOT prohibition against telephone booths in or upon highway rights-of-way does not include pedestrians within the class of protected persons. While the DOT's regulation may have safety implications, it does not provide a basis for negligence claims by this plaintiff. *See NCNB v. Gutridge*, 94 N.C. App. 344, 380 S.E.2d 408, *disc. rev. denied*, 325 N.C. 432, 384 S.E.2d 539 (1989).

[2] At trial, the burden was upon plaintiff to show an act or acts of negligence by GTE upon which liability to plaintiff might be founded. Having determined that the location of the booth in the right-of-way was not negligence per se, we look to the evidence to determine whether there was any basis for holding GTE liable.

At trial, the undisputed evidence as to the location and placement of the telephone booth plaintiff was using was as follows: The telephone booth was located in the parking lot of Durham Food Land (grocery store). Before the booth was installed, the owners of the Durham Food Land property represented and warranted to the GTE employees who installed the booth that it was on Durham Food Land's property. Under these circumstances, we discern no act of negligence on GTE's part in its placement of the telephone booth, and therefore hold that its motion for directed verdict should have been allowed.

For the reasons stated, the judgment below must be and is

Reversed.

Judge ORR dissents in a separate opinion.

Judge MARTIN concurs.

Judge ORR dissenting.

The majority, in my opinion, construes the public safety scope of the statute in question too narrowly. There can be no doubt that the statute was designed to protect the motoring public from the hazards incumbent with a car leaving the traveled portion of a highway and striking a fixed object such as a phone booth. However, to limit protection to the motorist in the car and not include the relatively unprotected person utilizing the phone booth is too restrictive an application. Under the majority's interpretation, a motorist striking a booth that violates the statute would be covered by the statute, but if that driver parked his car and was injured using the phone booth, no protection would exist.

The trial court correctly denied the defendant's motion for a directed verdict; and, for the above stated reasons, I dissent from the reversal of the trial court's ruling.

STATE OF NORTH CAROLINA v. LAWRENCE EDWARD HAMRICK, JR.

No. 9127DC917

(Filed 4 May 1993)

1. Appeal and Error § 233 (NCI4th)— criminal action—appeal by State from district to superior court—notice of appeal insufficient—reliance on defense counsel

The State's notice of appeal from district to superior court was inadequate where defendant was charged with misdemeanor death by vehicle and with driving left of the center; defendant pled responsible for the driving left of center infraction and filed a motion to dismiss the misdemeanor death by vehicle charge on double jeopardy grounds; the district court granted the motion; the State gave notice of appeal in open court; the defendant offered to draft the notice of appeal on behalf

of the State, including it with the order dismissing the criminal charges; no separate written notice of appeal was filed by the State; the State filed in superior court a petition for writ of certiorari; and the superior court issued the writ and subsequently reinstated the misdemeanor death by vehicle charge. The notice of appeal was inadequate to meet the requirements of N.C.G.S. § 15A-1432(b) because the basis for the appeal was not specified; the State had the responsibility to file the notice of appeal in the proper manner and reliance on defendant's counsel to prepare proper notice will not suffice.

Am Jur 2d, Appeal and Error §§ 290 et seq.

2. **Appeal and Error § 294 (NCI4th)— criminal action—appeal by State from district to superior court—writ of certiorari**

Although no statute explicitly gives the superior court authority to issue a writ of certiorari to preserve a party's right to an appeal, N.C.G.S. § 15A-1432 gives the State the right to appeal a district court order dismissing a charge, N.C.G.S. § 15A-101(0.1) provides that the term "appeal" also includes appellate review upon writ of certiorari, and Rule 19 of the General Rules of Practice gives the superior court the authority to grant the writ of certiorari in proper cases.

Am Jur 2d, Certiorari §§ 15 et seq.

3. **Constitutional Law § 186 (NCI4th)— driving left of center—misdemeanor death by vehicle—no double jeopardy**

The superior court properly reinstated the charge of misdemeanor death by vehicle where defendant had been charged with misdemeanor death by vehicle and the infraction of driving left of center; defendant pled responsible to driving left of center; and the district court dismissed misdemeanor death by vehicle as double jeopardy under the Fifth Amendment to the U.S. Constitution. Although a violation of N.C.G.S. § 20-146 for driving left of center is considered an infraction, it constitutes an offense within the double jeopardy clause; however, both the law and common sense dictate that a defendant cannot choose to plead responsible to the minor infraction and thereby evade prosecution for the more serious criminal offense. The judgment concerning the lesser offense must be vacated if defendant is convicted of the death by motor vehicle charge.

Am Jur 2d, Criminal Law §§ 279 et seq.

Appeal by defendant from order entered 24 July 1991 by Judge Zoro J. Guice, Jr., in Gaston County Superior Court. Heard in the Court of Appeals 20 October 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Herbert L. Hyde for defendant appellant.

COZORT, Judge.

This case presents two issues for our determination: (1) Does the superior court have the authority, upon a petition for writ of certiorari filed by the State, to reinstate a charge of misdemeanor death by vehicle which had been dismissed by the district court on double jeopardy grounds; and (2) Does a plea of "responsible" to the infraction of driving left of center prohibit, on double jeopardy grounds, prosecution of the defendant for misdemeanor death by vehicle, when the only basis for the misdemeanor death charge is the driving left of center infraction? We find the superior court had the authority to hear the matter and correctly ruled that the plea of "responsible" to the driving infraction did not bar later prosecution of the misdemeanor death by vehicle charge. The facts and procedural history follow.

On 1 May 1990, defendant was involved in a head-on automobile collision with a vehicle operated by Ms. Cynthia Berry. Ms. Berry died as a result of the accident. That same day, defendant was charged with the infraction of driving left of center in violation of N.C. Gen. Stat. § 20-146 (1989). In a separate summons, he was charged, also on 1 May, with the criminal offense of misdemeanor death by vehicle in violation of N.C. Gen. Stat. § 20-141.4(a2) (1989).

Defendant appeared voluntarily before a Gaston County magistrate on 18 May 1990, pled responsible for the infraction, and paid $50.00 in costs and fees. On 30 May 1990, defendant filed a motion to dismiss the misdemeanor death by vehicle charge pursuant to N.C. Gen. Stat. §§ 15A-953 and 15A-954(a)(5) (1988) on the grounds that the prosecution of the misdemeanor death by vehicle charge would violate the double jeopardy provisions of the Fifth Amendment to the United States Constitution. In an order entered 7 August 1990 and filed 14 August 1990, the district court dismissed the death by vehicle charge, ruling "the admission of responsibility and payment of the penalty by the Defendant

is the same as a guilty plea and that prosecution of the Defendant upon the same elements to which he has already pled guilty would constitute a violation of the double jeopardy clause of the fifth amendment of the Constitution of the United States . . . ."

The State gave notice of appeal in open court. The defendant offered to draft the notice of appeal on behalf of the State, including it with the order dismissing the criminal charge. No separate written notice of appeal was ever filed by the State. On 13 September 1990, the State filed in the superior court a petition for writ of certiorari, requesting the superior court to review the district court's dismissal of the misdemeanor death by vehicle charge. In an order filed that same day, the superior court issued the writ and calendared the matter for review in the superior court at the direction of the prosecutor. On 28 November 1990, the defendant moved in superior court to dismiss the State's appeal. The defendant's motion was denied on 27 March 1991.

On 24 July 1991, the superior court entered an order reinstating the misdemeanor death by vehicle charge. The defendant gave oral notice of appeal to this Court. The defendant failed, however, to certify to the superior court that the appeal was not taken for the purpose of delay, as required by N.C. Gen. Stat. § 15A-1432(d) (1988). The defendant also failed to secure from the superior court a determination that the cause is appropriately justiciable in the appellate division, as is required by that same statutory provision. On 30 September 1991, the defendant filed a petition for writ of certiorari to this Court. On 9 October 1991, the State moved for the petition to be denied and for the appeal to be dismissed.

We first address the State's motion to deny defendant's petition for writ of certiorari and motion to dismiss the defendant's appeal in this Court. Defendant admits that counsel then employed by defendant failed to follow the statutory procedure for appealing to the Court of Appeals. Nonetheless, because of the important issues raised by this appeal, we allow defendant's petition for writ of certiorari, pursuant to N.C. Gen. Stat. § 7A-32(c) (1989), and pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure.

[1] The defendant first contends that the State's notice of appeal from district court to superior court was deficient and that the superior court did not have jurisdiction to grant certiorari. We

agree that the State's notice of appeal was deficient. N.C. Gen. Stat. § 15A-1432 (1988) provides:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
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> * * * *
>
> (b) When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

In the case below, defendant offered to draw up the State's notice of appeal to the superior court in conjunction with the order dismissing the charges. The order, drafted by defendant's attorney, includes the following notation at the bottom of the page: "Upon the ruling of the Court's decision, the State in Open Court by and through the Special Deputy Attorney General appearing gave notice of appeal for the Court's ruling to the Superior Court Division." This notice of appeal is inadequate to meet the requirements of N.C. Gen. Stat. § 15A-1432(b) because the basis for the appeal is not specified. The State had the responsibility to file the notice of appeal in the proper manner. Reliance on defendant's counsel to prepare proper notice will not suffice.

[2] The State argues, however, that if we deem the notice of appeal to be inadequate, its writ of certiorari properly placed the case before the superior court. Defendant contends the superior court lacked the power to issue a writ of certiorari allowing the State to pursue its appeal from the district court order. We find the State's argument persuasive.

Although no statute explicitly gives the superior court authority to issue a writ of certiorari to preserve a party's right to an appeal, N.C. Gen. Stat. § 15A-1432 gives the State the right to appeal a district court order dismissing a charge. N.C. Gen. Stat. § 15A-101(0.1) (1988), found within the definition section of the Criminal Procedure Act, provides: "When used in a general context, the term 'appeal' also includes appellate review upon writ of cer-

tiorari." Furthermore, Rule 19 of the General Rules of Practice for the Superior and District Courts gives the superior court the authority to grant the writ of certiorari "in proper cases." The authority of a superior court to grant the writ of certiorari in appropriate cases is, we believe, analogous to the Court of Appeals' power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c) (1989). As a result, we find the superior court had the authority, given the facts and circumstances apparent below, to grant the writ of certiorari to allow the State's appeal from district court to superior court.

[3] Having determined the State's appeal was properly before the superior court, we now consider whether the superior court erred by reinstating the charge of misdemeanor death by vehicle. Defendant argues that to put him on trial for the death by vehicle charge would place him in double jeopardy in violation of the Fifth Amendment to the United States Constitution. The defendant contends the charge was predicated upon the charge for driving left of center, for which he entered a plea of responsible.

The defendant appeared before a magistrate, admitted responsibility for the left of center violation, and paid fees and costs totalling fifty dollars ($50.00). The district court found, and there is no evidence to the contrary, that the only basis for the charge of misdemeanor death by vehicle was based on the driving left of center infraction. The district court concluded as a matter of law that the admission of responsibility and payment of costs by the defendant was equivalent to a guilty plea, and that prosecution of the defendant upon the same elements to which he had already entered a plea of guilty would violate the double jeopardy clause of the Fifth Amendment. The superior court found that reinstatement of the charge would not constitute a double jeopardy violation.

The Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The United States Supreme Court has held that if a person has pled guilty to a crime and is later charged with a separate crime, the proof of which would prove all the elements of the crime to which he has previously pled guilty, the person has been tried twice for the same crime. *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228 (1980).

The State argues that a violation of N.C. Gen. Stat. § 20-146 (driving vehicle left of center) does not constitute an "offense" within the meaning of the double jeopardy clause. We do not agree. "An infraction is a noncriminal violation of law not punishable by imprisonment. Unless otherwise provided by law, the sanction for a person found responsible for an infraction is a penalty of not more than one hundred dollars ($100.00)." N.C. Gen. Stat. § 14-3.1 (1986). Although a violation of N.C. Gen. Stat. § 20-146 for driving a vehicle left of center is considered an infraction, the infraction is nonetheless, for all practical purposes, of a criminal nature: a criminal summons is issued for a violation of the statute, the violator may be required to appear in criminal court, a punishment is involved, and the infraction may be used as the basis in a criminal prosecution. We hold that a violation of N.C. Gen. Stat. § 20-146 constitutes an "offense" within the double jeopardy clause of the Fifth Amendment.

Defendant argues that the present case is controlled by *State v. Griffin*, 51 N.C. App. 564, 277 S.E.2d 77 (1981). In *Griffin*, the defendant was involved in an accident in which an automobile collided with another vehicle. The day of the accident, the defendant entered a plea of guilty to failing to yield the right-of-way in violation of N.C. Gen. Stat. § 20-158 (1989). Later, the driver of the other automobile died from injuries received in the accident. Defendant was subsequently charged with death by vehicle in violation of N.C. Gen. Stat. § 20-141.4 "in that he did unlawfully and willfully fail to yield the right-of-way . . . ." *Griffin*, 51 N.C. App. at 565, 277 S.E.2d at 77. It was stipulated between the parties that the State relied upon the same conduct of the defendant in failing to yield, to which he had previously pled guilty, as the basis for the death by vehicle charge. The death by vehicle charge was dismissed, based on double jeopardy. This Court affirmed the dismissal, holding: "[i]f the defendant was tried for death by vehicle, he would be put in jeopardy for a second time for the charge of failing to yield the right-of-way." *Id.* at 566, 277 S.E.2d at 77.

We find the case at bar is distinguishable from *Griffin*. In this case, both charges were filed simultaneously; the death by vehicle charge was brought at the same time as the left of center infraction. When charges are pending, double jeopardy does not act as a bar to prosecution. In *Ohio v. Johnson*, 467 U.S. 493, 81 L.Ed.2d 425, *reh. denied*, 468 U.S. 1224, 82 L.Ed.2d 915 (1984), the United States Supreme Court held that a defendant's plea

of guilty to one count of a multi-count indictment did not shield the defendant from prosecution of a greater offense. The Court stated:

> The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses . . . . [E]nding prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

Id. at 501-02, 81 L.Ed.2d at 435.

We find that the case below is more analogous to *Johnson* than to *Griffin*, and we hold that double jeopardy is not a bar to prosecution of the death by vehicle charge. Both the law and common sense dictate that a defendant cannot choose to plead responsible to the minor infraction and thereby evade prosecution for the more serious criminal offense. The superior court's order reinstating the misdemeanor death by vehicle charge is affirmed and the cause is remanded for further proceedings. If defendant is convicted of the death by motor vehicle charge, the judgment concerning the lesser infraction must be vacated, to avoid multiple punishments for the same conduct.

Affirmed.

Judges JOHNSON and LEWIS concur.

IN RE: CALVIN LOWERY

No. 9226DC382

(Filed 4 May 1993)

1. Hospitals and Medical Facilities or Institutions § 59 (NCI4th)—mental illness—inpatient commitment rehearing—examination by two physicians not required

The provision of N.C.G.S. § 122C-276(d) that respondent has the same rights at his rehearing as he had at the initial hearing does not require that respondent be examined by two

physicians for purposes of his inpatient commitment rehearing held pursuant to N.C.G.S. § 122C-276, it being sufficient that respondent was examined by only one physician to determine whether his continued inpatient commitment was necessary.

Am Jur 2d, Hospitals and Asylums § 12.

2. **Hospitals and Medical Facilities or Institutions § 59 (NCI4th) — mental illness and dangerousness to self — outpatient ability — inpatient commitment — sufficiency of evidence**

The evidence supported the trial court's conclusions that respondent was mentally ill and dangerous to himself, and the trial court properly committed respondent to Broughton Hospital for inpatient treatment even though respondent's psychiatrist testified that he was suitable for outpatient treatment, where the evidence at the inpatient commitment rehearing showed that respondent's condition of chronic mental illness and polysubstance abuse had not changed since his initial commitment; respondent required anti-psychotic medications; respondent refused to take his medications or to eat properly and would be unable to care for himself if returned to his mother's home; respondent had a history of bizarre, aggressive thoughts and behavior; and respondent refused to consider placement in a rest home and was incapable of surviving in a less structured setting.

Am Jur 2d, Hospitals and Asylums § 12.

Appeal by respondent from order entered 10 January 1992 by Judge Richard A. Elkins at the special proceedings session of the Mecklenburg County District Court at the Mecklenburg County Mental Health Center. Heard in the Court of Appeals 2 April 1993.

On 19 December 1991, respondent's mother petitioned for his involuntary commitment due to his being mentally ill and dangerous to himself and others. Subsequently, respondent was examined and two psychiatrists recommended that he be committed as an inpatient. By order dated 31 December 1991, respondent was committed to the Mental Health Center on an inpatient basis for a period not to exceed twenty-five days followed by an outpatient commitment not to exceed sixty-five days. While institutionalized, respondent's attending psychiatrist, Dr. B.K. Noll, reexamined him and determined that respondent required long-term care. Dr. Noll recom-

mended that respondent be involuntarily committed to Broughton Hospital for up to ninety days.

The Court held a rehearing pursuant to G.S. 122C-276 on 10 January 1992 at which Dr. Noll testified that respondent's condition of chronic mental illness and polysubstance abuse had not changed since his initial commitment, that he required anti-psychotic medications which he refused to take, that he would not eat properly, and that respondent was unable to return to his mother's home and would be unable to care for himself if he returned home. Dr. Noll also testified that while medically respondent was suitable for outpatient treatment, he refused to consider the suggestion of a rest home as alternative placement. Thus, due to respondent's refusal to go to a rest home and his inability to live independently, Dr. Noll recommended inpatient commitment to Broughton Hospital. Hilda Rakes, respondent's caseworker, also testified that respondent would be unable to survive without supervision.

Respondent testified that he knew what his medicines were and that he would take them. He stated that he had lived alone before and knew that he could do so again. Respondent also recounted that he had purchased food with food stamps and affirmed that he did not want to go to a rest home.

After the rehearing, the Court concluded that respondent was unable to care for himself on an outpatient basis and that he would not go to a structured environment at a rest home. Thus, after determining that respondent was mentally ill and dangerous to himself, the Court ordered respondent committed to Broughton Hospital on an inpatient basis for a period not to exceed ninety days. Respondent appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kathleen U. Baldwin, for the State.

Assistant Public Defender Cherie Cox for respondent-appellant.

MARTIN, Judge.

[1] Respondent contends that the trial court erred (1) in failing to require the examinations of two independent physicians for purposes of the inpatient commitment rehearing and (2) in ordering the inpatient commitment of the respondent when there was evidence that he was suitable for outpatient commitment. We affirm the order of the trial court.

Respondent's first argument is based on the fact that the trial court chose to treat the second hearing as a rehearing under G.S. 122C-276. That section provides in part as follows:

> (d) Notice and proceedings of rehearings are governed by the same procedures as initial hearings and the respondent has the same rights he had at the initial hearing including the right to appeal.

Respondent asserts that the above provision requires a specific obligation, before the rehearing, to conduct a second examination by a physician within 24 hours of arrival at an inpatient facility pursuant to G.S. 122C-266 just as is required for the initial commitment hearing. In this case respondent was examined only by a single physician, Dr. Noll, prior to the rehearing.

We agree with the State's position that the portion of the statute quoted above merely refers to the rights of a respondent at the rehearing proceeding itself and does not require a repetition of every occurrence surrounding the initial hearing. We do not find, nor does respondent cite to us, any support for a contrary position.

G.S. 122C-263(a) requires that, in most instances, a respondent believed to be mentally ill and in need of commitment must be taken without unnecessary delay to an area facility for initial examination by a physician or eligible psychologist. G.S. 122C-266 then requires a second examination for inpatient commitment pending a hearing and provides in part that "within 24 hours of arrival at a 24-hour facility . . . the respondent shall be examined by a physician." We believe this language demonstrates that the purpose of the second examination is to protect the rights of a respondent who has been taken to a medical facility immediately prior thereto to insure that he was properly committed.

In this case, respondent's initial commitment had been accomplished in accordance with the statute. The purpose of Dr. Noll's second examination was to determine whether continued inpatient commitment was necessary. There was no longer a question of whether respondent's initial commitment was necessary. The words "within 24 hours of arrival" demonstrate the applicability of that provision to the initial commitment phase. It would not make sense to apply that provision to the circumstances of the rehearing at which time there is no longer a question of whether

the initial commitment had been proper. The provision of G.S. 122C-276 quoted above requires only that the respondent should have the same procedural rights at the rehearing itself as he did at his initial hearing. There is no showing on the record before us that such rights were not provided.

[2] Respondent also contends that the trial court erred in ordering his commitment as an inpatient because medical and legal evidence existed that respondent was suitable for outpatient commitment. Respondent contends that outpatient treatment, for which Dr. Noll stated that respondent was suitable, was a less restrictive mode of treatment, and that outpatient treatment was available in forms other than nursing homes. Respondent asserts that his mere refusal to go to a nursing home did not convert his medical condition into one meriting a ninety day involuntary commitment. We disagree.

On appeal from an order of commitment, the questions for determination are (1) whether the court's ultimate findings of mental illness and danger to self are supported by the facts which the Court recorded in its order as supporting its findings, and (2) whether, in any event, there was competent evidence to support the court's findings. *In re Frick*, 49 N.C. App. 273, 271 S.E.2d 84 (1980). G.S. 122C-268 requires that the trial court find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is dangerous to himself or others. *In re Jackson*, 60 N.C. App. 581, 299 S.E.2d 677 (1983). On appeal it is this Court's function to determine if the trial court's findings with respect to respondent's mental illness and dangerousness are supported by any competent evidence; whether that evidence, however, is "clear, cogent and convincing" is for the trier of fact alone to determine. *In re Collins*, 49 N.C. App. 243, 271 S.E.2d 72 (1980); *Jackson, supra.*

In this case the trial court found that the respondent wasboth mentally ill and dangerous to himself. "Dangerous to himself" is defined in G.S. 122C-3(11) as meaning that within the relevant past:

> 1. The individual has acted in such a way as to show:
>
> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy

his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself.

"Mental illness" is defined when applied to an adult as:

[A]n illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

N.C. Gen. Stat. 120C-3(21).

We have held specifically that the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self. *In re Medlin*, 59 N.C. App. 33, 295 S.E.2d 604 (1982). The evidence presented at the rehearing was competent to support the finding that respondent was mentally ill and dangerous to himself.

The evidence presented at the rehearing demonstrated that respondent refused to comply with a recommendation that he be placed in a rest home setting, and that he was absolutely incapable of surviving safely in any setting less structured because of his chronic mental illness and polysubstance abuse. Dr. Noll also testified that respondent had a history of bizarre, aggressive thoughts and behavior. The evidence further demonstrated that respondent refused to take his medication or to eat properly and would be unable to care for himself if returned home. We hold that this evidence is competent to support the trial court's conclusions that respondent was mentally ill and dangerous to himself within the statutory definitions of those terms.

The mere fact that respondent may have been suitable for outpatient commitment does not require that result as both respondent's caseworker and respondent himself testified that he

would not go to the rest home. Respondent failed to present any alternative outpatient treatment possibilities. Thus, the trial court's finding that respondent met the criteria for inpatient commitment was supported by sufficient competent evidence.

Affirmed.

Judges EAGLES and JOHN concur.

IN RE: THE WILL OF FANNIE ECKLIN MOORE, DECEASED, RETHA ECKLIN LEWIS, LOIS ANDREW ECKLIN, SYLVIA ECKLIN NATALE, AND KATRINA ECKLIN CHRISMON, PETITIONERS v. HARRIET ECKLIN, OPAL MOORE RAKOWSKI NANNEY, LOUISE CRATCH, JOHN ECKLIN, JR. AND SID HASSELL, JR., ADMINISTRATOR C.T.A. OF THE ESTATE OF FANNIE ECKLIN MOORE, DECEASED, RESPONDENTS

No. 922SC223

(Filed 4 May 1993)

Wills § 44 (NCI3d)— holographic wills—intent of testatrix—per stirpes distribution

Where testatrix left two holographic wills dated the same day, one will left the residuary estate "to my Brother's & Sister, and their Children," and the second will provided that the residuary estate should go "to my brothers, and sister & their children" and also that it should go "First to Brothers Sisters then to their children," the testatrix intended to effect a per stirpes distribution of her residuary estate so that the estate should be divided into one share for each of testatrix's brothers and sister, and the issue of any deceased sibling will take in equal parts the share of their ancestor.

Am Jur 2d, Wills § 1140.

Taking per stirpes or per capita under will. 13 ALR2d 1023.

Appeal by petitioners from judgment entered 27 September 1991 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 2 March 1993.

Bevin W. Wall for petitioners-appellants.

Mayo & Mayo, by William P. Mayo and William P. Mayo, Jr., for respondents-appellees.

JOHNSON, Judge.

The testatrix in this action, Fannie Ecklin Moore, died on 14 August 1990. One of the respondents filed a petition seeking probate in solemn form on 20 September 1990. A response was filedby the petitioners. An order of probate of holographic will in solemn form was entered by the Beaufort County Clerk of Superior Court on 22 October 1990.

A petition for declaratory judgment was filed by the petitioners on 16 April 1991 and answers were filed by the respondents and the administrator of the estate. A hearing was conducted before Judge Griffin on 6 September 1991, wherein he ordered a per stirpes distribution of the testatrix's estate.

The testatrix, Fannie Ecklin Moore, died on 14 August 1990, leaving as her last will and testament two paper writings satisfying the North Carolina requirements for a holographic will. Both wills were hand written, signed by the testatrix, dated the same day, 15 June 1979, and both were entitled: "My Will if I don't get another wrote."

One will contained the following language: "then [the residuary] be divided or sold & divided what it sells for to my Brother's & Sister, and their Children. Half Brother's children the same." The other will made two references to distribution: "then [the residuary] be sold and or divided to my brothers, and sister & their children" was contained in the body of the will, and the phrase "First to Brothers Sisters then to their children" was contained at the end of the will but before the testatrix's signature.

Mrs. Moore was survived by:

1. Harriet Ecklin, a surviving niece, daughter of Charlie Ecklin who predeceased testatrix;

2. Opal Moore Rakowski Nanney, a surviving niece, daughter of Margie Ecklin Moore who predeceased testatrix;

3. Louise Cratch, a surviving niece, daughter of Johnny E. Ecklin who predeceased testatrix;

4. John Ecklin Jr., a surviving nephew, son of Johnny E. Ecklin who predeceased testatrix;

5. Retha Ecklin Lewis, a surviving niece, daughter of James Heber Ecklin (living);

6. Lois Andrew Ecklin, a surviving niece, daughter of James Heber Ecklin (living);

7. Sylvia Ecklin Natale, a surviving niece, daughter of James Heber Ecklin (living);

8. Katrina Ecklin Chrismon, a surviving great niece, daughter of Alton Ecklin (deceased), and granddaughter of James Heber Ecklin (living);

9. James Heber Ecklin, surviving brother of testatrix.

Respondents filed a petition in Beaufort County Superior Court, seeking probate of the will and a per stirpes distribution of the testate estate, which would have given a ¼ share to James Heber Ecklin, Harriet Ecklin and Opal Moore Rakowski Nanney, and a 1/8 share each to Louise Cratch and John Ecklin, Jr.

James Heber Ecklin, the only surviving sibling of the testatrix, renounced any and all of his interest in the testatrix's estate by written renunciation dated 28 September 1990 and filed with the Beaufort County Clerk of Superior Court on 4 October 1990. Petitioners then filed their response seeking a per capita distribution of the estate between the seven nieces and nephews and the daughter of the sole deceased nephew in equal shares of 1/8.

From order entered 7 October 1991, stating that "[i]t was the intention of the decedent that upon her death her estate be divided into one share for each of her brothers and sister and that the issue of any deceased sibling should take in equal parts the share of their ancestor," petitioners appeal.

Petitioners argue that the factual evidence presented in support of the testatrix's intention was, as a matter of law, ambiguous and contradictory, and that it was impossible for the factfinder to make any factual conclusion regarding the intention of the decedent. Respondents further contend that the trial court's conclusions of law, which provided for a per stirpes distribution, were not based on any competent findings of fact.

More specifically, respondents argue that the language " 'First to Brothers Sisters then to their children' would not create a devise to the Brothers and Sisters in fee simple, but would be a devise to two classes, the first class being 'Brothers & Sisters' and the second class being 'their children' or the nieces and nephews of the testatrix." Petitioners, citing *Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E.2d 758 (1963), proceed to argue that where a devise is to a class, the devisees take and share alike unless the testator clearly intended a different division.

We disagree with respondents' position, noting that the two wills must be construed as a whole and, if possible, meaning must be given to each clause, phrase and word. *Maxwell v. Grantham*, 254 N.C. 208, 118 S.E.2d 426 (1961). Our Supreme Court stated in *Adcock v. Perry*, 305 N.C. 625, 630, 290 S.E.2d 608, 611-12 (1982):

> In trying to ascertain the intent of the testator, the will is to be considered in its entirety so as to harmonize, if possible, provisions which would otherwise be inconsistent. (cites omitted). A phrase should not be given a significance which clearly conflicts with the evident intent of the testator as gathered from the four corners of the will and the court will adopt that construction which will uphold the will in all its parts if such course is consistent with the established rules of law and the intention of the testator. (cites omitted).

The *Adcock* Court also stated that Mr. Perry's testamentary scheme became apparent from a reading of the whole will. 305 N.C. at 630, 290 S.E.2d at 612. Likewise, in the case *sub judice*, a reading of the whole will leads to the conclusion that the testatrix intended that the living children of a predeceased sibling were to represent the deceased sibling and divide the sibling's share among themselves, effecting a per stirpes distribution.

Our acceptance of the interpretation petitioners suggest (that the actual or deemed predecease of all of the testatrix's siblings activated a second class consisting of the testatrix's siblings' children) would mean that no child of the testatrix's siblings could benefit unless all the siblings predeceased the testatrix. We do not believe that this was the intent of the testatrix; we believe that it was the testatrix's intent that her siblings and their children benefit under her will. Although all of the testatrix's siblings have predeceased her (in reality or by operation of law), we are inclined to hold that the distribution should none the less be per stirpes. It

is highly unlikely that the testatrix would have wanted her siblings' children to benefit only if all of her siblings predeceased her.

Our decision finds support in the intestacy laws of North Carolina which were designed to follow the most logical and natural process of distribution. Of course the intestacy laws do not apply in the instant case, but they do provide insight. North Carolina General Statutes § 29-15(4) (1984) provides:

> If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G.S. 29-16[.]

North Carolina General Statutes § 29-16 (1984) details per stirpes distribution. We therefore hold that there is no logical reason for this Court to favor a per capita distribution over a per stirpes distribution absent the intent of the testatrix as ascertained from the four corners of the will.

Even if this Court were to accept petitioners' argument that the testatrix's will created a class gift to her siblings, the North Carolina Antilapse Statute (North Carolina General Statutes § 31-42(b) (1984)) would again provide for per stirpes distribution. The statute states:

> Devolution of Devise or Legacy to Member of Class Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken as a member of a class had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act[.]

Accordingly, we cannot support a presumption in favor of per capita distribution absent the intent of the testatrix.

The decision of the trial court is affirmed.

Judges LEWIS and JOHN concur.

JEFFERSON-PILOT LIFE INSURANCE COMPANY, PLAINTIFF v. SMITH HELMS MULLISS & MOORE, A NORTH CAROLINA PARTNERSHIP, DEFENDANT AND THIRD PARTY PLAINTIFF v. NORTH GREENE ASSOCIATES LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, THIRD PARTY DEFENDANT

No. 9118SC1289

(Filed 4 May 1993)

1. **Evidence and Witnesses § 1994 (NCI4th)— lease termination agreement—parol evidence rule—extrinsic evidence admissible**

The trial court did not err in an action arising from the termination of a lease by considering extrinsic evidence of the parties' intent in entering into a lease termination agreement where the words of the agreement seem clear and unambiguous, but their meaning is less than certain when viewed in the context of all the surrounding circumstances.

Am Jur 2d, Contracts §§ 260-263.

2. **Landlord and Tenant § 35 (NCI4th)— lease—agreement to terminate—action for expenses under lease—question of parties' intent—summary judgment not appropriate**

Summary judgment should not have been granted for plaintiff in an action arising from the termination of a lease where the lease provided that defendant was to pay a portion of plaintiff's increased operating expenses during the lease, an agreement was subsequently signed to terminate the lease, defendant presented evidence that the obligation to pay those expenses was eliminated by the termination agreement, and plaintiff presented facts showing that the expenses were never considered and never intended to be released in the termination agreement. Summary judgment should not have been granted because the question of the parties' intent exists and extrinsic evidence is required to determine that intent.

Am Jur 2d, Landlord and Tenant § 1013; Summary Judgment § 27.

Appeal by defendant and third party defendant from judgment entered 24 October 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals on 7 December 1992.

On 17 December 1975, plaintiff and defendant entered into a lease whereby defendant leased space from plaintiff in the NCNB Building in Greensboro for a term of five years, with the option to renew for three consecutive five year periods (the 1977 lease). In addition to normal monthly rent payments, defendant was to pay a portion of plaintiff's increased operating expenses. The increased operating expenses were calculated using the first year of the lease as a base year and subtracting that base amount from each subsequent year's operating expenses. The amount of operating expenses payable by defendant was proportional to the amount of space occupied by defendant in the building. Defendant did not pay expenses for the current year as those expenses were incurred. Rather, plaintiff would permit operating expenses to accrue for two years before charging defendant. At the end of every two year period, plaintiff would calculate its operating expenses and determine the proportionate share owed by defendant. That amount would be divided and paid over the next two years with the monthly rent. This process continued for as long as defendant leased from plaintiff.

The lease also provided that at the end of the term, and apparently after termination for any reason, plaintiff would provide defendant with a statement setting forth the total amount of defendant's proportionate share of plaintiff's increased operating expenses for the period of time defendant actually occupied the premises following the last adjustment. Plaintiff could deliver the statement to defendant on or before the lease anniversary date of the year following the end of the term. Thereafter, defendant would have fifteen days to pay the amount due in lump sum.

Defendant renewed the lease with plaintiff several times and at the time this suit arose, was bound to continue under the lease until February 1992. On 7 July 1988, defendant entered into a lease agreement with third party defendant North Greene Associates (North Greene) for the leasing by defendant of space in the First Union Tower in Greensboro. This new lease was to commence in February 1990. As part of the inducement to enter into the new lease, North Greene agreed to pay defendant for rent due under the 1977 lease beginning after the commencement date of the new lease.

Subsequently, in an effort to reduce costs, North Greene negotiated an agreement with plaintiff to terminate the 1977 lease

for one hundred thousand dollars (the lease termination agreement). That agreement was entered into on 19 September 1989. As part of the lease termination agreement, the parties entered into a release which reads in pertinent part:

> Termination of the J-P Leases. Effective on the Termination Date (defined below), the J-P Leases between Jeff-Pilot and Smith Helms shall cease and terminate . . . . Jeff-Pilot and Smith Helms shall have no rights or obligations to each other under the J-P Leases that arise or accrue on or after the Termination Date, and Jeff-Pilot and Smith Helms do hereby release and discharge each other from any and all duties and obligations that they otherwise would have been required to perform under the J-P Leases on or after the Termination Date.

The termination date was defined as "the date that Smith Helms vacates the J-P and NCNB Premises and completes occupancy of its new office space in the First Union Tower."

Defendant moved out of the NCNB building and began occupying the First Union Tower in February 1990. In January 1990, prior to the move/termination date, plaintiff sent defendant a letter demanding payment of $231,364.08 as additional rent purportedly owed by defendant primarily for increased operating expenses for the years 1988 and 1989. Because defendant believed the lease termination agreement eliminated any obligation to pay this amount, it refused to pay. Plaintiff filed suit for payment. There was also a dispute over which date in February 1990 defendant vacated the NCNB premises and, accordingly, what amount of rent was due for that month, so plaintiff joined that dispute in its action for damages. On 31 January 1991, plaintiff mailed a letter to defendant demanding payment for defendant's share of increased operating expenses for January and February 1990. On 25 June 1991, plaintiff filed supplemental pleadings seeking payment of the increased operating expenses for January and February 1990.

Defendant pleaded release as a defense and filed a third party complaint against North Greene claiming that North Greene must indemnify defendant for any amount owed to plaintiff. Plaintiff moved for partial summary judgment. The trial judge granted plaintiff's motion on the claim for 1988 and 1989 operating expenses and reserved for trial only the issue of the date defendant vacated the NCNB building and the corresponding issue of the amount of rent due for February 1990. Claims for costs, interest and at-

torney's fees were deferred. The judge also granted defendant's motion for summary judgment on its claim for indemnity against North Greene. In order to allow defendant and North Greene to appeal immediately, the parties entered into a compromise agreement and stipulation which established the amount of damages which were due to plaintiff in addition to those determined by the order granting summary judgment. Based upon the agreement and order, the superior court judge entered judgment. From this judgment defendant and third party defendant appeal.

Elrod & Lawing, P.A., by Frederick K. Sharpless, for plaintiff appellee.

Bell, Davis & Pitt, by William K. Davis, for defendant and third party plaintiff appellant.

Adams, Kleemeier, Hagan Hannah & Fouts, by Daniel W. Fouts, for third party defendant appellant.

Troutman, Sanders Lockerman & Ashmore, by Robert W. Webb, Jr., for third party defendant appellant.

ARNOLD, Chief Judge.

Apparently there is no dispute over the calculation of the increased operating expenses nor over defendant's liability for those costs under the 1977 lease. Instead, the issue raised by appellants' assignment of error is did the lease termination agreement, specifically the release language, eliminate defendant's obligation to pay the increased operating expenses. Therefore, the decision in this case boils down to a matter of contract interpretation. Appellants contend that the plain language of the release releases them from any obligation to pay the increased operating expenses, and that the trial court erred by considering parol evidence of the parties' intent. In the alternative, appellants argue that any ambiguity in the release merely raises a question of fact for the jury.

[1] We address the parol evidence problem first. If there is a latent ambiguity in the contract, preliminary negotiations and surrounding circumstances may be used to determine what the parties intended. *Miller v. Green*, 183 N.C. 652, 654, 112 S.E. 417, 417-18 (1922). "A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable." *Id.* at 654, 112 S.E. at 418. Although the words of the agreement

at hand seem clear and unambiguous, their meaning is less than certain when viewed in the context of all the surrounding circumstances. It is unclear whether the release was intended to eliminate rent and expense obligations only for 1990 through 1992, or to absolve defendant of its obligation for 1988 and 1989 as well. In light of this ambiguity, the trial court did not err in considering extrinsic evidence regarding the parties' intent.

[2] The next question is did the trial court err in granting summary judgment for plaintiff, which resulted in the judgment establishing defendant's liability for the 1988 and 1989 increased operating expenses sought by plaintiff. Summary judgment is proper only where there is no genuine issue as to any material fact. In North Carolina it is well settled that "[w]henever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties. . . ." *Cleland v. The Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983) (citation omitted). If the agreement is ambiguous and the intention is unclear, interpretation of the contract is for the jury. *Id.* "[I]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent . . . to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 590, 158 S.E.2d 829, 837 (1968).

Defendant's and North Greene's forecast of evidence tends to show that the increased operating expenses may have accrued after the termination date of the 1977 lease, depending on the interpretation of the 1977 lease where those increased operating expenses are charged to defendant, and that the obligation to pay increased operating expenses was eliminated by the lease termination agreement. Plaintiff on the other hand, presented facts showing that the expenses sought by plaintiff were never considered and never intended to be released in the lease termination agreement. "Ambiguities in contracts are to be resolved by the jury upon consideration of 'the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' " *Cleland*, 64 N.C. App. at 157, 306 S.E.2d at 590. Because the question of the parties' intent exists, and extrinsic evidence is required to determine that intent, summary judgment should not have been granted. Therefore the judgment of the trial

court is reversed, and the case is remanded for trial on the issue of the parties' intent as to the agreement to terminate leases.

Reversed and remanded.

Judges JOHNSON and ORR concur.

WILLIAM H. WOODARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT v. NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); STATE OF NORTH CAROLINA, DEFENDANTS-APPELLANTS

No. 9210SC202

(Filed 4 May 1993)

Appeal and Error § 191 (NCI4th)— appeal of denial of motion to dismiss — stay — consideration of subsequent motion for summary judgment

The trial court lacked jurisdiction to enter an order granting summary judgment in an action resulting from a change in the retirement disability statute governing local government employees in North Carolina where defendants already had filed notice of appeal from an order denying motions to dismiss. The perfection or docketing of an appeal operates as a stay of proceedings within the meaning of N.C.G.S. § 1-294. Under that statute, an appeal removes a case from the trial court, which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court. The statute does permit the court to "proceed upon any other matter included in the action and not affected by the judgment appealed from," including the jurisdiction to hear motions and orders, so long as they do not concern the subject matter of the suit. The issues raised and the arguments furthered by the parties at the summary

judgment hearing were virtually identical to those relating to the motion to dismiss and it cannot be said that the matters reviewed by the lower court at the summary judgment hearing were unaffected by the appeal of the denial of defendants' motion to dismiss.

Am Jur 2d, Appeal and Error § 365.

Appeal by defendants and cross-appeal by plaintiff from order entered 16 January 1992 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 10 December 1992.

Marvin Schiller; and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, Donald L. Smith, and Susan S. McFarlane, for plaintiff appellee, cross-appellant.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Edwin M. Speas, Jr., Special Deputy Attorneys General Tiare B. Smiley and Norma S. Harrell, for defendant appellants, cross-appellees.

COZORT, Judge.

Plaintiff filed a declaratory judgment action against defendants to determine benefits due him following an amendment to the retirement disability statute which covers local government employees in this State. Defendants filed a motion to dismiss the action; the motion was denied. Defendants appealed the denial of their motion to dismiss to this Court. While the appeal was pending, the trial court entered an order granting plaintiff partial and full summary judgment, and denying defendants' motion for summary judgment. Because the trial court lacked jurisdiction to determine the summary judgment motions, we vacate the order of the trial court. Pertinent facts and procedural history follow.

Plaintiff brought this action on 11 January 1991 seeking a declaratory judgment and damages relating to an amendment, effective 1 July 1982, to the retirement disability statute which governs local government employees in North Carolina. On 28 June 1991, the trial court granted plaintiff's motion for class certification, and denied defendants' motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b). Defendants filed notice of appeal from the orders denying their motion to dismiss on 3 July

1991. On 26 August 1991, plaintiff filed a motion for partial summary judgment on the issue of impairment of contract. In response, on 3 September, the defendants moved to remove the motion from the calendar for lack of jurisdiction or in the alternative to continue the hearing on the motion until the case was resolved on appeal. In an order dated 22 November, the trial court denied defendants' motion for removal of the case from the calendar or for a continuance. The trial court proceeded to hear arguments on plaintiff's motion for partial summary judgment and on defendants' motion for summary judgment as to all liability claims. On 16 January 1992, the trial court granted plaintiff's motion for partial summary judgment on the impairment of contract claim, denied defendants' motion for summary judgment, and granted summary judgment to plaintiff as to all issues of liability. Defendants filed notice of appeal on 23 January 1992; plaintiff cross-appealed.

N.C. Gen. Stat. § 1-294 (1983) states:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

The scope of the stay, which becomes operative following the appeal of a judgment, is well-established by case law. In general, an appeal takes the case out of the jurisdiction of the trial court. *Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975). An appeal removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court. *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). *See also, Jenkins v. Wheeler*, 72 N.C. App. 363, 325 S.E.2d 4 (1985). "It is also well settled that an appeal, *even of an interlocutory order*, 'operates as a stay of all proceedings in the [lower court] relating to issues included therein until the matters are determined in the [appellate court].' " *Lowder v. Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) (*quoting Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) (emphasis added).

On the other hand, the statute permits the court below to "proceed upon any other matter included in the action and *not affected by the judgment appealed from*," N.C. Gen. Stat. § 1-294 (emphasis added), including the jurisdiction to hear motions

and orders, so long as they do not concern the subject matter of the suit. *See Herring v. Pugh*, 126 N.C. 852, 858, 36 S.E. 287, 289 (1900). Plaintiff argues the trial court was not divested of its jurisdiction to hear the summary judgment motions following the appeal of the motions to dismiss. We disagree.

Defendants advanced several grounds in their motions to dismiss plaintiff's cause of action. Defendants asserted that (1) defendants other than the State were not parties to and had not breached any contract with plaintiff which may exist; (2) defendants were not persons subject to suit within the meaning of 42 U.S.C. § 1983; (3) defendants were protected from suit under 42 U.S.C. § 1983 by reason of the doctrine of qualified immunity; (4) defendants were protected from suit for any state claims by reason of the doctrine of official immunity; (5) plaintiff had not stated a claim for breach of fiduciary duty against certain defendants; and (6) plaintiff's suit was barred pursuant to the doctrine of sovereign immunity. Although normally the denial of a motion to dismiss is interlocutory and not immediately appealable, this Court has held that the doctrine of sovereign immunity presents a question of personal jurisdiction and an appeal of a motion to dismiss based on this ground is immediately appealable. *See Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987). Furthermore, our Supreme Court has held recently that the denial of a motion for summary judgment which was based upon an immunity defense to a section 1983 claim affects a substantial right and is also immediately appealable. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied, Durham v. Corum*, --- U.S. ---, 121 L.Ed.2d 431 (1992).

The issues raised and arguments furthered by the parties at the summary judgment hearing were virtually identical to those relating to the defendants' motion to dismiss. We cannot say that the matters reviewed by the lower court at the summary judgment hearing were unaffected by the appeal of the denial of defendants' motion to dismiss. Admittedly, the defendants' appeal of the motion to dismiss presented questions which were interlocutory. However, this Court, in the interest of judicial economy and pursuant to N.C.R. App. P. 21(a)(1), addressed these untimely issues when rendering its opinion in *Woodard et al. v. North Carolina Local Governmental Employees' Retirement System et al.*, 108 N.C. App. 378, 424 S.E.2d 431 (1993), and in the companion case of *Faulkenbury et al. v. Teachers' and State Employees' Retirement System of*

North Carolina, et al., 108 N.C. App. 357, 424 S.E.2d 420 (1993). In *Woodard* and *Faulkenbury*, we reversed the lower court's denial of defendants' motion to dismiss plaintiff's action pursuant to 42 U.S.C. § 1983 and plaintiff's claim for breach of fiduciary duty. We affirmed the trial court's denial of defendants' motion to dismiss on the issue of constitutional impairment of obligation of contract.

The perfection of, or docketing of, an appeal relates back to the time of giving notice of the appeal and operates as a stay of proceedings within the meaning of the statute. *Lowder*, 301 N.C. at 580, 273 S.E.2d at 258. In this case, the notice of the appeal of the denial of defendants' motion to dismiss was given on 2 July 1991. The entry of the order granting partial summary judgment to plaintiffs, denying defendants' motion for summary judgment, and entering summary judgment for plaintiff occurred on 16 January 1992. Because the stay was in force at the time when the trial court heard the motions for summary judgment, the court lacked jurisdiction to enter the 16 January order. The order of the trial court must be

Vacated.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. RONALD DONNELL STANLEY

No. 9216SC19

(Filed 4 May 1993)

1. Homicide § 287 (NCI4th)— second degree murder—unlawful killing and malice—sufficiency of evidence

The State's evidence of an unlawful killing and malice was sufficient to support defendant's conviction of second degree murder where it tended to show that defendant struck the victim's girlfriend during an argument; defendant ran out of his house with a stick and confronted the victim as the victim approached his house; defendant and the victim were arguing in the yard between their houses when defendant struck the victim on the head with the stick; the victim fell down, and defendant delivered at least one more blow to the victim's

head after the victim fell; and either of the two blows to the victim's head could have been fatal.

Am Jur 2d, Homicide § 425.

2. **Criminal Law § 1145 (NCI4th)— aggravating factor—heinous, atrocious or cruel murder—improper finding**

The trial court erred in finding the heinous, atrocious or cruel aggravating factor for a second degree murder where the evidence tended to show that defendant struck the victim on the head with a stick two or possibly three times during an argument and that the victim was rendered unconscious immediately; there was no evidence that the victim endured excessive physical pain or psychological suffering; and the attack was not excessively more brutal than any other second degree murder. N.C.G.S. § 15A-1340.4(a)(1)f.

Am Jur 2d, Criminal Law §§ 598, 599.

3. **Criminal Law § 1165 (NCI4th)— aggravating factor—vulnerable victim—improper finding**

The trial court erred in finding as an aggravating factor for second degree murder that the victim was particularly vulnerable because he was a fallen victim where the evidence tended to show that defendant struck the victim with a stick during an argument and struck the victim at least one more time after the victim fell, since defendant did not choose the victim because he was vulnerable, and the trial court should not use the increasing level of vulnerability or weakness of a victim as an aggravating factor when that vulnerability or weakness results from the immediate chain of events that caused the victim's death.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 26 July 1991 by Judge Paul M. Wright in Robeson County Superior Court. Heard in the Court of Appeals on 26 February 1993.

Defendant was charged with first degree murder for killing Clifton Buck Oxendine. The victim and his girlfriend lived next door to defendant. On 20 October 1990, defendant argued with the victim's girlfriend and eventually struck her. That same day, the girlfriend told the victim about the incident. When the victim

arrived home from work that day an argument ensued between him and defendant. Defendant's version of the story is that he was attacked in his home by the victim, and was forced to defend himself. However, other testimony indicated that defendant ran out of his house with a stick and confronted the victim as the victim approached the defendant's house.

Testimony differs on how many blows were delivered by defendant, but the following events are fairly well established. Defendant and the victim were arguing in the yard between their houses, and defendant eventually struck the victim over the head with a stick. The victim either tripped or fell as a result of the blow. Thereafter, defendant delivered at least one more blow to the victim's head. At trial, the jury convicted defendant of second degree murder. The judge found aggravating and mitigating factors and sentenced defendant to life in prison. From this judgment defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for the State.

Public Defender Angus B. Thompson, by Assistant Public Defender Gayla Graham Biggs, for defendant appellant.

ARNOLD, Chief Judge.

[1] Second degree murder is the "unlawful killing of a human being with malice." *State v. Rogers*, 299 N.C. 597, 603, 264 S.E.2d 89, 93 (1980). There was some evidence that defendant acted in self defense, but there was also ample evidence that defendant was the aggressor, and that he unlawfully killed the victim.

The State also presented evidence of malice. "Malice is not only hatred . . . it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. It may be shown by evidence of hatred . . . and it is implied in law from the killing with a deadly weapon . . . ." *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), *overruled on other grounds by State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337 (1965) (citations omitted). A deadly weapon is an "instrument which is likely to produce death or great bodily harm, under the circumstances of its use." *State v. Cauley*, 244 N.C. 701, 707, 94 S.E.2d 915, 920 (1956). The stick in this case is such an instrument, and malice can therefore be implied from its use.

The State's evidence of an unlawful killing and malice was sufficient to overcome the motion to dismiss the second degree murder charge. Likewise, there was sufficient evidence to support the verdict of second degree murder. Therefore, we reject defendant's argument that there was insufficient evidence to find him guilty of second degree murder.

Defendant also argues that the trial court erred in refusing to dismiss the first degree murder charge. However, defendant was not convicted of first degree murder or otherwise prejudiced by the court's refusal to dismiss the charge, so we do not address that argument.

Defendant also argues that the trial court committed various errors in sentencing. The court found one statutory and one nonstatutory aggravating factor when sentencing defendant. The judge found, pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)f, that the murder was especially heinous, atrocious and cruel. He also found that the victim was particularly vulnerable because he was a fallen victim. Defendant argues that the evidence does not support these aggravating factors, and we agree.

[2] When determining if an offense was especially heinous, atrocious or cruel, the trial court should focus on whether the facts of the case disclose "*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). Evidence in this case establishes that defendant struck the victim on the head only two or possibly three times with a stick. The victim's girlfriend estimated that the victim was hit about three times after falling, but the State's pathologist testified that the victim received two blows to the head, either one of which could have been fatal. Furthermore, testimony of the witness nearest the victim indicates that the victim was rendered unconscious immediately. This attack was not excessively more brutal than any other second degree murder, nor do the facts establish that the victim endured excessive physical pain or psychological suffering. Therefore, the trial court erred when it found that the murder was especially heinous, atrocious or cruel.

[3] The court found, as an additional aggravating factor, that the victim was particularly vulnerable because he was a fallen victim. This factor cannot be considered under the facts of this case. This is not a case where the defendant chose the victim because he

was particularly vulnerable. In this case, the victim's increasing vulnerability resulted from the chain of events that caused his death. The trial court should not use the increasing level of vulnerability or weakness of a victim as an aggravating factor when that vulnerability or weakness results from the immediate chain of events that caused the victim's death.

Because the trial court erred in finding these aggravating factors, this case is reversed and remanded for new sentencing. We need not address defendant's remaining assignments of error which relate to the court's refusal to find certain mitigating factors.

Trial—No error.

Sentencing—Reversed and remanded.

Judges GREENE and McCRODDEN concur.

STATE OF NORTH CAROLINA v. MANLEY JARVIS GUTHRIE, DEFENDANT

No. 9210SC214

(Filed 4 May 1993)

1. Rape and Allied Offenses § 4.3 (NCI3d)— Rape Shield Statute—letter not excluded

Cross-examination of an alleged sexual offense and indecent liberties victim about a letter she wrote asking a school friend to have sex with her was not prohibited by the Rape Shield Statute, N.C.G.S. § 8C-1, Rule 412, because evidence of language does not constitute evidence of sexual behavior excluded by this statute.

Am Jur 2d, Rape §§ 40, 82, 83, 86.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity. 95 ALR3d 1181.

2. Evidence and Witnesses § 3088 (NCI4th)— letter soliciting sex—admissibility for impeachment

Where an alleged sexual offense and indecent liberties victim testified that defendant dictated letters she wrote to defendant implying that she would do things of a sexual nature for defendant if he would take her to school and lend her money, cross-examination of the victim about a letter she voluntarily wrote to a school friend asking the friend to have sex with her was relevant to impeach the credibility of the victim because this evidence supports an inference that the victim voluntarily wrote the letters to defendant and thus contradicts her earlier testimony.

Am Jur 2d, Witnesses § 862.

Appeal by defendant from judgment entered 15 November 1991 by Judge William H. Freeman in Wake County Superior Court. Heard in the Court of Appeals on 29 March 1993.

Defendant, the victim's step-grandfather, was convicted on two charges of second degree sexual offense and three charges of taking indecent liberties with a child. The State introduced several letters which the victim wrote to defendant. The letters contained promises from the victim inferring that she would do things of a sexual nature for defendant if he would take her to school or lend her money. The victim testified that defendant dictated the letters to her.

During cross-examination, defendant sought to question the victim about a letter (the letter) which she voluntarily wrote to a school friend in which she asked her friend to have sex with her. On voir dire, the victim admitted voluntarily writing the letter to her friend. The prosecutor objected to the testimony on the ground that it was prohibited by the Rape Shield Statute. The trial judge sustained the objection.

The jury returned a verdict of guilty on all charges, and defendant was sentenced. From this judgment defendant appeals.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Isham B. Hudson, Jr., for the State.

John T. Hall for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant's first argument is that the court erred by not allowing him to cross-examine the victim about the letter. Effective cross-examination is a fundamental right and "is denied when a defendant is prevented from cross-examining a witness at all on a subject matter relevant to the witness's credibility." *State v. Durham*, 74 N.C. App. 159, 163, 327 S.E.2d 920, 923 (1985). The denial of that right "is constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* But, the defendant's right to cross-examination is not absolute. The testimony which defendant sought to elicit must be relevant to some defense or relevant to impeach the witness. *Durham*, 74 N.C. App. at 167, 327 S.E.2d at 926.

N.C.R. Evid. 412 is "a codification of the 'rule of relevance' as it pertains to issues in a rape case." *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1982). Rule 412 provides that evidence of sexual behavior of the complainant is irrelevant unless it falls within one of four categories listed in the rule. N.C.R. Evid. 412(b)(1)-(4). Our Supreme Court, however, has held that Rule 412 is not the sole gauge in determining if evidence is admissible in rape cases. *Younger*, 306 N.C. at 698, 295 S.E.2d at 456. The victim's statements about prior specific sexual activity is sometimes admissible to impeach the victim even though the statements do not fall within Rule 412(b)(1)-(4). *Id.* at 698, 295 S.E.2d at 456-57.

The State objected to the testimony about the letter on the basis of Rule 412. The trial judge sustained the objection, apparently believing that Rule 412 rendered the testimony irrelevant and inadmissible. However, testimony about the letter is not the type of evidence which Rule 412 seeks to exclude. Rule 412 is concerned with sexual activity of the complainant. N.C.R. Evid. 412(a). We do not have evidence of sexual activity here. Instead, we have evidence of language.

We previously held that language or conversation is not sexual activity. *See Durham*, 74 N.C. App. at 167, 327 S.E.2d at 926 (child's accusation of her father to the extent it was evidence of conversation was not excluded by Rape Shield Statute), *State v. Baron*, 58 N.C. App. 150, 153-54, 292 S.E.2d 741, 743-44 (1982) (prior false accusations of improper sexual advances not prohibited by Rule 412). In *State v. Smith*, 45 N.C. App. 501, 263 S.E.2d 371, *disc. review denied*, 301 N.C. 104 (1980), we held that conversation be-

tween complainant and defendant concerning complainant's sexual problems with another man did not rise to the level of sexual behavior. *Smith*, 45 N.C. App. at 503, 263 S.E.2d at 372 ("While the topic of conversation may have been sexual in nature, there is no evidence presented in this case to indicate that the speech rose to the level of sexual behavior or activity . . . ." *Id.*).

Likewise, in this case, defendant's evidence is evidence of conversation, not of a sexual act. Therefore, testimony concerning the letter is not deemed irrelevant by Rule 412 and was improperly excluded on that basis.

[2] The remaining question is was testimony about the letter relevant to impeach the credibility of the victim. As in most sex offense cases, the victim's testimony is crucial to the State's case and her credibility can easily determine the outcome of the trial. Showing that the victim voluntarily wrote at least one letter to another person which is similar to the ones written to defendant bears directly on the victim's credibility. It infers that the victim wrote the letters to defendant voluntarily, contradicting her earlier testimony. Defendant had a right to develop this contradictory testimony on cross-examination, and denial of that right was reversible error.

Because we find reversible error in the limitation of defendant's cross-examination and because the evidentiary issues raised in defendant's remaining arguments may not arise at the second trial, we do not address defendant's remaining arguments.

New trial.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. GARY KENNETH FARLOW, DEFENDANT

No. 9118SC1261

(Filed 4 May 1993)

Criminal Law § 1098 (NCI4th)— indecent liberties and second degree sexual offense—sentencing—aggravating factors—age of victim

The trial court erred when sentencing defendant for indecent liberties and second degree sexual offense by considering the age of the victim as an aggravating factor. Evidence of the victim's young age is necessary to establish the offense of taking indecent liberties with children and therefore should not have been used as proof of an aggravating factor. Age is not an element of second degree sexual offense, but N.C.G.S. § 15A-1340.4(a)(1)o prohibits the consideration of any crime that is joinable with the crime for which defendant is currently being sentenced. By considering the victim's age, the judge aggravated defendant's sentence with a joined offense.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 29 August 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals on 26 February 1993.

Defendant was charged with first degree sexual offense and taking indecent liberties with children. The charges involved two separate children and were consolidated for judgment into two groups, relative to the child involved. Pursuant to a plea arrangement, defendant pleaded guilty to second degree sexual offense on the first degree sexual offense charges and pleaded guilty to all the charges of taking indecent liberties with children. The plea arrangement left determination of sentence to the trial judge. The trial judge found aggravating and mitigating factors and sentenced defendant to two consecutive forty year terms. The sentence exceeds the combined total of the presumptive sentences for these offenses. From this judgment defendant appeals pursuant to N.C. Gen. Stat. § 15A-1444(a1).

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

Neill A. Jennings, Jr. for defendant appellant.

ARNOLD, Chief Judge.

The indictments in 90 CRS 33403 and 33404 contain one count each of first degree sexual offense and taking indecent liberties with children. The judge found as an aggravating factor on the indecent liberties offenses that the age of the victim in 90 CRS 33403 and 33404 made the victim particularly vulnerable. Defendant argues that the trial judge improperly considered the victim's age because age is an element of the offense. We agree.

Defendant was charged under N.C. Gen. Stat. § 14-202.1 (1986) which states that a person is guilty of taking indecent liberties with children if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . under the age of 16 years for the purpose of arousing or gratifying sexual desire," or "[w]illfully commits or attempts to commit any lewd or lascivious act upon . . . any child of either sex under the age of 16 years." The victim in 33403 and 33404 was eleven years old.

N.C. Gen. Stat. § 15A-1340.4(a)(1) provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Evidence of the victim's young age is necessary to establish the offense of taking indecent liberties with children and therefore should not have been used as proof of an aggravating factor in this case. *See State v. Vanstory*, 84 N.C. App. 535, 538, 353 S.E.2d 236, 238, *disc. review denied*, 320 N.C. 176, 358 S.E.2d 67 (1987) (age of the victim cannot be considered in sentencing for first degree rape because age is an element of the crime).

Defendant also argues that the judge erred by using the victim's age to aggravate the sentence for the second degree sexual offenses in 33403 and 33404. Age is not an element of second degree sexual offense, but defendant argues that the victim's age should not have been considered because it is an element of a joined offense. We agree.

N.C. Gen. Stat. § 15A-1340.4(a)(1)o prohibits the consideration of any crime that is joinable with the crime for which defendant is currently being sentenced. When sentencing, the trial judge stated that "the age of the victim . . . made that victim particularly vulnerable [to the sexual offense]." As we held above, young age is a necessary element of taking indecent liberties with children. Therefore, by considering the victim's age, the judge actually ag-

gravated defendant's sentence with a joined offense. Aggravating a sentence with a joined offense is impermissible and is reversible error. *State v. Lattimore*, 310 N.C. 295, 299, 311 S.E.2d 876, 879 (1984); *State v. Jewell*, 104 N.C. App. 350, 358, 409 S.E.2d 757, 762 (1991), *aff'd per curiam*, 331 N.C. 379, 416 S.E.2d 3 (1992).

We find error in the use of these two aggravating factors; therefore, this case is reversed and remanded for a new sentencing hearing. Because we reverse on these grounds, we need not address defendant's remaining assignments of error, all of which relate to sentencing.

Reversed and remanded.

Judges GREENE and McCRODDEN concur.

DOROTHY M. FAULKENBURY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); AND STATE OF NORTH CAROLINA, DEFENDANTS-APPELLANTS

No. 9210SC203

(Filed 4 May 1993)

Appeal and Error § 191 (NCI4th)— appeal of denial of motion to dismiss—stay—consideration of subsequent motion for summary judgment

For the reasons stated in *Woodard v. Local Governmental Employees' Retirement System*, 110 N.C. App. 83, the trial court lacked jurisdiction to go forward with the summary judgment hearing in light of the stay of the proceedings which resulted from defendants' appeal of the denial of their motion to dismiss.

Am Jur 2d, Appeal and Error § 365.

Appeal by defendants and cross-appeal by plaintiff from order entered 16 January 1992 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 10 December 1992.

Marvin Schiller; and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, Donald L. Smith, and Susan S. McFarlane, for plaintiff appellee, cross-appellant.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Edwin M. Speas, Jr., and Special Deputy Attorneys General Tiare B. Smiley and Norma S. Harrell for defendant appellants, cross-appellees.

COZORT, Judge.

This case is a companion case to *Woodard v. North Carolina Local Governmental Employees' Retirement System et al.*, No. 9210SC202, filed simultaneously herewith. Plaintiff's complaint challenged an amendment effective 1 July 1982 to the teachers' and State employees' retirement disability statute. Defendants filed a motion to dismiss plaintiff's action; the motion was denied by the trial court on 28 June 1991. Defendants filed notice of appeal of the denial of their motion to dismiss on 3 July 1991. On 26 August 1991, plaintiff proceeded to file a motion for partial summary judgment on the issue of impairment of contract. Defendants responded by filing a motion to remove the case from the calendar for lack of jurisdiction or in the alternative for a continuance of the case. Defendants' motion was denied 22 November 1991.

The trial court went forward with the case, hearing arguments on plaintiff's motion for partial summary judgment and defendants' motion for full summary judgment. On 16 January 1992, the trial court entered an order granting plaintiff's motion for partial summary judgment as to the impairment of contract claim, denying defendants' motion for summary judgment and granting summary judgment to plaintiff as to all issues of liability. For the reasons stated in *Woodard v. Local Governmental Employees' Retirement System*, No. 9210SC202, filed today, we find the trial court lacked jurisdiction to go forward with the summary judgment hearing in light of the stay of the proceedings which resulted from defendants' appeal of the denial of their motion to dismiss. The order entered by the trial court on 16 January 1992 is therefore

Vacated.

Judges GREENE and WYNN concur.

JEAN H. GODLEY v. FREDERICK D. GODLEY, JR.

No. 9126DC635

(Filed 18 May 1993)

1. **Divorce and Separation § 121 (NCI4th)— equitable distribution—stock as gift—competent evidence to support finding**

The trial court in an equitable distribution action did not err in finding that defendant's father made gifts of stock in the family corporation to defendant during the marriage where both defendant and his father testified that the stock was a gift, and the father also testified about his brother's plan to divide the two family businesses between themselves so that each might give a separate business to their sons.

Am Jur 2d, Divorce and Separation § 884.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 123 (NCI4th)— equitable distribution—family business—no active appreciation of stock—competent supporting evidence**

The trial court in an equitable distribution action did not err in finding that defendant husband's family business stock had no active appreciation during the marriage, since the court found that defendant was not a manager or other person directing or controlling any of the business operations of the company, and any changes in the value of defendant's interest in the company were not the result of any active effort on the part of defendant.

Am Jur 2d, Divorce and Separation § 891.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation §§ 124, 145 (NCI4th)— equitable distribution—post-separation income—no marital property—distributional factors

The trial court did not err in failing to find that post-separation rental income was marital property, but the court did commit reversible error in failing to find that the post-separation income was a distributional factor. N.C.G.S. § 50-20(c)(12).

Am Jur 2d, Divorce and Separation § 880.

4. Evidence and Witnesses § 2398 (NCI4th)— equitable distribution—refusal to appoint appraisers—method of valuing property—no error

The trial court in an equitable distribution action did not err in denying plaintiff's motion for the appointment of appraisers pursuant to N.C.G.S. § 8C-1, Rule 706.

Am Jur 2d, Divorce and Separation §§ 937, 942.

5. Divorce and Separation § 121 (NCI4th)— equitable distribution—housing partnership options—gift from defendant's father—competent supporting evidence

Evidence was sufficient to support the trial court's finding that housing partnership options were gifts from defendant's father and not bargained for consideration where defendant's father testified that he gave defendant the options because the housing developments were defendant's idea and a means of planning the father's estate, and there was no evidence which suggested that the father received consideration for the options.

Am Jur 2d, Divorce and Separation § 884.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

6. Divorce and Separation § 135 (NCI4th)— equitable distribution—value of housing partnership options—failure to find not error

There was no merit to plaintiff's contention that the trial court erred in failing to find the value of housing partnership options, since plaintiff failed to carry the burden of presenting evidence from which the court could classify, value, and distribute the property.

Am Jur 2d, Divorce and Separation §§ 937, 942.

7. Divorce and Separation § 119 (NCI4th)— equitable distribution—partner's capital account deficit—marital debt

The trial court in an equitable distribution action did not err by finding that defendant's partner's capital account deficit in a realty partnership was a marital debt, by distributing it to defendant, and by giving him a dollar for dollar credit as if it were a debt, since plaintiff's own expert testified that, to the extent the partnership had to pay debts, defendant would be liable for his negative capital account, and since funds withdrawn from the account and creating the deficit were used during the marriage directly or indirectly for the benefit of the marriage unit.

Am Jur 2d, Divorce and Separation §§ 879, 880.

8. Divorce and Separation §§ 127, 145 (NCI4th)— equitable distribution—commissions earned between separation and distribution order—separate property—consideration as distributional factor

The trial court erred in holding that property commissions received between the date of separation and the date of trial were marital property, since, at the date of separation, defendant had a mere contractual right to receive an uncertain amount of commissions at some time in the future, if at all, and the right to receive the commissions therefore had not vested on the date of separation; furthermore, only those commissions for a sum certain which is ascertainable, realized between the date of separation and the date of the equitable distribution order, should be used as a distributional factor.

Am Jur 2d, Divorce and Separation § 880.

9. Divorce and Separation § 165 (NCI4th)— equitable distribution—marital residence—husband ordered to convey to wife—no requirement as to conveyance free of present wife's interest

The trial court in an equitable distribution action did not err in ordering defendant to convey to plaintiff his entire right, title, and interest in and to the marital residence without requiring him to convey the residence free of his current wife's marital interest or to compensate plaintiff for the cost of acquiring release of the marital interest from his current wife.

Am Jur 2d, Divorce and Separation § 870.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

10. Divorce and Separation § 161 (NCI4th)— equitable distribution—distributional factors clearly set out

There was no merit to defendant's contention that the trial court in an equitable distribution action erred in relying upon broad and vague references to distributional factors in order to justify as equitable an unequal division of the marital property, since the trial court clearly set out as distributional factors plaintiff's status as homemaker during a 23-year marriage which resulted in three children, plaintiff's poor health and medical expenses and defendant's good health, and plaintiff's nonexistent separate estate and defendant's separate estate in excess of $2,000,000; moreover, the factors considered by the trial court were sufficient to support its award, notwithstanding the judge's failure to consider some distributional factors and his improper consideration of others.

Am Jur 2d, Divorce and Separation §§ 915, 917-919, 924, 930, 932.

11. Divorce and Separation § 144 (NCI4th)— equitable distribution—plaintiff's medical impairment properly considered—adult children residing with plaintiff—defendant's income prior to distribution—improper factors

Evidence was sufficient to support the trial court's finding that plaintiff was medically impaired, and the court properly considered this factor in making distribution; however, the court erred in considering plaintiff's taking in of the parties' 22-year-old son and 18-year-old daughter and erred in considering defendant's income from 1984 to 1988 instead of income at the time of distribution.

Am Jur 2d, Divorce and Separation §§ 915, 917.

12. Divorce and Separation § 136 (NCI4th)— equitable distribution—value of businesses—no negative value assigned by court

There was no merit to defendant's contention that the trial court erred in refusing to consider the negative value of three companies when determining what award would be equitable, since the shares of stock in the businesses, which

the court was valuing, did not have a negative value, as testified to by defendant's CPA.

Am Jur 2d, Divorce and Separation § 937.

13. Divorce and Separation § 155 (NCI4th)— equitable distribution—post-separation expenses to preserve marital property—treated as distributional factor

The trial court did not err in treating defendant's post-separation expenditures made to preserve marital property as distributional factors.

Am Jur 2d, Divorce and Separation § 915.

Appeal by plaintiff and defendant from order entered 31 December 1990 by Judge Robert P. Johnston, in Mecklenburg County District Court. Heard in the Court of Appeals 13 October 1992.

Ronald Williams, P.A., by Ronald C. Williams, and Martin, Morton, Bryant, McPhail & Hodges, by Elizabeth T. Hodges and James H. Morton, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for defendant-appellee.

JOHNSON, Judge.

On 5 February 1987, plaintiff, Jean H. Godley, filed a complaint for absolute divorce, alimony, child custody and support and equitable distribution. Defendant Frederick D. Godley, Jr. answered on 8 July 1987, asserting defenses and counterclaims. The parties were divorced on 17 July 1987. From 15 January 1990 through 19 November 1990 the issue of equitable distribution was heard. The trial court informed counsel of its final decision on 31 December 1990, and filed the judgment on 1 January 1991. Both parties filed timely notices of appeal.

Jean and Frederick Godley were married on 9 August 1963, separated on 2 February 1985, and divorced on 17 July 1987. The parties have three children, all adults; however, at the time of trial, Catherine, the 18 year old youngest child, was in her senior year of high school.

Ms. Godley is 47 years old. During the marriage she was primarily a homemaker and has not earned a significant income at any

relevant time. Mr. Godley is 48 years old and is self-employed, working primarily in businesses developed and/or run in conjunction with his father, Fred O. Godley and his brothers, Bob and Bill Godley.

Two years after the separation, plaintiff-appellant brought this action seeking equitable distribution. In its equitable distribution decree, the court awarded an unequal distribution in plaintiff's favor, giving her in excess of 90% of the parties' marital estate. The court found that the factors justifying an unequal distribution were the income, property and liabilities of the parties at the time the division was to become effective; the duration of the marriage and the age and physical and mental health of the parties; and other factors which the court found to be just and proper.

A more specific statement of facts follows:

1. GODLEY CONSTRUCTION CO., INC.

When GCCo (Godley Construction Co., Inc.) was incorporated on 1 July 1959, defendant's two older brothers, William and Robert, were working full time and defendant was still in high school. At that time, 720 shares were issued, with 149 to the father, F. O. Godley, [20.64%], 63 each to William and Robert and the remaining shares to third parties. No shares were issued to defendant. GCCo redeemed 30 of the father's shares on 15 March 1960. When the parties married on 9 August 1963, there were 532 shares outstanding, with defendant owning 50 shares and his father owning 119 shares. On 14 February 1964, GCCo redeemed the father's 119 shares and the corporation issued 8 shares to defendant. After 14 February 1964, the father owned no stock in GCCo. Thereafter, GCCo issued 314 shares to the three brothers on the following dates: defendant: 15 March 1965, 8 shares; 4 January 1967, 42 shares; 30 April 1968, 16 shares; 5 January 1976, 66 shares [total 132]. William & Robert each: 4 January 1967, 5 shares; 30 April 1968, 16 shares; 5 January 1975, 66 shares [total 87 each].

Defendant started working part-time for GCCo after school and in the summers while in high school and college. He graduated from high school in 1961. He was an active participant in GCCo as evidenced by the corporate tax returns, loan documents, and corporate minutes. The corporate minutes reflect the following: on 28 May 1966, defendant was elected assistant secretary and put in line to be promoted from the sales to expediter; (b) on

25 February 1967 defendant was given an employee bonus; (c) on 6 September 1967, GCCo decided to sell certain real estate and defendant signed the minutes as director; (d) on 18 May 1968 the salary of defendant and his two brothers was set at $250.00 per week plus bonus and GCCo decided to sell real estate; (e) on 18 November 1968 a profit sharing plan was adopted; (f) on 17 April 1969 defendant made a motion that GCCo become involved in precast concrete panel business and that GCCo form a partnership with Dixon Block; the motion passed unanimously with "enthusiastic" response; (g) on 18 December 1970, GCCo purchased all the outstanding stock of Dixon Block and moved it to N. Graham Street, and also the decision was made to construct and lease a building to B. F. Goodrich Co.; (h) on 27 January 1971 defendant signed a directors resolution accepting on behalf of GCCo the loan commitment terms from NCNB to finance construction of a building and to lease it to B. F. Goodrich Co.; (i) on 22 February 1971 decision made to negotiate an agreement to construct and lease a building to The Whirlpool Corp.; (j) on 19 May 1971 defendant, acting on behalf of GCCo, executed a consent for corporate name change; and (k) on 10 February 1973 defendant reported on the installation and operation of a computer presently in use in GCCo office and was elected secretary-treasurer.

When Robert left to go on his own in the mid-1970's and William left in the late 1970's, defendant remained with GCCo as its only shareholder-employee and as its officer and director.

Defendant attended the annual meetings and was re-elected officer and director in 1974, 1975, 1976, 1977, 1978, 1979, and 1980. There were no minutes produced for the years 1981-1985. Defendant was elected vice-president at the 29 December 1986 shareholders meeting. On 26 February 1976, defendant signed a loan application representing that he then was employed by GCCo at $30,000 per year. Defendant remained employed by GCCo through 1984.

2. WILKINSON BOULEVARD WAREHOUSES

These warehouses are admittedly marital property although titled in defendant's sole name. On the separation date the warehouses had a fair market value of $310,000, a debt of $77,239, and a net fair market value of $232,761. At the time of trial the warehouses had a net fair market value of $410,000. There is no evidence the $100,000 appreciation was other than "passive." The warehouses were distributed to defendant.

The marital estate had the warehouses under lease continuously from the separation date to the trial date. Defendant received all the post-separation rental income.

3. HOUSING PARTNERSHIPS

From 1978 to 1980 defendant, his father and Frank McCool entered into four HUD partnerships to build and rent low income subsidized housing for the elderly in Charlotte, Monroe, Clinton and Rocky Mount. Pursuant to the partnership agreement terms, defendant and his father paid in capital of $450 each and McCool paid in $100 in return for 45%, 45%, and 10% partnership interest, respectively. Financing was arranged through non-recourse HUD or loans. Each of the housing partnership agreements provides that defendant would be general manager to conduct the day to day affairs of the partnership and granted defendant an option to purchase his father's interest in each partnership for $10,000 per partnership at any time.

On 22 December 1980, the Charlotte partnership acquired McCool's 10% interest in it. After the separation, the McCool shares in the remaining three partnerships were acquired by the respective partnerships. At the time of trial, defendant owned 50% of each partnership.

CHARLOTTE HOUSING FOR THE ELDERLY PARTNERSHIP had $100,855 post-separation appreciation from negative $1,822, to positive $99,033. Defendant's appraiser valued this asset at zero, but the trial court valued it at a negative $1,822, subtracted $1,822 from his share of the marital estate and distributed it to defendant although it was generating $35,000-50,000 per year net cash flow and $25,000 per year appreciation.

ROCKY MOUNT HOUSING FOR THE ELDERLY PARTNERSHIP had post separation appreciation of $164,387 from a negative $70,744 to a positive $93,643 between separation and trial. Defendant's appraiser valued the marital estate's interest in this partnership at zero, but the trial court valued it at a negative $70,744, subtracted $70,744 from his share of the marital estate and distributed to him this partnership interest generating $50,000-60,000 per year net cash flow plus $40,000 per year appreciation.

MONROE HOUSING FOR THE ELDERLY PARTNERSHIP interest appreciated $196,861 between separation and trial, from $37,792 to $234,653. The marital estate's interest in this partnership was

valued at $37,792 and it was distributed to defendant at $37,792 although it was and is generating $70,000-85,000 per year net cash flow and $60,000 per year appreciation.

CLINTON HOUSING FOR THE ELDERLY PARTNERSHIP interest appreciated $51,369 between separation and trial from $27,827 to $79,196. The marital estate's interest was valued at $27,827 and distributed to defendant from $27,827 which is less than one year's "net cash flow" and appreciation.

4. HOUSING PARTNERSHIP OPTIONS

The trial court found that the five options were vested as of the date of separation although none had been exercised on the separation date.

The partnership agreements containing the options were entered into at the inception of each partnership and before the projects were built from 1978-1980. Upon completion, the four projects had a net fair market value of zero.

Plaintiff contended the defendant's options to purchase his father's interest in the five partnerships were bargained for consideration. The trial court found they were gifts.

5. GODLEY REALTY PARTNERSHIP

Defendant contended the marital estate owed Godley Realty Partnership $540,372 by virtue of the $540,372 partner's capital account deficit shown on the 1984 schedule K-1 prepared by the partnership. Defendant and his father were equal partners in Godley Realty Partnership which is admittedly marital property. The $540,372 capital account deficit was comprised of a $431,188 deficit at the beginning of the year, an ordinary loss of $43,098 (one half the $86,196 partnership tax loss), a charitable contribution of $160 (one half the partnership's $320 charitable contribution), and defendant's 1984 withdrawal of $65,926. After the separation, the partnership was incorporated.

6. CHARLESTON PROPERTY COMMISSIONS CONTRACT

Defendant stipulated that during the term of the marriage, he entered into a contract with Godley Auction to assist it in restructuring its finances in return for 20% of the net profits from a 3,350 acre tract of land it owned in Charleston, South Carolina, but was in danger of losing. In December of 1983, the financial

restructuring was completed. No commissions had come due on the separation date. At the time of trial, several hundred acres remained to be sold with profits expected. The trial court found that the commissions contract was marital property and that defendant had received commissions under the contract in excess of $2,000,000 between separation and trial. The court concluded that defendant's receipt of this $2,000,000+ was a distributional factor and not marital property and did not distribute any portion of it to plaintiff by way of direct distribution or credit to her or charge to him. All of it was left with defendant. However, the court concluded that plaintiff would be entitled to one-half of the disputed $400,000 commission earned by defendant between the date of separation and the date of trial. It found that commissions coming due after trial were marital property and ordered their distribution in kind as part of the marital estate.

PLAINTIFF'S APPEAL

[1] On appeal, the appellant, Jean Godley, brings forth seven assignments of error. By her first assignment of error she argues that the trial court committed reversible error in finding that the defendant's father made gifts of GCCo stock to defendant during marriage. We disagree.

In an action for equitable distribution, the court must first classify property as either marital or separate. *Loeb v. Loeb*, 72 N.C. App. 205, 208-09, 324 S.E.2d 33, 37, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985). Only marital property is subject to equitable distribution. *Id.* The court must then divide the property equally unless it determines that equal division is not equitable. *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985).

It is well-settled law that the party claiming the property to be marital must meet the burden of showing by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage, before the date of separation, and is presently owned. North Carolina General Statutes § 50-20(b)(1) (1987); *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Once that burden is met, the burden shifts to the party claiming the property to be separate property. The party must prove by a preponderance of evidence that the property was acquired by bequest, descent or gift during the course of the marriage. North Carolina General Statutes § 50-20(b)(2); *Atkins*, 102 N.C. App.

at 206, 401 S.E.2d at 788. If both parties meet their requisite burdens, the property is adjudicated separate property and is not subject to equitable distribution. North Carolina General Statutes § 50-20(b)(1).

In the case *sub judice*, it is undisputed that the appellant met her burden of showing that the GCCo stock was acquired by plaintiff during the marriage and prior to separation. The issue then becomes whether the appellee adequately carried his burden of proving by a preponderance of the evidence that the shares of stock were a gift to appellee from his father, Fred O. Godley.

The party claiming a gift must show (1) the intent of the donor to give the gift so as to divest himself immediately of all right title and control therein, and (2) the delivery, actual or constructive, of the chose to the donee, with consequent loss by the donor of dominion over the property given. *Fesmire v. Bank*, 267 N.C. 589, 148 S.E.2d 589 (1966).

We first note that the findings of the trial court will not be disturbed on appeal if there is competent evidence to support the findings. *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986). The evidence presented at trial supports the trial court's finding that the stock Fred O. Godley gave to his son was a gift. The defendant and his father testified that the stock was a gift. The father also testified about his brother's plan to divide the two family businesses between themselves so that each might give a separate business to their sons. Because competent evidence was presented to support the finding of a gift, the finding will not be disturbed on appeal.

[2] By her second assignment of error, appellant contends that the trial court committed reversible error in finding that the defendant's GCCo stock had no active appreciation during the marriage. We disagree.

Active appreciation is that which results from the contributions, monetary or otherwise, made by one or both spouses. It is then that, under the source of funds theory, the marital estate is entitled to a proportionate return of its investment in separate property. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Again, if there is any evidence to support the trial court's findings, they will not be disturbed on appeal. *Nix*, 80 N.C. App. at 110, 341 S.E.2d at 116. The trial court found that "[d]efendant

was not a manager or other person directing or controlling any of the business operations of Godley Construction Company." The court then concluded that "[c]hanges in value of Defendant's interest in Godley Construction Company . . . are not the result of any active effort on the part of Defendant[.]" Defendant testified at trial that he worked for Godley Construction Company "[i]n a very limited basis." This testimony provides support for the trial judge's finding.

Plaintiff seeks to bolster her contention that there was active appreciation by citing *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985) and *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985). Those cases are distinguishable from the case at bar.

In *Phillips*, the plaintiff-husband acquired a 98% controlling interest in a corporation prior to his marriage. During the marriage, plaintiff exercised total control over the financial and managerial affairs of the corporation. Plaintiff also siphoned off funds which were used to purchase other assets which also increased in value because of the active participation of plaintiff. The case was remanded, with instructions that the trial court attempt to determine the active appreciation of the corporation.

In *McLeod*, the plaintiff-husband inherited, during the marriage, corporate stock representing a minority interest in the corporation. Later, as president of the corporation, plaintiff caused the corporation to redeem all outstanding stock except those shares owned by him. Plaintiff became the sole owner of the corporation. This court held that the appreciation of the stock was active, resulting from the plaintiff-husband's business decision.

The case now before us is distinguishable on its facts. Mr. Godley did not have great control over the financial affairs of the company, nor did he take or initiate actions which resulted in the appreciation of the stock. No error.

[3] By her third assignment of error, the appellant argues that the trial court committed reversible error by failing to find that post-separation income from the Wilkinson Boulevard property was marital property, or in the alternative, in failing to find that it was a distributional factor to be charged dollar for dollar against the husband's distribution.

We first note that marital property means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties. North Carolina General Statutes § 50-20(b)(1). Post-separation income derived from marital property does not fall within the definition of marital property as set out by the legislature. We find no basis upon which to hold that defendant's post-separation rental income is marital property. *See Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992) (rental income from marital property between date of separation and date of equitable distribution action may not be added to marital estate, but must be considered as a distributive factor under North Carolina General Statutes § 50-20(c)12; and where there has been no exchange, contribution or conversion of marital funds or assets since separation, the source of funds theory does not apply to convert post-separation income into a marital asset). No error.

Plaintiff-appellant further argues that the post-separation income generated from marital property should be considered as a distributional factor. We agree. The *Chandler* Court stated, "Where, as in this case, the post-separation income is not a result of either [party's] action, the income could be considered as any other distributional factor under Section 50-20(c)(12)." *Chandler*, 108 N.C. App. at 69, 422 S.E.2d at 590. Although the trial court made a specific finding of fact as to defendant's average monthly income which consisted of rent proceeds, dividends and interest, it is not clear that the post-separation income was treated as a distributional factor. On remand, the post-separation income of the Wilkinson Boulevard property should be treated as a distributive factor.

[4] Plaintiff next argues that the trial court committed reversible error by denying plaintiff's motion for the appointment of appraisers pursuant to North Carolina General Statutes § 8C-1, Rule 706 (1992). Rule 706, however, allows for the appointment of an appraiser if, in the discretion of the trial court, one is necessary. Absent an abuse of discretion, such ruling will not be disturbed on appeal. We find no abuse of discretion; therefore, this assignment of error is overruled.

Plaintiff argues further that the trial court erred in accepting an appraisal method which did not value the intangible assets and did not reasonably approximate the net worth of the partnership interest and by finding negative net fair market values with respect

to the Charlotte and Rocky Mount properties that were contrary to defendant's appraiser's evaluation and was unsupported by other evidence. This Court notes that this assignment attempts to raise the question of methodology used by the court when evaluating the housing partnerships. This assignment was not set out in the record on appeal. Assignment of Error 22, under which the previous argument was brought, speaks only of errors regarding the trial court's finding and conclusion as contrary to the evidence or not supported by competent evidence. Rule 10 of the North Carolina Rules of Appellate Procedure provides that "the scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal." The assignment of error as briefed does not correspond to the referenced assignment of error and thereby fails to comply with Rule 10. We nonetheless considered plaintiff's argument and found it meritless.

[3] Plaintiff also asserts that the trial court committed reversible error by not finding and concluding that post-separation cash revenues received by the housing partnerships were marital property or in the alternative, the defendant should be charged dollar for dollar post-separation appreciation received by him in distribution.

We reiterate that post-separation income is not marital property, and the law of North Carolina does not require that it be treated as such. The trial court, however, did err in failing to consider the post-separation appreciation as a distributional factor under North Carolina General Statutes § 50-20(c). We remand the case for treatment of the post-separation appreciation as a distributional factor.

[5] By her fourth assignment of error, the appellant argues that the trial court erred in finding that the housing partnership options were gifts to and not bargained for consideration, or if the options were gifts, the trial court erred in failing to find active or passive appreciation. More specifically, appellant argues that the defendant did not carry his burden of proving the options were voluntary transfers without any consideration. We disagree, noting that the evidence in the record supports the trial court's finding that defendant's housing options were gifts and therefore his separate property.

Defendant's father testified that the idea to develop the four housing projects was defendant's and that the father tried to discourage defendant from the undertaking; that eventually the defendant sold his father on the idea; that upon entering the part-

nership, defendant's father gave defendant the options because it was defendant's idea and a means of planning the father's estate. There was no evidence which suggested that the father received consideration for the options. We find the evidence presented sufficient to support the trial court's finding of fact and conclusion of law that the options were a gift.

[6] Plaintiff alternatively argues that even if the options were gifts, the trial court erred in failing to find the value of the options on the date of separation and on the date of trial.

When classifications of assets are disputed, the assets must be labeled marital or separate depending on the proof presented to the trial court of the nature of those assets. *Johnson v. Johnson*, 317 N.C. 437, 454, 346 S.E.2d 430, 440 (1986). Here, plaintiff did not meet her burden of proving the value of the property. Therefore, the party claiming the property to be marital, having failed to carry her burden of presenting evidence from which the court can classify, value and distribute property, cannot claim error when the trial court fails to classify the property as marital and distribute it. *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990). Accordingly, the trial court did not err in failing to find the value of the options at the specified date. The *Miller* Court opined:

> Since the party claiming the property, here a debt, to be marital, has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. *See Beaty v. Beaty*, 167 Mich. App. 553, 423 N.W.2d 262, 264 (1988) ("if the burden is not met, the interest should not be considered an asset.") Furthermore, we will not remand the case for the taking of new evidence. The parties have had ample opportunity to present evidence and have failed to do so. 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. Furthermore, remanding the matter for the taking of new evidence, 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." (cites omitted).

Miller, 97 N.C. App. at 80, 387 S.E.2d at 184. No error.

[7] By her fifth assignment of error, plaintiff next argues that the trial court erred in finding that defendant's $540,372 partner's capital account deficit in Godley Realty Partnership was a marital debt and by distributing it to the husband and by granting him a dollar for dollar credit as if it were a debt.

Plaintiff's own expert, Roy Dellinger, testified that to the extent that the partnership had to pay debts, Mr. Godley would be liable for his negative capital account of $540,372. The trial court also found that the funds withdrawn from the account and creating the deficit, were used during the marriage directly or indirectly for the benefit of the marriage unit. The finding of fact and conclusion of law were supported by the evidence. No error.

[8] By her sixth assignment of error, plaintiff argues that the trial court committed reversible error in failing to find that the Charleston property commissions received by defendant between the separation and trial dates were marital property. Plaintiff contends that "[t]he $2,000,000 + commissions received under the contract between the separation date and the trial date are as much marital property as the commissions coming due after the trial and it was error for the court to hold otherwise." We disagree, noting that by definition property must be acquired during the marriage and before separation to be classified as marital property subject to equitable distribution. We further hold that the trial court erred in finding that the commissions were marital property, vested before the date of separation.

Our decision finds support in *Cobb v. Cobb*, 107 N.C. App. 382, 420 S.E.2d 212 (1992), where this Court held that the trial court's failure to include the future value of timber on the Phelph's Farm as marital property was not error. In *Cobb*, the appellant argued that the future value of timber on land that is marital property becomes vested during marriage and is subject to equitable distribution in the same manner as deferred compensation which is classified as marital property if vested. North Carolina General Statutes § 50-20(b)(1). The *Cobb* Court stated, however, that the future value of the timber is more analogous to an option "which is not exercisable as of the date of separation and which may

be lost as a result of events occurring thereafter and are, therefore not vested, should be treated as separate property of the spouse for whom they may, depending upon the circumstances, vest at some time in the future." *Cobb*, 107 N.C. App. at 385-86, 420 S.E.2d at 214. The Court further stated that the future value of the timber may never be realized if the trees were destroyed by fire or insects.

The case now before us is similar to *Cobb*, in that Mr. Godley, having met the requirements to receive 20% of the commissions earned by Godley Auction, has a mere contractual right to receive an uncertain amount of commissions at some indefinite time in the future, if at all. The dispositive factor is that the right to receive the commissions had not vested on the date of separation. *See Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987); *See also* North Carolina General Statutes § 50-20(b)(2) ("the expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property"). Defendant has not deferred anything of which he was entitled to receive on the date of separation, into the future. The future commissions, if any, were not acquired during the marriage; therefore, they are separate property. *See Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993) (plaintiff-wife argued that husband's bonuses based upon his performance the previous year were deferred compensation; this Court held that there was no evidence indicating that plaintiff's or defendant's right to receive a bonus was vested on the date of separation. "In fact, it appears from the evidence that a situation may arise where no employee will receive a bonus, for example, if CSC shows no profit."). Accordingly, we hold that defendant's contractual right to receive future profits, which may or may not be realized, was not vested at the time of separation and therefore is not marital property.

Plaintiff also argues that the trial court erred in not considering the future commissions as a distributional factor. We believe that only those commissions, for a sum certain which is ascertainable, realized between the date of separation and the date of the equitable distribution order, shall be used as a distributional factor. The trial court properly treated the commissions as such.

The trial court, however, erred in ordering the 50/50 distribution of possible future commissions after the entering of the equitable distribution order, as they were defendant's separate property not subject to equitable distribution and too speculative to be considered

as a distributional factor. The portion of the order granting a 50/50 division of future commissions after the date of the order is reversed.

[9] By her last assignment of error, plaintiff contends that the trial court erred in not finding that the defendant had remarried and in failing to order him to convey the residence free of the current wife's marital interest or to compensate plaintiff for the cost of acquiring release of the marital interest from his current wife. Defendant's current wife, Kathy Godley, is not a party to this suit. The trial court acted properly in ordering defendant to convey to plaintiff his entire right, title and interest in and to the property. No error.

DEFENDANT'S APPEAL

[10] By his first assignment of error, defendant argues that "[i]t is not proper for a court in making an equitable distribution to loosely rely upon broad and vague references to distributional factors in order to justify as equitable a vastly unequal division of marital property. We find no merit in this assignment. In the equitable distribution judgment, the court specifically set out the distributional factors on which it relied to make an unequal distribution.

The court used as distributional factors (1) that three children resulted from the 23 year marriage during which plaintiff was a mother, housekeeper and wife. North Carolina General Statutes § 50-20(c)(3). Plaintiff had no earnings until 1987, and from 1987 through 1989 she earned between $621 and $1,929 per year and was earning $32 per week at the time of trial. Defendant had earned income between $60,462 and $2,038,101 per year between 1984 and 1988. North Carolina General Statutes § 50-20(c)(1).

The court also used as a distributional factor the deterioration of various organs and parts of plaintiff's body as a result of long term juvenile diabetes; that her health insurance is $350 per month and that prescriptions are $300 per month. The court found that defendant had no significant health problems and the evidence presented showed none. North Carolina General Statutes § 50-20(c)(3).

In addition, the trial court considered as a distributional factor that plaintiff had no separate estate and that defendant's separate estate was valued at $2,171,333 as of the date of trial. North Carolina General Statutes § 50-20(c)(1).

The trial court in its discretion assigns each distributional factor the particular weight appropriate for that factor in a given case, and an unequal distribution based on a single distributional factor if supported by competent evidence will not be disturbed on appeal absent an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In the instant case, defendant has proven no abuse of discretion and we find none. We have reviewed the record and find that the distributional factors were clearly set out and were not "loosely [relied] upon" as suggested by defendant. We so hold notwithstanding the trial judge's failure to consider some distributional factors and his improper consideration of others.

[11] By his second assignment of error, defendant contends that the trial court erred in basing its judgment upon findings of fact and conclusions which were irrelevant, erroneous, contrary to the evidence and the law and/or lacked sufficient basis in the competent evidence before it.

First, defendant assigns error to finding of fact "F", stating that the evidence did not support the trial judge's finding that plaintiff is medically impaired. There was substantial testimony from Dr. Shultz from which the trial court could have made its finding as to plaintiff's health. Accordingly, we find no error.

Defendant further argues that the trial court's finding that plaintiff has voluntarily taken in their 22 year old son, David, was irrelevant to the equitable distribution proceeding. We agree and hold that this factor was improperly considered as a distributional factor. The trial judge also improperly considered the fact that the minor child, Catherine, was still residing at the marital residence at the time of trial. North Carolina General Statutes § 50-20(f) provides that the court shall provide for equitable distribution without regard to alimony or child support.

Defendant also contends that the trial court erred in considering his income from 1984 to 1988. Defendant is correct in stating that it is his income at the time of distribution that is relevant. North Carolina General Statute § 50-20(c)(1).

We have considered the remainder of defendant's second assignment of error and find it meritless.

In his third assignment of error, defendant charges that the trial court erred in finding and concluding that his possible future

earnings from the Charleston commissions contract were marital property. This assignment has been addressed in plaintiff's appeal.

[12] Defendant next argues that the trial court erred in refusing to consider the negative value of Single-Vend, Inc., Lambda Corp., and Godley Travel, Ltd. when determining what award would be equitable. Defendant fails to realize, however, that the shares of stock in these businesses, which the court was valuing, did not have a negative value. Defendant's CPA, Donald Hubbard, and Robert Beck testified against defendant on this point. There is sufficient evidence upon which the trial court made its decision; therefore, the decision will not be disturbed on appeal. No error.

[13] By his final assignment of error, defendant argues that the trial court erred in refusing to provide defendant with adjustive credits for his post-separation expenditures made to preserve marital property. The trial court treated some, not all, of defendant's post-separation expenditures as distributional factors. Defendant, citing *Miller*, 97 N.C. App. at 77, 387 S.E.2d at 181 and *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991), concedes that there "is authority for such treatment." Accordingly, we find no error.

In summary, with the exception of the Charleston property commissions, we find no error in and therefore affirm that part of the trial court's judgment addressing the classification and valuation of property owned by the parties. The trial court's classification of the future commissions from the Charleston property as marital property, however, is reversible error which requires correction on remand. The future commissions are separate property, not subject to equitable distribution. Furthermore, on remand, only the commissions generated between the date of separation and the entering of the equitable distribution order should be considered as a distributional factor.

We further find that the trial court committed reversible error in failing to find that the post-separation income from the Wilkinson Boulevard property and the post-separation cash revenues from the housing partnerships were distributional factors.

We also hold the trial court improperly considered as distributional factors the support of the parties' adult and minor children and defendant's earned income from 1984 to 1988 instead of his income at the time of distribution.

We therefore vacate the part of the judgment addressing the distribution of the marital property and remand this case to the trial court for redetermination of what constitutes an equitable distribution of the marital property and entry of a new judgment consistent with this opinion and correcting the errors identified herein.

The decision of the trial court is affirmed in part, vacated in part and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JAMES WAYNE SMITH

No. 9213SC104

(Filed 18 May 1993)

1. **Indictment, Information, and Criminal Pleadings § 21 (NCI4th)—first degree sexual offense—omission of "with force and arms"**

The trial court did not err by denying defendant's motion to dismiss an indictment for first degree sexual offense because the indictment failed to properly allege that the offense was committed with force and arms. The holding of *State v. Corbett*, 307 N.C. 169 applies and, in any event, the indictment here uses the words "by force and against the victim's will[.]"

Am Jur 2d, Indictments and Informations §§ 83, 84.

2. **Kidnapping and Felonious Restraint § 21 (NCI4th)—kidnapping—purpose of terrorizing victim—evidence sufficient**

The evidence in a kidnapping prosecution was sufficient for the jury to infer an intent to terrorize where defendant kidnapped the victim from her work site and immediately began to transport her to a secluded wooded area; defendant's accomplice testified that defendant placed a knife against the victim's throat and told her he would cut her head off if she did not answer his questions honestly; the victim testified that defendant held her at gunpoint during virtually the entire ordeal; defendant placed a gun at the back or side of the victim's head on several occasions; defendant discharged a

firearm near the back of the victim's head on no less than two occasions; the accomplice testified that defendant told him after the second occasion that he was just trying to scare the victim and had told her that the accomplice had sent him back to kill her; and the victim testified that defendant placed a gun beside her head, told her to raise her head, placed his penis in her mouth, and, after a minute, backed up, laughed, and said he was just trying to prove a point.

Am Jur 2d, Abduction and Kidnapping § 32.

3. **Robbery § 4.3 (NCI3d)— armed robbery—intent to deprive victim of property—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss an armed robbery charge where defendant contended that there was no evidence that defendant intended to permanently deprive the victim of her truck but an accomplice testified that defendant offered his brother the truck or anything he wanted and, after the brother refused the truck, the accomplice and defendant drove the truck about a mile down the road, got out, and defendant fired several shots into the truck around the gas tank.

Am Jur 2d, Robbery §§ 18, 23.

4. **Robbery § 5.2 (NCI3d)— armed robbery—special instructions—given in substance**

The trial court did not err in its instructions on armed robbery where it gave defendant's requested instructions in substance.

Am Jur 2d, Robbery § 71.

5. **Rape and Allied Offenses § 6.1 (NCI3d)— first degree sexual offense—instruction on attempted first degree sexual offense denied—no error**

The trial court did not err in a prosecution for first degree sexual offense, among other charges, by denying defendant's request to instruct the jury on attempted first degree sexual offense where the victim testified that defendant placed his penis in her mouth, stayed there about a minute, backed up, laughed, and said he was just trying to prove a point; an officer took a statement from the victim in which she said that defendant placed his penis in her mouth; another officer

took a statement in which the victim said that defendant told her he wanted oral sex, then changed his mind and said he couldn't do it; and an accomplice provided in a statement that defendant had told the accomplice that he tried to get the victim to have oral sex but that she didn't want to. The mere possibility that the jury might infer from one of the victim's statements that defendant did not force her to perform oral sex is not sufficient to require the court to submit the lesser offense. The statement to the accomplice that the victim refused to perform oral sex does not refute the victim's testimony that defendant placed his penis in her mouth because the act of oral sex entails more than is required for conviction of first degree sex offense by fellatio, which only requires "any touching by the lips or tongue of one person of the male sex organ of another."

Am Jur 2d, Trial §§ 1427, 1430, 1432.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

6. Robbery § 5.4 (NCI3d)— robbery—instruction on lesser offense of assault with deadly weapon—evidence of intoxication—sufficient

The trial court erred by failing to give an instruction on assault with a deadly weapon as a lesser included offense of armed robbery where an accomplice testified that defendant was drinking liquor during the morning and consumed many alcoholic drinks during the day; he also testified that defendant was drunk and beginning to get crazy; the victim testified that she noticed the odor of alcohol about defendant when he got into the truck; and she also testified that she saw defendant drink a swallow or two of whiskey or brandy from a partially empty bottle. If there was evidence of lack of intent, the court should have instructed on the lesser offense.

Am Jur 2d, Robbery §§ 66, 75.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

7. Criminal Law § 803 (NCI4th)— instructions—lesser included offense—failure to object

An issue was preserved for appeal in a prosecution for armed robbery and other offenses where the court instructed

the jury that it could consider evidence of defendant's intoxication to determine whether defendant had the requisite specific intent necessary to commit the crime of armed robbery, did not instruct the jury on the lesser included offense of assault with a deadly weapon, and the State argued that defendant did not request a further specific instruction linking the intoxication with the assault charge and did not object to the instruction given. Defense counsel asked the trial court to instruct the jury on the lesser offense of assault with a deadly weapon based on lack of evidence of permanent deprivation of property and this was sufficient to preserve the instruction for appeal; moreover, a defendant is entitled to a charge on a lesser included offense even when there is no specific prayer for such instruction when there is some evidence supporting the lesser included offense.

Am Jur 2d, Trial §§ 876 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

8. **Kidnapping and Felonious Restraint § 14 (NCI4th)—kidnapping—instructions—degree—release in safe place—evidence insufficient**

The trial court did not err by not instructing the jury on second degree kidnapping where the victim testified that she was left tied to a tree in a wooded area off a dirt road and a detective testified that the area was 45 feet off the dirt road and 93 feet down a path, that the ground was damp, and that he saw snakes in the area.

Am Jur 2d, Abduction and Kidnapping § 32.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

Judge COZORT concurring in part and dissenting in part.

Appeal by defendant from judgments entered 29 August 1991 by B. Craig Ellis in Brunswick County Superior Court. Heard in the Court of Appeals 3 March 1993.

Defendant was indicted and convicted of first degree kidnapping, felonious larceny of a firearm, first degree sexual offense and robbery with a firearm. Defendant was sentenced as follows:

life in prison for the first degree sexual offense; forty years in prison for first degree kidnapping; forty years in prison for robbery with a firearm; and ten years for larceny of a firearm. The sentences all run consecutively.

At trial Susan Watters testified that she was employed by David O. Watters Enterprises as a cable splicer. About mid-day on 22 April 1991 Ms. Watters was at work alone splicing cable along Highway 17 south of Shallotte, North Carolina when she noticed a gray station wagon pull up beside her truck, a black four-wheel drive Chevrolet. Ms. Watters got into her truck and went to eat lunch. Ms. Watters returned to her work site about 1:15 p.m., and resumed work. Once again, the gray station wagon pulled alongside her truck, and Ms. Watters noticed the defendant seated in the front passenger seat. The defendant asked her several questions. He then got out of the car, walked around to the back of her truck and asked her what she was doing. Ms. Watters returned to her work, and the defendant asked her if she actually knew what she was doing. As Ms. Watters turned to respond, the defendant stepped between her truck and the highway and pulled out a handgun. The defendant instructed Ms. Watters to walk over to the truck as if nothing was wrong. Ms. Watters walked over to the truck and the defendant cut off the truck's ignition. The defendant then opened the truck's door, told her that he wasn't going to hurt her and that he only wanted the truck. Ms. Watters told him to take the truck and leave, but the defendant refused and instead instructed her to get into the truck and sit in the middle. The defendant got in the truck, started it, pulled onto Highway 17 and started driving toward Grissettown. The gray station wagon followed.

The defendant drove to Grissettown and turned right on Highway 904. While he was driving, the defendant held the gun in his left hand and pointed it at Ms. Watters. The defendant stopped at an intersection, and the gray station wagon parked beside the road. The driver of the station wagon, a man with a mustache and long blond hair identified as Thomas Carr, got into the truck's driver's seat. The defendant moved into the passenger seat. Mr. Carr resumed driving.

After pulling back onto the road, the defendant and Mr. Carr began discussing whether to leave Ms. Watters tied up in a secluded area or make her drive to a bank robbery or use her as

a hostage. Mr. Carr eventually turned onto a dirt road which lead through a wooded area and toward the Waccamaw River. After turning onto the dirt road, the defendant noticed a box of .22 bullets in the truck's side pouch, and asked Ms. Watters where the gun was. Ms. Watters told the defendant that she did not know if a gun was in the truck and Mr. Carr stopped the truck. The men made Ms. Watters slide forward. Mr. Carr pulled the seat forward and the men found Ms. Watters' husband's .22 rifle. Mr. Carr handed the rifle to the defendant who fired it at the ground to see if it was loaded. The defendant reloaded the gun and the men began searching the truck. The men found a butcher knife and ammunition. The defendant grabbed Ms. Watters by her hair, "smashed [her] head back" and held the knife to the back of her neck while Mr. Carr finished searching the truck. At this time, Ms. Watters was beside the truck.

The men then told Ms. Watters to get back into the truck. The defendant, armed with the pistol, and Mr. Carr walked around to the truck's tailgate and began talking. The defendant then walked back to Ms. Watters, and asked her if she had overheard them. When she said she had not, he told her she was lying. The defendant grabbed Ms. Watters' arm and "snatched [her] out of the truck[,]" and put the pistol to the back of her head. Mr. Carr said "not to do it there" because "it would get all over the inside of the door of the truck, and they would have to get rid of that vehicle." The defendant then led Ms. Watters to a canal three or four steps away, held the gun at the back of her head and fired it. That shot did not wound Ms. Watters.

After the defendant fired the pistol he told Ms. Watters to get back into the truck. She did. Mr. Carr began driving the truck down the road again. The defendant, still holding the pistol, told her to look at the road and "be sure and see that there is nobody come down here in a long time, so nobody can help you." While driving down the road the men began discussing robbing a bank.

Mr. Carr stopped the truck at the end of the road. The men told Ms. Watters to get out, and the defendant, pointing the pistol at Ms. Watters, told her to take off her clothes and put them in the back of the truck. Ms. Watters did so. Mr. Carr approached her, dressed but with his penis exposed, and fondled her breasts. Ms. Watters "told him that he had promised they wouldn't hurt [her]. And for some reason he backed up and left [her] alone."

The defendant then grabbed Ms. Watters arm, led her to the canal, and held the gun to the back of her head again. The defendant told her to go back to the truck and put her clothes back on. While she was dressing the defendant asked her "if [she] liked to give head, and [she] told him no." Ms. Watters was then instructed to lay face down on the ground and put her arms behind her back. The defendant stood over her with the gun. Mr. Carr found some tape in the truck and attempted to tie Ms. Watters' hands. However, the tape kept breaking. The defendant asked Ms. Watters if there was anymore tape. She told him where there was some more tape. Mr. Carr retrieved the tape, 8½ inch wide black electrical tape, and tied her hands behind her back. At this time the defendant was still standing over her with a gun.

Mr. Carr then picked up Ms. Watters, stood her upright on her feet and all three walked over to a small ditch beside the truck. The three jumped the ditch and began walking up a path. After a short ways Mr. Carr taped Ms. Watters' ankles. The defendant, still holding the pistol, told Ms. Watters to get on her knees. Ms. Watters fell to her knees, and the defendant took out his penis. The defendant told Ms. Watters to raise her head, but she kept looking at the ground. The defendant placed the gun beside her head and said, "I told you to raise your head." When she did, the defendant placed his penis in her mouth. The defendant "stayed there about a minute and backed up and kind of laughed, and said [he] was just trying to prove a point." The defendant then told Mr. Carr to bring the tape. Mr. Carr walked over and taped up Ms. Watters' mouth. The defendant was standing in front of Ms. Watters with the gun. The two dragged Ms. Watters to a tree, made her sit in front of it, and "taped up [her] hands behind [her] back to the tree." The defendant told her that if he was not on the run he would take her with him. The men then left.

Ms. Watters heard two doors shut and the truck start. She then heard something to her right. As she began to raise her head to look, the defendant called her by name and told her not to raise her head. The defendant walked over, placed her husband's rifle at the base of her neck and told her that Mr. Carr wanted her dead because he did not want anybody to be able to identify him. The defendant then "moved the gun over and fired it four or five times and said, 'you're dead, get my drift, fall over.' " Ms. Watters slumped over to one side and the defendant left.

Ms. Watters waited a few moments, chewed through the tape around her mouth so that she could breathe, slipped her shoes off and used her feet and legs to get the tape off her ankles. She then put her feet on the tree and "pulled and twisted for quite some time" until she was able to free herself from the tree. Ms. Watters put her shoes back on and "took off" through the woods. Ms. Watters eventually got her hands free, took the tape off her face and put it in her shirt pocket. When she got to the river she swam across. She followed paths through the woods until she came to a house by the highway. She told two people that she had been kidnapped, and that she needed help. Someone then called the sheriff's department.

On cross-examination Ms. Watters testified that while in the truck she noticed an odor of alcohol about the defendant. She also testified that when Mr. Carr got into the truck, the defendant got a bottle of whiskey or brandy out of the station wagon. The bottle was partially empty. Ms. Watters saw the defendant drink "[a] swallow or two."

Mr. Carr also testified for the State. On 22 April 1991 Mr. Carr and the defendant left Wilmington at about 9:00 a.m. and drove to Shallotte in an old gray station wagon that Mr. Carr owned. While *en route* the defendant told Mr. Carr that he was going to rob a bank and that he wanted Mr. Carr to drive. Mr. Carr agreed to drive. The defendant showed Mr. Carr a .38 revolver.

Defendant and Mr. Carr drove to a trailer where they met two men and a woman. After a short while, all five drove to the local ABC store where they got two pints of liquor. They returned to the trailer and started drinking. Defendant and Mr. Carr left after about thirty to forty-five minutes. The two men drove around Shallotte "checking out different places as far as, you know, a place to, you know, stick up." The defendant then decided that they needed another vehicle, so the men continued to drive around, but started looking for another vehicle.

The defendant and Mr. Carr noticed Ms. Watters on the side of the road. Mr. Carr turned the car around and pulled up on the side of the road. At that time Ms. Watters was getting in her truck and pulling off. Later that day the two men passed by the same spot and saw Ms. Watters again. The defendant instructed Mr. Carr to pull over and he did. The defendant started talking to Ms. Watters, got out of the car, walked over to her

truck, talked with her for about a minute longer, and then got into the truck with Ms. Watters. At that time, the defendant had the .38 pistol with him. The truck pulled off and Mr. Carr followed.

Eventually, the two vehicles pulled over to the side of the road, and the defendant told Mr. Carr to leave his car there and to drive the truck. Mr. Carr began driving. He turned down a dirt road at the defendant's instruction. Ms. Watters was in the middle of the front seat between Mr. Carr and the defendant. The defendant was holding the .38 pistol. While in the truck, the defendant asked Ms. Watters when she was expected back at work or at home. The defendant threatened to kill her if she didn't tell the truth and "[a]t one point he pulled a knife and put i[t] up against her throat and told her he would cut her head off if she didn't tell him the truth."

Mr. Carr stopped the truck and the defendant and Ms. Watters got out on one side. The defendant told Mr. Carr that he had seen some shells and that he knew there was a gun in the truck. The defendant put his pistol up to Ms. Watters' head and told her he knew there was a gun in the truck. Ms. Watters said she did not know if there was or not. Mr. Carr pushed the seats back, found a .22 rifle and gave it to the defendant. The defendant "checked it out, looked at it, and loaded it." He then told Mr. Carr to take Ms. Watters' money from her purse, got into the truck and drove further down the dirt road. The defendant was pointing the .38 pistol at Ms. Watters. After driving a short distance, Mr. Carr stopped the truck and all three got out. The defendant had Ms. Watters stand by the passenger side of the truck while he and Mr. Carr walked to the back of the truck where the defendant said, "[L]ook, . . . I'm going to go ahead and, you know, rape and kill this bitch. . . ." Mr. Carr testified that he became upset because he had no intentions of raping or killing anybody. Mr. Carr tried to talk the defendant out of killing Ms. Watters but the defendant insisted. The two men walked back over to Ms. Watters. The defendant then told her to take off her clothes. The defendant motioned to Mr. Carr with the gun and Mr. Carr went around in front of Ms. Watters and touched her breast. Mr. Carr then stepped back, undid his pants and "slipped out" his penis. Ms. Watters said "[P]lease, sir, you promised not to hurt me." Mr. Carr zipped his pants up, and told the defendant that they had promised not to hurt her. The defendant then told Ms. Watters to get dressed.

After Ms. Watters got dressed the defendant placed the .38 pistol beside Ms. Watters' head and pulled the trigger firing the gun. The defendant told Mr. Carr to tape her up. Mr. Carr complied. The two then discussed whether to leave Ms. Watters out in the woods or take her as a hostage. The three then jumped over a "waterway" and sat Ms. Watters down. Mr. Carr went back to the truck. Three or four minutes later the defendant walked up to the truck and told Mr. Carr to tape up Ms. Watters' mouth and tape her to the tree. Once again, Mr. Carr complied. The two men returned to the truck, and the defendant told Mr. Carr that he would be back in a minute. In his statement to the police, Mr. Carr said that at this time the defendant "was drunk and beginning to get real crazy." While he was gone, Mr. Carr heard three shots from the .22 rifle. The defendant returned, and Mr. Carr asked if he had killed Ms. Watters. The defendant said, "[N]o, I was just trying to scar [sic] her, but I made you look like the heavy. I told her you sent me back there to kill her." The two men then drove off in the truck.

They went to the ABC store, where they got another pint of liquor, and to a drug store, where they got a box of surgical gloves. The two men then returned to where they had left Ms. Watters and discovered that she had escaped. The men drove toward Leland where the defendant's brother (or brother-in-law) lived. The defendant gave the .22 rifle to his brother and offered him the truck. The defendant's brother told the defendant that he didn't want the truck. Thereupon, the defendant and Mr. Carr got into the truck and drove it about a mile from the defendant's brother's house. The defendant and Mr. Carr got out of the truck, and the defendant "took the .38 and emptied it into the truck where the gas tank was at." The defendant and his brother then took Mr. Carr home. The next morning Mr. Carr turned himself in to the sheriff's department.

On cross-examination Mr. Carr testified that the defendant consumed "many" alcoholic drinks during the day in question including the "vast majority" of a pint of liquor after they left Ms. Watters in the woods. The alcohol appeared to make the defendant meaner and wilder as the day progressed. Finally, Mr. Carr also testified that the defendant told him that he had attempted to have Ms. Watters perform oral sex upon him but that she refused.

Det. Gene Caison of the Brunswick County Sheriff's Department testified that on 22 April 1991 he talked to Ms. Watters. Ms. Watters' statement was substantially the same as her testimony set out above. However, Det. Caison said that Ms. Watters told him that the defendant had "tried to get her to perform oral sex." Det. Caison also testified that he was involved in the defendant's arrest. Sometime later, when Det. Caison began to leave a room in which the defendant was located, the defendant started a conversation. Det. Caison testified:

> Q. And could you tell the jury what he said to you at that point in time?
>
> A. When I started to stand to leave, Mr. Smith stated, "is the girl all right?" And I said "yes." He then said, "I know she's hurt up here," and he was doing this, (indicating) as he said it. He then said, "I know it's not worth much, but if you see her, tell her I'm sorry." I said, "okay." He then said, "things just got out of hand. I don't know why. Well, I do too. I'm an alcoholic and a drug addict."

On cross-examination, Det. Caison read his investigative report. That report in part stated that "[t]he victim got on her knees, and the [defendant] told the victim that he wanted oral sex. Subject then changed his mind and said he couldn't do it."

Det. Nancy Simpson of the Brunswick County Sheriff's Department also read into evidence a detailed statement that she took from Ms. Watters on 29 April 1991. That statement provided in part:

> The younger man walked to the truck and the older man [the defendant] stayed with her. He put the gun to her head, and cocked it, and placed his penis in her mouth. She thought she was going to be killed at that point. He moved his penis and said, "that's enough. I just wanted to prove a point."

The defendant did not present any evidence. From judgment imposing sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General, Daniel C. Oakley, for the State.

Michael R. Ramos for the defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the indictment in 91CrS3100 (first degree sexual offense) because the indictment failed to properly allege an offense as required by G.S. § 15-144.2 and G.S. § 15A-924. Specifically, defendant argues that the indictment was insufficient under G.S. § 15-144.2, G.S. § 15A-924 and *State v. Dillard*, 90 N.C. App. 320, 368 S.E.2d 422 (1988), because it failed to allege that the offense was committed with force and arms.

In *State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553 (1982), our Supreme Court addressed substantially the same argument as it related to first degree rape. Our Supreme Court noted that G.S. § 15-155 provided, in part, that:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for . . . omission of the words . . . "with force and arms," . . . .

Id. at 174, 297 S.E.2d at 558. Our Supreme Court then held:

> We therefore must determine whether the inclusion of the averment "with force and arms," though not necessary by virtue of G.S. § 15-155, is nevertheless mandated by G.S. § 15-144.1(a). We do not read this statute as either *requiring* the averment or as expressing a legislative intent that the language in G.S. § 15-144.1(a) prevail over the express language in G.S. § 15-155 which states in effect that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment. As the bill of indictment upon which defendant was charged comports with the requirements of G.S. § 15-144.1(a), this assignment of error is overruled.

Id. at 175, 297 S.E.2d at 558.

The holding in *Corbett* applies with equal force here. In any event, we note that the indictment here uses the words "by force and against the victim's will[.]" This language is sufficient. *See, State v. Dillard*, 90 N.C. App 318, 368 S.E.2d 422 (1988) (upholding sexual offense indictment that used the words "by force and against

the victim's will" instead of "with force and arms"). This assignment is overruled.

II.

[2] Defendant next argues that the trial court erred by failing to dismiss the charge of kidnapping because there was insufficient evidence that the purpose of the kidnapping was to terrorize Ms. Watters. We disagree.

"[W]here the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Taylor*, 304 N.C. 249, 275, 283 S.E.2d 761, 778 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *rehearing denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983).

Defendant contends that a review of the evidence will show that the purpose of the kidnapping of Ms. Watters was either to hold her as a hostage or to obtain another vehicle to facilitate a bank robbery. The indictment alleges that the defendant kidnapped Ms. Watters "for the purpose of terrorizing her." Defendant's argument overlooks a record replete with evidence from which a jury could find that the defendant kidnapped Ms. Watters with the intent to terrorize her.

The defendant kidnapped Ms. Watters from her work site and immediately began to transport her to a secluded wooded area. Mr. Carr testified that while *en route* the defendant placed a knife against Ms. Watters' throat and "told her he would cut her head off" if she did not answer his questions honestly. Ms. Watters testified that during virtually the entire ordeal the defendant held her at gunpoint, that on several occasions the defendant placed a gun at the back or side of her head, and that on no less than two occasions the defendant discharged a firearm near the back of her head. Indeed, Mr. Carr testified that after the second occasion, the defendant told him, "I was just trying to scar [sic] her, but I made you look like the heavy. I told her you sent me back there to kill her." Furthermore, Ms. Watters testified that the defendant placed a gun beside her head, told her to raise her head and then placed his penis in her mouth. After a minute the defendant "backed up and kind of laughed, and said [he] was just trying to prove a point." This evidence is sufficient for a jury

to infer an intent to terrorize. Accordingly, this argument is overruled.

III.

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of armed robbery because there was insufficient evidence that the defendant intended to permanently deprive the owner of the possession of the truck Ms. Watters was driving. Defendant cites *State v. Smith*, 268 N.C. 167, 150 S.E.2d 194 (1966).

In *Smith*, our Supreme Court stated that "[i]n robbery, as in larceny, the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property." *Id.* at 170, 150 S.E.2d at 198. (Citations omitted.) However, the Court then went on to hold that:

> When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (*animus furandi*). A man's intentions can only be judge by his words and deed; he must be taken to intend those consequences which are the natural and immediate results of his acts. If one who has taken property from its owner without any color of right, his intent to deprive the owner wholly of the property "may, generally speaking, be deemed proved" if it appears he "kept the goods as his own 'til his apprehension, or that he gave them away, or sold or exchanged or destroyed them. . . ." State v. South, 28 N.J.L. 28, 30, 75 Am. Dec. 250, 252.

Id. at 173, 150 S.E.2d at 200.

Defendant argues that there is no evidence that the defendant intended to permanently deprive the owner of the truck. To the contrary, we find more than ample evidence that the defendant had the specific intent to wholly and permanently deprive the owner of the possession of the truck and no evidence that the defendant "took the vehicle for a temporary use only."

Defendant points out that the defendant "left the truck in plain view and in the vicinity of Leland, North Carolina[,]" and

based on that fact, defendant contends there is no evidence that the defendant intended to permanently deprive the owner of the truck of its use.

Mr. Carr testified that the defendant "[o]ffered [his brother] the truck or anything he wanted." Additionally, Mr. Carr testified that after the defendant's brother refused the truck, he and the defendant drove the truck about a mile down the road. The two men got out of the truck, and the defendant fired several shots with a .38 pistol into the truck "where the gas tank was at." The State has presented ample evidence that the defendant intended to permanently deprive the owner of the truck.

IV.

[4] By this argument defendant contends that the trial court erred in denying his request for special instructions on armed robbery. Defendant reiterates his contention that there was insufficient evidence of defendant's intent to permanently deprive the owner of the truck of its use. Defendant's brief argues:

> At the instruction conference the Defendant tendered a written instruction on the charge of armed robbery. It requested that the court instruct the jury that in order to find the Defendant guilty of armed robbery they must find beyond a reasonable doubt that the Defendant had the specific intent to deprive the owner permanently of possession of the 1990 truck and to convert it to his own use and if they did not so find or had reasonable doubt as to that then they should find the Defendant not guilty of armed robbery.

We have closely examined the instructions given by the trial court and hold they give the defendant's requested instruction in substance. Accordingly, this assignment is overruled. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

V.

[5] Defendant next argues that the trial court erred by denying his request to instruct the jury on the lesser included offense of attempted first degree sexual offense. We disagree.

> The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However,

> when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

State v. Boykin, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984) (citations omitted). Error in failing to instruct on a lesser offense is not cured by a verdict of guilty of the greater offense. *State v. Bell*, 284 N.C. 416, 200 S.E.2d 601 (1973).

Defendant argues that there is conflicting evidence warranting instruction on the lesser offense of attempted first degree sexual offense. At trial Ms. Watters testified that the defendant "placed his penis in [her] mouth." The defendant "stayed there about a minute and backed up and kind of laughed, and said I was just trying to prove a point." Det. Simpson testified that she took a statement from Ms. Watters. According to that statement, Ms. Watters told Det. Simpson that the defendant "placed his penis in her mouth." Det. Caison also took a statement from Ms. Watters. According to that statement, Ms. Watters said she "got on her knees, and the [defendant] told [her] that he wanted oral sex. [The defendant] then changed his mind and said he couldn't do it." Mr. Carr also gave a statement to Det. Caison. That statement provided that the defendant told Mr. Carr that "he tried to get her to have oral sex with him but that she didn't want to." Mr. Carr further testified under cross-examination:

> Q. And you recall to the best of your ability that Mr. Smith said to you that he attempted to get—to have her perform oral sex but that she refused?
>
> A. Yes, sir. That's what he informed me of, yes.

"The mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the issue of the defendant's guilt or innocence of a lesser offense than that which the prosecuting witness testified was committed." *State v. Lampkins*, 286 N.C. 497, 505, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L. Ed. 2d 1216 (1976). Here, Ms. Watters testified at trial that the defendant placed his penis in her mouth. The mere possibility that the jury might infer from her statement to

Det. Caison that the defendant did not force her to perform oral sex is not sufficient to require the court to submit the lesser offense to the jury.

Moreover, the defendant's statement to Mr. Carr does not conflict with Ms. Watters' testimony. Mr. Carr told Det. Caison that the defendant said "he tried to get her to have oral sex with him, but that she didn't want to." The act of oral sex entails more than is required for conviction of first degree sexual offense by fellatio. Fellatio only requires "any touching by the lips or tongue of one person of the male sex organ of another." *State v. Hewett*, 93 N.C. App. 1, 12, 376 S.E.2d 467, 473 (1989) (citing *State v. Bailey*, 80 N.C. App. 678, 682, 343 S.E.2d 434, 437 (1986), *review dismissed*, 318 N.C. 652, 350 S.E.2d 94 (1986)). The defendant's statement that Ms. Watters refused to perform oral sex does not refute Ms. Watters' testimony that the defendant "placed his penis in [her] mouth." *But cf. State v. Rhinehart*, 322 N.C. 53, 366 S.E.2d 429 (1988). Accordingly, this assignment is overruled.

VI.

[6] Defendant next argues that the trial court erred by failing to give an instruction on armed robbery's lesser included offense, assault with a deadly weapon, because there was conflicting evidence of the defendant's specific intent to permanently deprive the owner of the use of his property. Specifically, defendant claims he was entitled to the instruction for two reasons: (1) there is conflicting evidence of defendant's intent to permanently deprive and (2) there was evidence that the defendant was intoxicated.

"Assault with a deadly weapon is a lesser included offense of the crime of robbery by firearm." *State v. Davis*, 31 N.C. App. 590, 591, 230 S.E.2d 203, 204 (1976). Intent is not an element of assault with a deadly weapon. *State v. Curie*, 19 N.C. App. 17, 198 S.E.2d 28 (1973). Accordingly, if there was evidence supporting a finding of lack of intent, the court should have instructed on the lesser offense.

We have already decided defendant's first argument against him under heading III, *supra*. The dispositive question here, then, is whether the defendant's alleged intoxication required the trial court to instruct on assault with a deadly weapon.

We hold that there is ample evidence in the record to warrant submission of the lesser offense of assault with a deadly weapon

to the jury. Mr. Carr testified that the defendant began drinking liquor during the morning of 22 April 1991, and that during the day, the defendant consumed "many" alcoholic drinks. Mr. Carr also testified that when they were in the woods, the defendant "was drunk and beginning to get real crazy." Ms. Watters testified that when the defendant got into the truck with her she noticed the odor of alcohol about him. She also testified that after Mr. Carr got into the truck she saw the defendant drink "[a] swallow or two" of brandy or whiskey from a partially empty bottle. Based on this testimony, the trial court instructed the jury that it could consider the evidence of defendant's intoxication to determine whether the defendant had the requisite specific intent necessary to commit the crime of armed robbery with a firearm.

We hold that based on this same testimony the trial court should have submitted to the jury the lesser offense of assault with a deadly weapon. Accordingly, we reverse defendant's conviction for robbery by firearm and remand for a new trial on this charge.

[7] We note in passing, however, that the State argues that "[t]he defendant did not request further specific instruction linking the intoxication with an assault charge and he did not object to the instruction given." The transcript clearly reveals that defense counsel asked the trial court to instruct the jury on the lesser offense of assault with a deadly weapon based on lack of evidence of "permanent deprivation of property." This was sufficient to preserve the instruction for appeal. In any event, "[r]egardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). "[W]hen there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction. . . ." *Bell*, 284 N.C. at 419, 200 S.E.2d at 603 (1973).

The State also argues that "the evidence does not even support the intoxication charge. *See, State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986)." *Johnson* is clearly distinguishable from the instant case. In *Johnson* our Supreme Court rejected defendant's argument that the trial court should have instructed on intoxication by drugs. In doing so the Court noted that there was no evidence to support the defendant's assertion that he had consumed drugs or was intoxicated at the relevant time.

VII.

[8] Finally, defendant argues that the jury should have been instructed on the lesser included offense of second degree kidnapping. Defendant argues that there was evidence from which the jury could conclude that the victim was released in a safe place. We disagree.

Defendant contends that the only evidence concerning where the victim was released was Det. Caison's statement that she was released in a "woodland" area. Ms. Watters testified that she was left tied to a tree in a wooded area off of a dirt road. Moreover, defendant completely overlooks the remainder of Det. Caison's description of the area where Ms. Watters was left. Det. Caison testified that the area was 45 feet off a dirt road and 93 feet down a path to the tree. Det. Caison also testified that the ground was damp, and that when he returned to the area the next day he saw snakes. This argument is wholly without merit.

VIII.

In conclusion, we find no error in defendant's convictions for first degree kidnapping (91 CRS 2720), larceny of a firearm (91 CRS 2722), and first degree sexual offense (91 CRS 3100). We reverse defendant's conviction for robbery with a firearm (91 CRS 3332) and remand for a new trial.

No error in part; reversed and remanded in part.

Judge WYNN concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with all of the majority opinion except that portion which holds that the failure of the trial court to instruct the jury on assault with a deadly weapon, as a lesser included offense of armed robbery, requires the reversal of defendant's conviction in 91 CRS 3332 and an order for a new trial. The issue is whether the trial court was required to instruct the jury on the lesser charge of assault with a deadly weapon, in addition to giving the instruction on the defense of voluntary intoxication. I vote the trial court committed no error.

A trial court need not submit lesser included offenses to the jury when the State's evidence is positive as to each and every element of a crime charged and there is no conflicting evidence relating to any element of such crime. *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979). "[T]he contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense." *State v. Coats*, 46 N.C. App. 615, 617, 265 S.E.2d 486, 487 (1980).

Our case law makes it clear that intoxication may affect one's ability to form the specific intent required to commit robbery with a firearm. *State v. White*, 322 N.C. 506, 515-16, 369 S.E.2d 813, 817-18 (1988). Nonetheless, evidence of intoxication should not automatically require an instruction on the lesser included offense of assault with a deadly weapon where an instruction on voluntary intoxication has been given. In the present case, the defendant requested and received the correct instruction on voluntary intoxication. The general instruction given on voluntary intoxication allowed the jury to consider the evidence of defendant's intoxication in its deliberations. The jury could have determined the intoxication negated an element of the armed robbery. The defendant should not now be heard to complain that he was entitled to more.

I vote no error on all counts and respectfully dissent.

STATE OF NORTH CAROLINA v. JESSE DWIGHT MIXION

No. 9121SC1043

(Filed 18 May 1993)

1. Homicide § 313 (NCI4th)— second degree murder—evidence of self-defense—sufficient evidence of malice

The State presented sufficient evidence of malice for submission to the jury of a charge against defendant for the second degree murder of his estranged wife, although defendant presented evidence that he acted in imperfect self-defense, where the State's evidence tended to show that defendant intentionally shot his wife and his sister-in-law with a .25 caliber pistol; defendant had threatened his wife on prior occasions,

damaged her property, and said that he would kill her before he let her live in the family home; and on the night in question, neither the wife nor the sister-in-law said or did anything threatening toward defendant immediately prior to the shooting. Discrepancies between the State's evidence of malice and defendant's evidence of imperfect self-defense were for the jury to resolve.

Am Jur 2d, Homicide §§ 50, 51, 139-169, 274.

2. **Evidence and Witnesses § 267 (NCI4th)— psychiatric testimony—opinion that victim not homicidal—admission as harmless error**

A psychiatrist's opinion formed during an interview of a murder victim several months before the murder that the victim was not homicidal was inadmissible under Rule of Evidence 405(a) to show that the victim was not homicidal on the night in question and that defendant could not have been acting in self-defense when he shot the victim. However, the admission of this testimony was not prejudicial error where the psychiatrist testified on cross-examination that the interview lasted only thirty minutes and that she was not familiar with the victim's medical state on the date of the killing; the jury knew that the victim was armed with a pistol when she entered defendant's house the night of the killing and that she could have shot defendant if that was her intention rather than merely hitting him with her pistol; and a different result would not have been reached if the psychiatrist's opinion had been excluded.

Am Jur 2d, Expert and Opinion Evidence §§ 190, 193.

3. **Evidence and Witnesses § 339 (NCI4th)— prior threats, assaults, damage to property—admissibility to show malice and intent**

In a prosecution of defendant for the murder of his estranged wife, nonhearsay testimony that defendant had previously threatened and assaulted his wife and damaged her property and that she had taken legal action against him was admissible to prove defendant's malice and intent. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide §§ 280, 282, 283, 359, 360.

4. Evidence and Witnesses § 876 (NCI4th)— threats and harassment—hearsay statements of murder victim—state of mind exception

Hearsay testimony that a murder victim had told others that defendant had cut off her heat and electricity, threatened to kill her, harassed her, assaulted her several times, damaged her furniture, and tampered with her house, that he was crazy, and that the police had been unable to catch him for violating a restraining order was admissible under the state of mind exception to the hearsay rule set forth in Rule of Evidence 803(3).

Am Jur 2d, Evidence §§ 496, 497, 650.

5. Homicide § 629 (NCI4th)— self-defense in home—amount of force—instructions

The trial court in a prosecution for second degree murder and felonious assault did not err in failing to give defendant's requested instruction on defendant's right to increase the amount of force used in self-defense in his own home where defendant actually requested an instruction on defense of habitation; defendant did not shoot the victims to prevent entry into his home and was thus not entitled to an instruction on defense of habitation; and the court properly instructed the jury that if defendant was not the aggressor and was in his own home, he could stand his ground and repel force with force regardless of the character of the assault being made upon him, but that defendant would not be excused if he used excessive force.

Am Jur 2d, Homicide §§ 174 et seq., 496.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

6. Criminal Law § 1184 (NCI4th)— aggravating factor—prior convictions—insufficient record evidence

The trial court's finding of the statutory aggravating factor of prior convictions was not supported by competent record evidence where the State filed a notice to defendant of intent to use defendant's record of prior convictions at trial, a computer printout of defendant's record of prior convictions was attached to the notice, the prosecutor cross-examined defendant at trial about several of the listed convictions, defendant

admitted he had been convicted of assaulting his wife in 1982, and the prosecutor referred to defendant's prior convictions at the sentencing hearing, but there was no evidence indicating whether the assault conviction was for a simple or an aggravated assault and thus whether the offense was punishable by imprisonment for more than 60 days, the prosecutor never offered the printout list of convictions as evidence, and defendant never stipulated to these convictions. N.C.G.S. § 15A-1340.4(e).

Am Jur 2d, Homicide §§ 310-314.

7. **Criminal Law § 1238 (NCI4th)— strong provocation—extenuating relationship—separate mitigating factors**

Although strong provocation and an extenuating relationship are listed in the same statutory subsection, N.C.G.S. § 15A-1340.4(a)(2)i, they are separate mitigating factors, and the trial court's finding of the strong provocation factor does not have the same effect as finding the factor of an extenuating relationship.

Am Jur 2d, Homicide §§ 274, 290, 291, 575.

8. **Criminal Law § 1245 (NCI4th)— mitigating factor—extenuating relationship—insufficient evidence to require finding**

Evidence of past difficulties and a stormy relationship between defendant and his estranged wife for which both were at fault did not require the trial court to find an extenuating relationship as a mitigating factor for defendant's second degree murder of his wife.

Am Jur 2d, Homicide §§ 274, 290, 291, 575.

9. **Criminal Law § 1216 (NCI4th)— mitigating factors—duress—strong provocation—failure to find duress not error**

Although evidence that a murder victim was armed with a pistol and initiated the confrontation with defendant would support a finding of duress as a mitigating factor for defendant's second degree murder of the victim, the trial court did not err in failing to find duress where this same evidence was the basis for the trial court's finding of strong provocation as a mitigating factor.

Am Jur 2d, Homicide §§ 119, 274, 290, 291, 575.

Judge COZORT dissenting.

Appeal by defendant from judgments and commitments entered 5 April 1991 by Judge W. Steven Allen in Forsyth County Superior Court. Heard in the Court of Appeals 13 January 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General John G. Barnwell, for the State.

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

LEWIS, Judge.

A Forsyth County Grand Jury indicted defendant for the murder of his wife Sylvia Mixion and the assault with a deadly weapon with intent to kill inflicting serious injury (hereinafter "the assault") upon his sister-in-law Toni Nelson. At trial the State pursued a second-degree murder conviction, and the jury found defendant guilty of second-degree murder and the assault. Judge Allen found aggravating and mitigating factors, and sentenced defendant to a total of 52 years imprisonment, 40 years for the murder and 12 years for the assault.

We begin with a recitation of the facts, including the discrepancies between the State's evidence and defendant's evidence. It is undisputed that Ms. Mixion and Ms. Nelson arrived at defendant's place of residence at about 10:30 p.m. on 5 July 1990. They entered the house and found defendant in the back bedroom. Ms. Mixion was angry with defendant, started to shout at him, and pulled out a pistol but never fired. The ensuing fight flowed to the front bedroom and then to the living room. At some point defendant picked up a gun. In the living room defendant fired two shots: one killed Ms. Mixion and the other injured Ms. Nelson.

Defendant's evidence tends to show that defendant may have acted in self-defense when he shot his wife and injured his sister-in-law. Several of defendant's friends were in the house that night when Ms. Mixion and Ms. Nelson arrived. They testified that Ms. Mixion stormed into the house and attacked defendant as he was sitting peacefully in his bedroom. Ms. Mixion repeatedly hit defendant with a pistol as the fight progressed to the front bedroom and the living room. Although one friend, Larry Wilson, was standing in the doorway to the living room when the shooting occurred, he testified that he could "not exactly" see the people in the room when the shot was fired, and that he "didn't know who had shot

who at that time." The other friends had left the house before the shots were fired.

Defendant himself testified that Ms. Mixion came into the bedroom, stuck her pistol in his face, cursed at him, and hit him with and without the pistol. According to defendant, they started fighting as he tried to leave the room. He picked up a gun. At one point Ms. Nelson jumped on top of him, hit him, and brought him to the floor. He alleges that when they got to the living room Ms. Mixion pushed him, raised her pistol, cocked it, pointed it at him and said "I am going to kill you." When Ms. Nelson said "shoot," defendant fired his gun twice.

The State's evidence, on the other hand, tends to show that defendant was not acting in self-defense. The State was permitted to introduce evidence of events which occurred prior to the night in question. This evidence indicated that defendant's wife and son had left him in October 1989. On a subsequent occasion defendant entered the family home, where his wife and son were living, and chopped up all of the furniture, and on another occasion he cut off their heat and electricity. In June 1990 he told his wife, and also his son, that he would kill his wife before he let her have the house. Defendant's son was permitted to testify that defendant had previously threatened his wife, fought with her, and cut her with a knife. Ms. Nelson testified that defendant had tried to run over his wife with his car in January 1990.

The State was also allowed to introduce the expert testimony of a psychiatrist, Dr. Nancy Gaby. Dr. Gaby testified that she had met with Ms. Mixion for 30 minutes on 26 February 1990. She testified that Ms. Mixion told her that defendant had been harassing and threatening her in "numerous" and "vicious" ways, and that she had obtained a restraining order. Dr. Gaby testified that Ms. Mixion was neither suicidal nor homicidal. Ms. Mixion's divorce attorney, John Schramm, testified that she told him defendant had previously assaulted her and damaged her property.

Toni Nelson testified that on 5 July 1990 she and Ms. Mixion went to defendant's house and found defendant in the back bedroom. Ms. Mixion started shouting, cursing, and hitting defendant and became "real irate." She pulled out a pistol, shook it at defendant, and then left the bedroom to go to the front bedroom. Ms. Nelson was still in the room with defendant when he produced a gun from under his mattress and followed Ms. Mixion. Ms. Nelson testified

that she saw Ms. Mixion underneath defendant in the front room, and that he was "pounding down" on her. Ms. Nelson hit defendant on the head with a cordless drill. Ms. Nelson testified that she and Ms. Mixion were standing in the living room when defendant came out of the front bedroom. Neither of them said anything to defendant before he shot his gun twice, once at Ms. Mixion and once at her. Ms. Mixion fell to the floor and Ms. Nelson ran outside. Ms. Mixion's pistol, a Derringer, was found in the open position, with two unfired rounds on the floor, about two to three feet from her head. A pistol in the open position cannot be fired.

On appeal, defendant claims the court should have granted his motion to dismiss, because the evidence of malice was insufficient and in fact showed that he acted in imperfect self-defense. Defendant argues the trial court erroneously allowed the State to introduce various types of evidence at trial. Defendant challenges the admission of the psychiatrist's expert testimony, evidence of prior wrongs and acts, and hearsay evidence of prior wrongs and acts. Defendant argues that the trial court should have given his requested jury instruction on his rights to self-defense in his own home. Finally, defendant challenges the trial court's finding of the aggravating factor of prior convictions, and its failure to find as a mitigating factor an extenuating relationship with his wife and that he acted under duress or threat thereby reducing his culpability.

I. Defendant's Motion to Dismiss

[1] Defendant first argues the trial court erred in denying his motion to dismiss at the close of all the evidence, because the evidence showed he acted in imperfect self-defense as a matter of law. He claims the evidence of malice was insufficient, and therefore he could only have been guilty of voluntary manslaughter and should not have been convicted of second degree murder.

On defendant's motion to dismiss in a criminal case, the evidence must be viewed in the light most favorable to the State, allowing the State the benefit of every reasonable inference. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

To establish second-degree murder, the State must produce evidence that defendant committed "the unlawful killing of a human being with malice, but without premeditation and deliberation."

State v. Thomas, 332 N.C. 544, 559, 423 S.E.2d 75, 83 (1992). The element of malice is rebuttably presumed when "an individual intentionally takes the life of another with a deadly weapon." *State v. Deans*, 71 N.C. App. 227, 232, 321 S.E.2d 579, 582 (1984), *disc. rev. denied*, 313 N.C. 332, 329 S.E.2d 386 (1985). The trial judge found as a matter of law that defendant's weapon, a .25 caliber Raven pistol, was a deadly weapon. The State's evidence also showed that defendant threatened his wife on prior occasions, damaged her property, and even said he would kill her before he let her live in the house. On the night in question, the State's evidence shows that neither Ms. Mixion nor Ms. Nelson said or did anything threatening towards defendant immediately prior to the shooting in the living room.

After reviewing the evidence in the light most favorable to the State, we find sufficient evidence of malice to go to the jury. It was for the jury to resolve the discrepancies between the State's evidence of malice and defendant's evidence of imperfect self-defense. The trial court properly denied defendant's motion to dismiss.

II. Expert Character Testimony

[2] Defendant argues the trial court erroneously admitted the expert testimony of psychiatrist Nancy Gaby. Dr. Gaby was permitted to read from her notes, taken during a February 1990 interview with Ms. Mixion, her conclusion that in her opinion Sylvia Mixion was not homicidal. Defendant claims this evidence was introduced to show that Ms. Mixion was not homicidal on the night in question and therefore defendant could not have been acting in self-defense. Thus, according to defendant, Dr. Gaby's testimony amounted to an improper expert opinion of defendant's guilt. *See State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). Defendant argues this evidence was extremely prejudicial.

In North Carolina an expert may not express an opinion regarding the guilt or innocence of a defendant. *See State v. Keen*, 309 N.C. 158, 163, 305 S.E.2d 535, 538 (1983). According to Rule 405(a) of the North Carolina Rules of Evidence, "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C.G.S. § 8C-1, Rule 405(a) (1992).

The State argues the evidence was admissible under Rule 803 as a state of mind expression and as a statement for purposes of medical diagnosis and treatment. § 8C-1, Rule 803(3), -(4). However,

Rule 803 only relates to the admissibility of Dr. Gaby's hearsay statements of what Ms. Mixion told her during their interview. Although Dr. Gaby's notes indicate that Ms. Mixion did in fact state that she was not suicidal or homicidal, defendant is objecting to the admission of *Dr. Gaby's* conclusion that Ms. Mixion was not homicidal. Rule 803 does not assist the State regarding the admissibility of Dr. Gaby's own opinion, and the State has presented no argument addressing the admissibility of Dr. Gaby's opinion.

We must conclude the trial court erred, under Rule 405(a), in admitting Dr. Gaby's opinion that Ms. Mixion was not homicidal. However, defendant has not shown that this amounted to prejudicial error under N.C.G.S. § 15A-1443(a) (1988) (if not a constitutional error defendant has burden to show prejudice and that a different result would have been reached). On cross-examination, defendant's attorney established that Dr. Gaby's interview with Ms. Mixion lasted only 30 minutes, and it occurred several months before the night in question. Dr. Gaby admitted she was not familiar with the victim's medical state in July 1990, when the shooting occurred. Furthermore, we note that the jury had heard detailed testimony from several witnesses concerning the night in question as well as testimony regarding the past relationship between defendant and Ms. Mixion. The jury knew that Ms. Mixion was armed from the time she entered defendant's house that night, and that she could have shot defendant if that had been her intention, instead of merely hitting him with her pistol. In light of the other evidence presented, we do not believe a different result would have been reached if Dr. Gaby's testimony, based upon a brief encounter several months earlier, had been excluded. *See State v. Davis*, 106 N.C. App. 596, 604, 418 S.E.2d 263, 268 (1992), *disc. rev. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993) (although error to allow unlimited expert testimony on post-traumatic stress disorder, error was not prejudicial in light of other strong and convincing evidence).

III. Evidence of Prior Wrongs and Acts

A. Character Evidence

[3] Defendant contends the trial court erroneously allowed non-hearsay evidence of prior wrongs and acts in violation of Rules 404 and 403. This evidence consisted of the testimony of various people that defendant had previously threatened and assaulted Ms. Mixion and damaged her property, and that she had taken legal

action against him. Defendant claims this evidence was introduced to show his violent character and that he did not act in self-defense on 5 July 1990.

According to Rule 404, "[e]vidence 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." § 8C-1, Rule 404(b). However, defendant concedes in his brief that when one spouse is accused of killing the other, evidence of the accused's prior assaults and threats made during their marriage is admissible to prove malice and intent. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). The evidence was clearly admissible under this principle.

B. Hearsay Evidence

[4] Defendant also objects to hearsay evidence of alleged prior wrongs and acts. He objects to testimony that Ms. Mixion told others that he had cut off the heat and electricity, that he had threatened to kill her, that he had been harassing her, that he was crazy, that the police had not been able to catch him for violating the restraining order, that he had assaulted her several times in the past, that he had damaged her furniture, and that he had tampered with the house. Defendant also argues that even if the evidence was admissible under the state of mind exception to the hearsay rules, it was not relevant to the case.

Rule 803(3) sets forth the state of mind exception to the hearsay rules: "[a] statement of the declarant's then existing state of mind, emotion, sensation . . . but not including a statement of memory or belief to prove the fact remembered or believed . . . ." § 8C-1, Rule 803(3). Defendant claims the evidence did not show state of mind, because Ms. Mixion did not express her emotional state or feelings. She did not state that she was fearful of defendant, but merely related facts and events that had transpired.

It is true that in many of the cases addressing this hearsay exception, the evidence allowed indicates that the declarant had actually expressed fear of the defendant. *See State v. Meekins*, 326 N.C. 689, 694, 392 S.E.2d 346, 349 (1990) (testimony of niece that victim told her she was afraid of defendant admissible under Rule 803(3)). However, we note that *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), is similar to this case. In that case the trial court allowed hearsay evidence that the victim had stated

defendant had previously beaten her and threatened her. The witnesses did not state that the victim had expressed any fear. The Supreme Court found no error, noting that the testimony was admissible under Rule 803(3), because "the scope of the conversation . . . related directly to [the victim's] existing state of mind and emotional condition." 326 N.C. at 313, 389 S.E.2d at 74. In *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990), the Supreme Court found that the victim's statements to her son that defendant had threatened her "revealed her then-existing fear of the defendant . . . ." *Id.* at 683, 392 S.E.2d at 74.

We find that the hearsay evidence of threats and harassment by the defendant related directly to Ms. Mixion's state of mind and was therefore admissible under Rule 803(3). We also find that her state of mind was relevant to the case. In *Cummings*, the Court stated that the victim's state of mind was "highly relevant as it relates directly to the status of her relationship with defendant . . ." 326 N.C. at 313, 389 S.E.2d at 74. Defendant's contention that the evidence did not bear sufficient indicia of reliability under the Sixth Amendment of the United States Constitution is entirely frivolous. The evidence falls squarely within one of the established hearsay exceptions.

IV. Jury Instructions

[5] Defendant argues he is entitled to a new trial because the trial judge did not charge the jury with his requested jury instruction on his right to increase the amount of force used in self-defense in his own home, and that he was not required to retreat in his own home. At trial, defendant actually requested an instruction on defense of habitation, which the judge refused since the two women had already entered the house at the time of the shooting. Although the judge did instruct that defendant had no duty to retreat in his own home, the judge did not instruct that defendant had the right to increase his force.

We find the trial court properly instructed the jury according to Pattern Instruction 308.10 as follows: "If the defendant was not the aggressor and he was in his own home . . . he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force . . . ." This instruction is in accordance with *State v. McCombs*, 297 N.C. 151, 253 S.E.2d 906 (1979), wherein the Court stated,

> the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation . . . . Once the assailant has gained entry . . . the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat . . . .

Id. at 156-57, 253 S.E.2d at 910. *See also State v. Marshall*, 105 N.C. App. 518, 523-24, 414 S.E.2d 95, 98, *disc. rev. denied*, 332 N.C. 150, 419 S.E.2d 576 (1992). Defendant did not shoot to prevent entry into his home. He was therefore not entitled to an instruction on defense of habitation. We note the trial judge properly instructed on self-defense and imperfect self-defense.

V. Aggravating Factor: Prior Convictions

[6] Defendant argues that the trial court's finding of the statutory aggravating factor of prior convictions is not supported by any competent record evidence. Defendant claims the alleged prior convictions were not proven by any acceptable method under the Fair Sentencing Act, N.C.G.S. § 15A-1340.4(e) (Cum. Supp. 1992), or by any other permissible method of proof.

The State relies on the fact that prior to trial and sentencing, it submitted a motion in which it referred to evidence of defendant's conviction for assaulting Ms. Mixion with a knife in 1985. With this motion the State filed a "Notice of Intent to Use Record of Prior Convictions," attaching a list of convictions "obtained from official records." The State points out that the trial court heard arguments on the pre-trial motions, and that at trial the prosecutor cross-examined defendant about several of the listed convictions. Thus, when the prosecutor referred to a prior conviction at the sentencing hearing, he was referring to competent evidence of record. The State therefore contends it met its burden of proving the prior convictions.

The State must prove by a preponderance of the evidence the existence of aggravating factors. § 15A-1340.4(a), -(b). Prior convictions may be proved "by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." § 15A-1340.4(e). According to defendant, the State never introduced any court record of defendant's convictions, and the parties never stipulated to them. Defendant contends the State's only evidence consisted of the prosecutor's unsworn statement that defendant had some prior convictions.

The Supreme Court has stated that "the enumerated methods of proof of N.C. Gen. Stat. § 15A-1340.4(e) are permissive rather than mandatory." *State v. Graham*, 309 N.C. 587, 593, 308 S.E.2d 311, 316 (1983). In *Graham*, a deputy had advised the court of defendant's record from his own personal knowledge, and, more significantly, the defendant had admitted the prior convictions. *Id.* In *State v. Williams*, 92 N.C. App. 752, 376 S.E.2d 21, *disc. rev. denied*, 324 N.C. 251, 377 S.E.2d 762 (1989), the Court stated that "[a] prosecutor's mere unsworn assertion that an aggravating factor exists is insufficient proof for the trial court to find it." 92 N.C. App. at 753, 376 S.E.2d at 22. In that case, although the prosecutor was reading from official records, he did not offer them into evidence and defendant did not stipulate to them. For these reasons this Court remanded the matter for a new sentencing hearing, at which the Court noted the prior convictions would most likely be properly established. *Id.* at 753-54, 376 S.E.2d at 22.

In the case at hand, defendant did admit that he had been convicted of assaulting Ms. Mixion in 1982. However, there was no evidence indicating whether this conviction was for a simple assault or some form of aggravated assault. To be admissible, the prior conviction must have been for an offense punishable by more than 60 days imprisonment. § 15A-1340.4(a)(1)o. A simple assault is punishable by a fine or imprisonment for "not more than 30 days." N.C.G.S. § 14-33(a) (Cum. Supp. 1992). Without further information, defendant's admission that he was convicted of an assault cannot support a finding of the aggravating factor of a prior conviction.

We find there was insufficient evidence of defendant's prior convictions. The prior convictions were not proven by any acceptable methods, statutory or otherwise. The list of convictions submitted with the State's "Notice of Intent to Use Record of Prior Convictions" is a computer printout apparently obtained from the Winston-Salem police department. Although the prosecutor referred to the list during his cross-examination of defendant at trial, he never offered the list as evidence, and defendant never stipulated to it. We must remand for a new sentencing hearing, at which the State will have the opportunity to prove defendant's convictions by appropriate methods.

VI. Mitigating Factors: Extenuating Relationship; Duress or Threat

Finally, defendant contends the trial court erred in failing to find the statutory mitigating sentencing factors of an extenuating relationship between defendant and the victim, § 15A-1340.4(a)(2)i, and that defendant was acting under duress or threat which reduced his culpability. § 15A-1340.4(a)(2)b. A trial judge's failure to consider a statutory mitigating sentencing factor must be reversed on appeal if that factor is supported by uncontradicted, substantial, and credible evidence. *State v. Jones*, 309 N.C. 214, 218-20, 306 S.E.2d 451, 454-56 (1983). In order to find error in a judge's failure to find a mitigating factor, "the evidence must show conclusively that this mitigating factor exists, [and that] no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988).

Section 15A-1340.4(a)(2) includes the following two mitigating factors:

> b. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability . . . .
>
> i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

A. Extenuating Relationship

An extenuating relationship should be found if circumstances show that part of the fault for a crime can be "morally shifted" from defendant to the victim. *State v. Martin*, 68 N.C. App. 272, 276, 314 S.E.2d 805, 807 (1984). Defendant claims his relationship with Ms. Mixion was "mutually stormy and difficult." Their son testified that neither defendant nor his mother were free from fault. Defendant also points to uncontradicted evidence that Ms. Mixion apparently shot a gun at defendant during their marriage, falsely accused defendant of having venereal disease, and threatened to shoot defendant in January and July 1990. Also, on the night in question Ms. Mixion was the initial aggressor. Thus, defendant claims at least part of the moral fault should be shifted to Ms. Mixion.

[7] The State responds that the court did in fact find this mitigating factor when it stated that "[t]he Court finds as a mitigating factor that the defendant acted under strong provocation." Since strong provocation is a factor listed in the same statutory subsection as an alternative to an extenuating relationship, the State essentially argues it has the same effect as finding the factor of an extenuating relationship.

We must reject the State's argument that it is unnecessary to consider the existence of an extenuating relationship in addition to strong provocation. In *State v. Crandall*, 83 N.C. App. 37, 348 S.E.2d 826 (1986), *disc. rev. denied*, 319 N.C. 106, 353 S.E.2d 115 (1987), this Court stated that proof of both types of conduct set forth in the alternative in a subsection of statutory sentencing factors would support the finding of two separate mitigating factors "so as to reflect the defendant's lesser culpability." 83 N.C. App. at 40-1, 348 S.E.2d at 829. *See State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988) (Court found extenuating relationship and also discussed existence of strong provocation).

[8] Thus, we must determine if the defendant has shown uncontradicted, substantial evidence of an extenuating relationship. Past difficulties in a marital relationship are not sufficient to support a finding of an extenuating relationship. *State v. Hudson*, 331 N.C. 122, 158, 415 S.E.2d 732, 752 (1992), *cert. denied*, 113 S. Ct. 983, 122 L. Ed. 2d 136 (1993). In *State v. Bullard*, 79 N.C. App. 440, 339 S.E.2d 664 (1986), the Court stated that although the defendant and victim had been arguing over an extended period of time, this evidence did not compel a finding that they had an extenuating relationship, because this evidence did not "necessarily lessen the seriousness of the crime committed." *Id.* at 443, 339 S.E.2d at 665-66 (*quoting State v. Michael*, 311 N.C. 214, 220, 316 S.E.2d 276, 280 (1984)).

In light of these principles, we cannot conclusively determine that this mitigating factor exists. The trial court could have considered the evidence and properly concluded that this factor was not supported by uncontradicted and substantial evidence.

B. Duress or Threat

[9] Defendant argues that since all of the evidence shows that Ms. Mixion initiated the fight and used "gross physical force" on defendant, the trial court should have found the defendant commit-

ted the crime under duress or threat. We note that even the State's evidence showed that the victim was armed and assaulted defendant with a pistol immediately prior to the shooting.

In *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988), evidence that the victim had stabbed defendant 48 hours before defendant killed the victim was not sufficient to establish that defendant acted under duress. *Id.* at 524, 364 S.E.2d at 413-14. The Court noted that at the time of the shooting the victim did not display a weapon and did not initiate the confrontation. *Id.* at 524, 364 S.E.2d at 414. *See also Bullard*, 79 N.C. App. at 442-43, 339 S.E.2d at 665 (no duress where victim not armed and did not initiate confrontation).

Although the evidence in the case at hand would probably support a finding of duress since the victim was armed and had initiated the confrontation, we are constrained by the fact that the same evidence may not support more than one mitigating factor. *Crandall*, 83 N.C. App. at 41, 348 S.E.2d at 829. This evidence appears to be the basis for the trial judge's finding of strong provocation. The judge summarily stated the finding of strong provocation in response to defense attorney's plea for that factor because "[defendant] was in his home where, regardless of who it is, entered with a deadly weapon and an assault ensues . . . ," and because "of the method and manner of the attack upon [the defendant]." Since the same evidence may not support a finding of strong provocation and duress, we find no error in the judge's failure to find duress.

We must remand this case for a new sentencing hearing for proper documentation of defendant's prior convictions.

In the trial, no error.

Remanded for new sentencing.

Judge WELLS concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT dissenting.

I concur with all of the majority opinion except that portion which concludes that the matter must be remanded for resentenc-

ing. I find the trial court's finding of the aggravating factor of prior conviction is supported by evidence properly before the trial court, and I vote no error.

At the beginning of the trial, on 1 April 1991, the State filed with the court a notice to the defendant that the State intended to use defendant's record of prior convictions during cross-examination if the defendant took the stand, and in its case in chief if any prior conviction involved Sylvia Mixion. Attached to the notice was a printout of defendant's record. The printout showed that defendant was convicted on 21 January 1986 of assault with a deadly weapon, a knife, in violation of N.C. Gen. Stat. § 14-33. N.C. Gen. Stat. § 14-33(b)(1) (Cum. Supp. 1992) defines that offense as a misdemeanor punishable by imprisonment for not more than two years. The printout also revealed that defendant was convicted on 24 August 1982 of assault on a female, in violation of N.C. Gen. Stat. § 14-33(b)(2). A conviction under that section also subjects the defendant to imprisonment for not more than two years. As the majority points out, the defendant admitted the 1982 conviction, which, as a matter of law, satisfies the "more than 60 days' confinement" requirement of N.C. Gen. Stat. § 15A-1340.4(1)o. (Cum. Supp. 1992).

I also observe that the defendant made no objection when the State offered and argued the prior convictions at the sentencing hearing. The State's attorney stated: "The State, I believe, may have tendered a copy of the record. I believe it's been recited in evidence for the court." The State's attorney then made specific reference to the assault with a deadly weapon and the assault on a female, as well as a trespass conviction. Defendant should not now be permitted to argue that it is unclear whether the assault was simple or aggravated. *See State v. Quick*, 106 N.C. App. 548, 555-61, 418 S.E.2d 291, 296-99 (1992).

It would be a waste of our already overburdened judicial resources to remand this case for a resentencing hearing when all that would be produced is exactly the same information which was properly before the trial court two years ago.

I respectfully dissent.

STATE OF NORTH CAROLINA v. BRENDA HARDING

No. 9214SC84

(Filed 18 May 1993)

1. Criminal Law § 253 (NCI4th)— denial of continuance—no abuse of discretion

The trial court's denial of defendant's motion to continue did not constitute an abuse of discretion where defendant contended that the funeral of the man who had been her "common law husband" for 17 years was to take place on the afternoon of the day her trial was to begin on July 15; defendant made an oral motion to continue and presented no affidavits or testimony indicating that her ability to assist in her own defense would be inhibited due to the stress she suffered as a result of her friend's death; defendant did not show how denial of the motion prejudiced her in any way; and in fact the trial did not begin until July 16.

Am Jur 2d, Continuance §§ 5, 59; Criminal Law §§ 516, 839.

Continuance of criminal case because of illness of accused. 66 ALR2d 232.

2. Evidence and Witnesses § 2803 (NCI4th)— leading witness—no abuse of discretion in overruling objection

The trial court did not commit prejudicial error in overruling defendant's objection to the leading of a State's witness who was arrested with defendant and who testified concerning the location of the drug house which defendant allegedly ran, since other witnesses for the State had established the address of the house; there was confusion about the actual location of the house and the State's diagram of the area; but it was clear that all witnesses described the same house.

Am Jur 2d, Witnesses §§ 745, 752-756.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR2d 952.

3. Evidence and Witnesses § 362 (NCI4th)— evidence of drug use over 20-year period—limiting instruction—defendant not prejudiced

In a prosecution of defendant for possession of heroin with intent to sell or deliver, trafficking, and conspiracy to

commit trafficking, the trial court did not commit plain error by admitting into evidence testimony by a witness tending to show defendant's long-term drug use over a twenty-year period, since defendant did not object to the testimony at the time it was given, but instead raised the issue at the jury instruction conference, and the trial court agreed to instruct the jury that the testimony could be considered only to show plan, scheme, or design.

Am Jur 2d, Evidence §§ 298 et seq.; Witnesses § 745.

Habit or routine practice evidence under Uniform Evidence Rule 406. 64 ALR4th 567.

4. **Criminal Law § 304 (NCI4th)— joinder of 15 charges—defendant not prejudiced**

The trial court did not err in joining for trial fifteen charges against defendant since the joinder of charges was not the product of arbitrary reasoning as the transactions were closely related in time and nature under the circumstances, and defendant failed to point to any tangible evidence of prejudice which resulted from the joinder.

Am Jur 2d, Actions §§ 104 et seq.; Criminal Law §§ 19-21.

Joinder of offenses under Federal Rules of Criminal Procedure 8(a). 39 ALR Fed 479.

5. **Evidence and Witnesses § 2214 (NCI4th)— identification of substance as heroin—random sampling by chemist—testimony as to whole exhibit admissible**

An expert chemist may give his opinion as to the whole when only part of the whole has been tested; therefore, a chemist could properly identify the contents of 165 bags as heroin in this prosecution of defendant for possession of heroin, trafficking, and conspiracy to traffic, though the chemist tested only a random sample of the bags.

Am Jur 2d, Evidence §§ 773, 776; Expert and Opinion Evidence § 298.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance. 76 ALR2d 354.

6. Evidence and Witnesses § 1463 (NCI4th)— test for controlled substances—chain of custody of evidence

The State properly established the chain of custody of evidence in this prosecution for possession of heroin, trafficking, and conspiracy to traffic.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44 et seq.

7. Criminal Law § 181 (NCI4th)— defendant not incapacitated by drugs during trial—motion for appropriate relief properly denied

The trial court did not err in denying defendant's motion for appropriate relief on the ground that defendant was under the influence of a controlled substance throughout her trial since there was sufficient evidence in the record to support the trial court's findings that defendant was able to aid in the preparation of her defense, understand the proceedings against her, and cooperate with counsel; there was no reasonable probability of a different result had defendant not used drugs during the trial because her mental capacity was not so affected as to hinder her ability to understand the proceedings; and defendant was not subject to double jeopardy or any other violation of state or federal constitutional rights.

Am Jur 2d, Criminal Law § 99.

Propriety of criminal trial of one under influence of drugs or intoxicants at time of trial. 83 ALR2d 1067.

Appeal by defendant from judgment entered 15 August 1991 and order entered 11 September 1991 by Judge J. Milton Read, Jr., in Durham County Superior Court. Heard in the Court of Appeals 12 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victoria L. Voight, for the State.

James N. McNaull for defendant appellant.

COZORT, Judge.

Defendant was convicted of possession of heroin with intent to sell or deliver, trafficking by unlawfully possessing 14 or more but less than 28 grams of heroin, and conspiracy to commit trafficking by possession of 14 or more but less than 28 grams of heroin.

The trial court arrested judgment on the offense of possession of heroin with intent to sell or deliver and ordered the defendant to serve a term of 18 years in prison. On appeal, defendant assigns as error various rulings made by the trial court prior to, during, and subsequent to the trial proceedings. We find the defendant received a fair trial free from prejudicial error.

Defendant Brenda Harding was indicted on several charges for the possession of, trafficking in, and conspiracy to traffic in heroin. Following several continuances by the State, defendant's trial was scheduled for 15 July 1991. On 15 July, defendant made a motion to continue. The trial court denied the motion and proceeded with the case. The State moved to consolidate all the charges against defendant; the motion for joinder was allowed.

The State's evidence presented at trial included testimony of codefendants who had been indicted on similar narcotics charges and of police officers who had observed defendant "running the show" at a drug house at 1317 Gillette Street in Durham, North Carolina. Defendant made a motion to dismiss all charges at the close of State's evidence. The trial court granted the defendant's motion as to one count of possession of drug paraphernalia; the other charges remained. Defendant then moved for a mistrial based upon the complexity of the charges as drawn; this motion was also denied.

The jury returned a verdict on 18 July 1991 finding defendant guilty of possession of heroin with intent to sell or deliver, trafficking by possessing 14 or more but less than 28 grams of heroin, and conspiracy to commit trafficking by possession of 14 or more but less than 28 grams of heroin. Defendant made a motion for judgment notwithstanding the verdict based upon the insufficiency of the evidence. The motion was denied.

On 24 July 1991, defendant filed a motion to continue the sentencing hearing pending receipt of certain urine and blood tests which defendant had taken on 18 July. Defendant's motion was allowed. On 29 July 1991, defendant moved for a new trial, which motion was later converted to a motion for appropriate relief. Defendant alleged that she was under the influence of drugs during the trial and was incapable of effectively assisting counsel in presenting her defense. Defendant furthermore claimed the charges subjected her to double jeopardy. The trial court denied defendant's motion for a new trial and for appropriate relief.

[1] Defendant's first argument on appeal addresses the trial court's denial of her motion to continue the trial. Defendant made a motion to continue the trial on 15 July 1991. The request was based on the fact that defendant's "common law husband," with whom she had lived for seventeen years, had died on 12 July. Funeral services for defendant's alleged common law husband were scheduled for the afternoon of 15 July. Defendant contends that, under the circumstances, forcing her to go forward with the trial abridged her constitutional rights because her ability and capacity to assist in her own defense was "greatly reduced."

A motion for a continuance is ordinarily left to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of discretion. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Even where a motion raises a constitutional question, its denial is grounds for a new trial "only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Pickard*, 107 N.C. App. 94, 100, 418 S.E.2d 690, 693 (1992) (citing *Branch*, 306 N.C. at 104, 291 S.E.2d at 656 (1982)). A trial judge should deny a motion for a continuance unless the reasons for delaying the trial are fully established. *State v. Horner*, 310 N.C. 274, 277, 311 S.E.2d 281, 284 (1984). Therefore, an affidavit showing sufficient grounds should be filed in support of such a motion. *Id.*

Defendant made an oral motion to continue the trial and presented no affidavits or testimony indicating that her ability to assist in her own defense would be inhibited due to the stress she suffered as a result of her friend's death. Furthermore, defendant has not explained how the denial of the motion to continue prejudiced her in any way. In fact, it appears from the record the trial did not actually begin until 16 July. Accordingly, the trial court's denial of defendant's motion to continue the proceedings did not constitute an abuse of discretion.

[2] Next, defendant claims the trial court erred in permitting the State to question a witness concerning the location of the drug house on Gillette Street in Durham. Defendant's assignment of error contests the manner of questioning which the State employed while examining State's witness Jethro Hopkins about the location of the house at 1317 Gillette Street. Mr. Hopkins, who had been arrested with the defendant, testified as to the location of the

drug house. The State utilized a diagram to illustrate where the drug house was located. Hopkins testified that the house where the drugs were sold was "the first house right after you pass the church. That's where the drugs were sold, right in there." It is apparent from the record that the first house after the church on the diagram was 1315, not 1317 Gillette Street. The Assistant District Attorney attempted to clarify the location and address of the particular house where the drugs were sold by pointing out to Hopkins that he was confused. The defense objected due to the leading nature of the questions; the objection was overruled. Defendant claims the overruling of the objection constituted prejudicial error, since Hopkins may have called into question the testimony of previous State's witnesses.

As a general rule, leading questions are not permitted on direct examination. An exception to the rule exists, however, where the question is posed to elicit preliminary or introductory information or where the question is asked for testimony already received without objection. *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985). Leading questions asked by the State to a State's witness which directed the witness's attention to the subject matter at hand without suggesting an answer are permissible. *State v. Mosley*, 33 N.C. App. 337, 339, 235 S.E.2d 261, 263, *cert. denied*, 293 N.C. 162, 236 S.E.2d 706 (1977). Here, the record reveals that other witnesses for the State had established the address of the house where the drugs were being sold as 1317 Gillette Street prior to Hopkins' taking the stand. Despite confusion over the actual location of the house and the accuracy of the State's diagram, it is clear the witnesses described the same house. The trial court did not commit prejudicial error in overruling the defendant's objection as to the leading of State's witness Hopkins.

[3] Defendant further contends the trial court committed plain error by admitting into evidence testimony by Hopkins tending to show defendant's long-term drug use over a twenty-year period. Hopkins, replying to the State's questions concerning how he knew defendant, stated he had known her "for about twenty-something years"; that he knew her "in and out of drug houses," that she bought drugs from him, and that she had been selling drugs for about seven or eight years. Defendant did not object to the testimony at the time it was given; she raised the issue at the jury instruction conference. The trial court agreed to instruct the jury that the testimony could be considered only to show plan, scheme, or design.

Defendant now complains that Hopkins' testimony "was extremely remote in time, it's [*sic*] probative value, if any, was heavily outweighed by it's [*sic*] prejudicial effect, and it could not be fairly viewed as falling under the 404(b) exception." Due to defendant's failure to object at trial, we must review this objection under the plain error rule. Under the plain error rule, a new trial will be granted for an error to which no objection was raised at trial only if a defendant meets the heavy burden of convincing the reviewing court that the jury would have returned a different verdict but for the error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

We find no plain error in admitting this testimony, especially in light of *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E.2d 918, 919 (1978), which stated, "[i]n drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found." Such evidence is particularly relevant where the crimes charged involve conspiracy to sell drugs, which involve a connection between two or more persons, and possession with intent to sell, which involves guilty knowledge. *State v. Shaw*, 53 N.C. App. 772, 774-75, 281 S.E.2d 702, 704, *cert. denied*, 304 N.C. 590, 289 S.E.2d 565 (1981). Here, defendant received a limiting instruction despite her failure to object at the appropriate time to Hopkins' testimony. Because the jury was cognizant of the limited purpose of Hopkins' testimony, there is no plain error.

[4] Defendant's next argument challenges the trial court's joinder of the several charges against defendant for trial. Defendant claims the consolidation of the numerous indictments against her had the potential for confusing the jury and destroying the presumption of innocence to which she was entitled. The trial judge admitted the cases which had been joined together for trial amounted to an "unbelievably complicated spider web to all these allegations here and different indictments . . . ." The court also complained that "[t]he State has just made the matter tremendously complicated for the jury and certainly for the court to try to understand what the State is after here." Defendant submits that the complexity of the allegations and joinder of almost 15 separate indictments prejudiced her.

N.C. Gen. Stat. § 15A-926(a) (1988) states: "Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together constituting parts of a single scheme or plan." A trial court's decision to consolidate or sever charges is discretionary and will not be overturned absent a display of an abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the product of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985), *rev'd on other grounds*, 323 N.C. 306, 372 S.E.2d 704 (1988). When reviewing the joinder of several offenses, we must determine whether the offenses are so separate in time and so distinct in circumstances as to render a consolidation unjust and prejudicial to the defendant. *State v. Green*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978). We have carefully examined the record and conclude that the joinder of the charges was not the product of arbitrary reasoning, since the transactions were closely related in time and nature under the circumstances. Additionally, defendant has failed to point to any tangible evidence of prejudice which resulted from the joinder.

Turning to the next issue, defendant questions the trial court's denial of her motion to dismiss based on the insufficiency of the evidence made at the close of State's evidence and made again following the verdict. The standard for ruling on a motion to dismiss is "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). The reviewing court must consider all the evidence taken in the light most favorable to the State to determine whether there is substantial evidence of that crime charged and that defendant committed the crime. *State v. Perry*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982).

Defendant contends the State failed to prove beyond a reasonable doubt each and every element of the offenses charged. Specifically, defendant argues that the State did not prove that

the drugs identified at trial weighed more than 14 grams. Defendant asserts additionally that the State failed to identify conclusively the contents of the 140 plastic bags comprising exhibit 2-J and the contents of the 25 plastic bags comprising exhibit 2-E. Defendant questions the testimony of Ms. Linda A. Farren, a chemist employed by the State Bureau of Investigation (SBI). Defendant contends that Ms. Farren's testimony as to the weight and composition of the combined 140 packets and 25 packets, respectively, was not admissible because she did not conduct a comprehensive chemical analysis of every packet. Defendant also disputes the chain of custody established as to the exhibits. Defendant's arguments are without merit.

[5] In *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), our Supreme Court held that the chemist's testimony as to the various methods of examination of small portions of 390 separate glassine packets of heroin was sufficient evidence to raise an inference that defendant was guilty of trafficking. Similarly, in *State v. Hayes*, 291 N.C. 293, 230 S.E.2d 146 (1976), the Court held there was sufficient evidence to go to the jury on the issue of whether all 19 envelopes in defendant's possession contained marijuana even though the chemist had only performed a chemical analysis on 5 of the 19 envelopes. Therefore, the rule is well established that an expert chemist may give his opinion as to the whole when only part of the whole has been tested.

Here, of the 140 packets, Ms. Farren randomly performed color tests on 6 packets and conducted a microcrystalline test on 5 other randomly selected bags. She determined the bags contained the same material. She then combined the contents of the bags to obtain a total weight of 12.8 grams, mixed the powder to obtain a homogeneous mixture, obtained an infrared spectra of the mixture, and performed a base extract. Farren performed a similar procedure of random testing and combined testing with respect to the 25 packets. Farren's expert testimony concerning the heroin was admissible into evidence.

[6] Furthermore, the State properly established the chain of custody of the evidence. A two-prong test must be met before real evidence is properly received into evidence. First, the item offered into evidence must be authenticated as the same object involved in the incident; and second, it must be demonstrated that the object has not undergone a material change. *State v. Campbell*, 311 N.C.

386, 388-89, 317 S.E.2d 391, 392 (1984). A detailed chain of custody need be established only when the evidence cannot be readily identified, or is susceptible to alteration, and there is cause to believe the item may have been in fact altered. *Id.* We have reviewed defendant's complaint with regard to the custody of the materials mailed to the SBI laboratory and find that a sufficient chain of custody was established. Accordingly, we conclude the trial court did not err by denying defendant's motions to dismiss for insufficiency of the evidence.

The defendant alleges additionally that the trial court erred by failing to declare a mistrial based on the grounds that (1) the charges were confusing to the jury because they overlapped; (2) the trial court allowed the Assistant District Attorney to lead in his examination of witness Hopkins; (3) the trial court permitted Hopkins to testify as to bad acts which were remote in time; and (4) the trial court allowed into evidence the real evidence of the drugs after the packages had been combined for weight and testing.

A motion for a mistrial must be granted if an incident occurs of such a nature that a fair and impartial trial would be impossible under the law. N.C. Gen. Stat. § 15A-1061 (1988); *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980). Whether a motion for a mistrial should be granted is a matter which rests in the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982). Absent a showing of abuse of discretion, the decision of the trial court will not be disturbed on appeal. *State v. Mills*, 39 N.C. App. 47, 50, 249 S.E.2d 446, 448 (1978), *cert. denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). The grounds advanced by defendant to support her motion for a mistrial are identical to those used by defendant as a basis for her motions to dismiss. Having once again reviewed these grounds, we find no abuse of discretion in the trial court's decision to deny defendant's motion for a mistrial.

[7] Finally, defendant argues the trial court erred in denying her motion for appropriate relief on the grounds that defendant was under the influence of a controlled substance throughout her trial. Upon incarceration following the verdict on 18 July, defendant began exhibiting possible signs of drug withdrawal. Defendant's sentencing hearing was continued twice pursuant to her motion in anticipation of the results of a drug test defendant took the night she was taken into custody. Defendant then filed a motion

for a new trial on 29 July 1991, which the trial court treated as a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1411 et seq. Defendant filed her own affidavit, her attorney's affidavit, and a memorandum of law in support of the motion. Defendant presented no medical evidence as to competency. In compliance with N.C. Gen. Stat. § 15A-1002(b)(3), a hearing was held on the matter on 1 August 1991. The trial court took the matter under advisement, and on 16 August 1991, entered an order in open court denying defendant's motion for appropriate relief. The trial court then sentenced defendant to serve eighteen years in prison. The trial court filed a written order on 11 September 1991 which included findings of fact and conclusions of law addressing the denial of the motion for appropriate relief.

On reviewing orders entered on motions for appropriate relief, the findings of fact are binding if they are supported by any competent evidence, and the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law. *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986).

Defendant claims her constitutional rights of due process and confrontation were violated because she was under the influence of drugs during the trial.

N.C. Gen. Stat. § 15A-1001(a) (1988) provides:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

Defendant contends drug usage during trial caused her to be incompetent to stand trial, since she was unable to properly participate in her defense and to understand the nature of the proceedings against her. It is undisputed that defendant in fact used drugs around the time of the trial, since laboratory test results indicated positive use of opiates and cocaine.

The trial court's written order included in part the following findings of fact:

(2) That the trial began on July 16, 1991. The defendant was present throughout the trial proceedings. The court observed the defendant conferring with her attorney at various times prior to trial, during jury selection, during trial and at recess;

(3) That the undersigned Judge noticed nothing unusual about the defendant during any of these proceedings. She did appear to sleep some in the courtroom during jury deliberations but the Court has observed other defendants doing this in the past;

(4) That on one occasion the defendant was late arriving to court and was admonished by the undersigned and thereafter her presence was prompt;

* * * *

(7) That the defendant did not exhibit to the undersigned judge any signs during trial of being under the influence of any controlled substance. At no time did defense counsel suspect drug usage during trial. Defense counsel never said anything about his client's condition to the undersigned during trial;

* * * *

(10) That defendant voluntarily used one or more controlled substances before and/or after trial but at all times during trial the defendant was able to aid in preparation and conduct of her defense. The undersigned does not find as a fact that the defendant used as many drugs at the time of her trial as contended by defense. The undersigned, as previously found herein, was in a position to see, hear and observe this defendant and counsel throughout most of the trial. At no time did she appear to the Court to be under the influence of any drugs;

(11) That the defendant knew she "couldn't run because her father-in-law put up her property bond" and that it would be forfeited if she failed to show for the court proceedings. The defendant plead [sic] not guilty. She considered the plea offers. She did not use drugs during her court trial, only after and before. During the trial she discussed plea negotiations with her lawyer, elected not to testify, discussed with her lawyer whether or not to call witnesses and rejected some;

defense counsel spent one hundred twenty-four (124) hours of his time representing the defendant over a period of two years;

(12) That there is no believable evidence before the Court to show that the influence of any drugs on this defendant was sufficient to destroy her mental competency during trial. To the contrary, it does not appear to the undersigned that the defendant's mental capacity was so affected by drugs or alcohol that she could not understand the nature of the proceedings or intelligently assist in the preparation of her defense. At all times she had the capacity to comprehend her position, to understand the nature and object of the proceedings against her, to conduct her defense in a rational manner and to cooperate with her counsel to the end that available defenses could be interposed;

* * * *

(15) That the defendant was not under the influence of any impairing drugs to such a degree that she was incapable of effectively assisting counsel in her own defense, or incapable of making vital decisions such as to accept or reject plea offers or to take or not take the stand; . . .

Based on the above findings of fact, the trial court entered the following conclusions of law:

(1) That the defendant at all times during trial was able to aid in the preparation and conduct of her defense and that she had the capacity to comprehend her position, to understand the nature and object of the proceedings against her, to conduct her defense in a rational manner and to cooperate with her counsel to the end that any available defense could be imposed on her behalf;

(2) That there was no reasonable probability of a different result had the defendant not used drugs during the period of time of her trial and had testified; that her mental capacity was not so affected by drugs that she could not understand the nature of the proceedings or intelligently assist in the presentation of her defense; and

(3) That she has not been subject to any double jeopardy; and that none of the defendant's statutory or constitutional

> rights, State or Federal, have been violated in the trial of her cases.

Defendant contends there is no competent evidence to support that portion of finding of fact #11 which states that defendant "did not use drugs during her court trial, only after and before." Drug test results detected the presence of opiates and cocaine in defendant's body on 18 July 1991; the test did not indicate when the drugs were consumed. Defendant's affidavit stated that she used both cocaine and heroin on each day of the trial except for 18 July. We do not find that the trial court's error in finding that the defendant used drugs only prior to and following the trial is dispositive of this issue.

In *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989), our Supreme Court stated:

> [A] defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. It is the attorney who must make the subtle distinctions as to the trial.

There is competent evidence in the record to support the trial court's remaining findings of fact and its conclusions of law that (1) defendant was able to aid in the preparation of her defense, to understand the nature and object of the proceedings against her and to cooperate with counsel; (2) there was no reasonable probability of a different result had the defendant not used drugs during the time of her trial because her mental capacity was not so affected as to hinder her ability to understand the proceedings; and (3) she has not been subject to double jeopardy or any other violation of state or federal constitutional rights. Defendant's voluntary use of drugs during her trial will not warrant the order of a new trial where the record otherwise shows her to have been competent. Consequently, defendant's motion for appropriate relief was properly denied.

We have reviewed the remaining assignments of error and find them to have no merit.

In the defendant's trial, we find no error. We affirm the trial court's denial of defendant's motion for appropriate relief.

Judges EAGLES and WYNN concur.

STATE OF NORTH CAROLINA v. BILL JONES, JR.

No. 9118SC1156

(Filed 18 May 1993)

1. Evidence and Witnesses § 3110 (NCI4th)— corroborative statements—failure to object to noncorroborative portions—failure to raise impeachment issue—objections waived

Defendant waived his argument that the admission of statements given to police officers by three State's witnesses should have been excluded because they did not corroborate the in-court testimony of the witnesses and because they were unduly prejudicial to the defendant, since defendant did not object to the specific portions of the witnesses' statements which purportedly were noncorroborative of their in-court testimony and defendant made no effort to reiterate an impeachment argument at the time the statements were entered into evidence.

Am Jur 2d, Trial §§ 411-423.

2. Homicide § 299 (NCI4th)— second degree murder—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where it tended to show that a witness observed defendant attempting to pull something out of his pocket when he was standing behind one victim, but he put his hand back into his pocket when he noticed the witness watching him; when a witness later asked the victims to leave her house, defendant tried to grab one victim but was restrained by the witness; defendant, while alone, followed the victims to the area where their car was parked; he was the only person seen walking from the area shortly after the shots rang out; after the shots were fired, a witness observed defendant outside her kitchen window fumbling with

something; the following day police recovered shells from that area; approximately five minutes after the shots were fired, defendant directed his girlfriend to drive him to his mother's residence where he gave a pistol to his nephew for safekeeping; the bullets extracted from the victims' bodies were consistent with those that could be used in a pistol like defendant's; and medical testimony tended to show that the fatal shots could have been fired at the time defendant was in the area.

Am Jur 2d, Homicide §§ 53, 245 et seq.

3. Criminal Law § 881 (NCI4th) — length of time to reach verdict — no coercion or intimidation by trial court

The trial court did not err in denying defendant's motion for mistrial based on the extraordinary length of the jury proceedings and the court's instructions to and inquiries of the jury where the jury deliberated for one afternoon and most of another day before the judge inquired as to their progress; the jury indicated they were deadlocked whereupon the judge gave further instructions pursuant to N.C.G.S. § 15A-1235(b); on the next day at noon the judge asked the bailiff to inquire as to whether a deadlock remained, but the jury reported they were making progress; it was only at that point that defendant moved for a mistrial; and there was no evidence of coercion or intimidation by the trial court to influence the jury's progress.

Am Jur 2d, Trial §§ 1733, 1743, 1744.

Time jury may be kept together on disagreement in criminal case. 93 ALR2d 627.

Appeal by defendant from judgment entered 18 October 1989 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 3 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley, for defendant appellant.

COZORT, Judge.

Defendant was convicted of two counts of second-degree murder. He was sentenced to two consecutive life terms in prison. Defendant disputes the following on appeal: (1) the trial court's admission into evidence for corroboration purposes the prior statements given to police by three of the State's witnesses, (2) the trial court's failure to dismiss the charges based on insufficiency of the evidence, and (3) the trial court's denial of defendant's motion for a mistrial because the jury deliberated for an unreasonable amount of time. We conclude the defendant received a fair trial free from prejudicial error.

The State's evidence at trial tended to show that during March of 1989, defendant Bill Jones, Jr., resided with his girlfriend Queen Esther Zimmerman (Queen Esther) in an apartment located in Building #1424 at East Commerce Street in High Point, North Carolina. On the evening of 24 March 1989, Melanie Tucker, a friend of Queen Esther, testified that around 6:00 p.m., Queen Esther picked up Melanie to come over for a visit. The two women went initially to the apartment of Queen Esther's brother, Sam Zimmerman, and then proceeded to Queen Esther's apartment where they watched television. Throughout the evening, various neighbors and friends of Queen Esther would come to the apartment, or "drink house," where they drank alcohol at the mobile bar in the kitchen, socialized, contributed money to pay for the drinks, and then left. The defendant was in and out of the apartment at various times after the women arrived.

At approximately 9:00 p.m., Melanie and Queen Esther ordered a pizza. While waiting for the pizza to be delivered, Melanie sat in the living room and watched television, while Queen Esther entertained her guests in the kitchen. Between 9:45 and 10:00 p.m., Betty Dunlap and her daughter, Cynthia Dunlap, stopped by the apartment and went into the kitchen. Cynthia left the apartment for a few minutes and returned shortly. Melanie indicated that from where she was sitting in the living room, she could see Cynthia and her mother in the kitchen, though they could not see her. Melanie saw the defendant enter the kitchen and stand behind Cynthia. Defendant began to pull something out of his pocket with his hand, but when he saw Melanie looking at him from the living room, he hurriedly left the apartment. Defendant returned to the apartment after a few minutes and spoke privately with Queen

Esther. Queen Esther then asked the Dunlaps to leave. Before Cynthia could leave the apartment, the defendant attempted to grab her, but Queen Esther restrained him by clutching his arms. When Queen Esther asked the defendant why he was behaving so badly, the defendant replied, "in a few days you'll find out why." The defendant left soon after the Dunlaps exited the premises.

As Melanie and Queen Esther began eating the pizza which had been delivered, they heard a "popping" noise outside. Melanie thought the noise came from the opening of Queen Esther's screen door, but Queen Esther went to the door, opened it, and looked outside because she thought she had heard a gunshot. Not long after the noise was heard, the defendant came back into the apartment and went upstairs. Some boys from the neighborhood came inside with the defendant, but did not say much to either Melanie or Queen Esther. Melanie indicated she wanted to go home because she sensed something was wrong, but Queen Esther persuaded her to accompany her and the defendant to defendant's mother's house. The three then got into defendant's car to drive to Sally Jones' home. During the trip, Queen Esther asked the defendant why he "did it," and the defendant said, "Do what?" Queen Esther then asked the defendant, "Why did you shoot those people?" Defendant replied, "What people?" Queen Esther then said, "Those people that you ran out of the house." Melanie testified that she observed defendant removing a gun from his pants and giving the gun to Queen Esther. From Mrs. Jones' house, Melanie called a taxi to take her home.

The bodies of Betty and Cynthia Dunlap were discovered on the morning of 25 March 1989. The women had been shot while sitting in the front seat of their car. Autopsies conducted on both bodies revealed the women died from head injuries caused by the entry of a .38 caliber bullet. Other witnesses who testified for the State placed defendant near the Dunlaps' automobile at the time the shots were fired. Additional testimony tended to show that defendant had brandished a gun that evening and was intoxicated. Defendant presented no evidence.

[1] Defendant first argues on appeal that the admission of statements given to police officers by State's witnesses Melanie Ferree Tucker, Jenny Harris, and Validia Scott should have been excluded because they did not corroborate the in-court testimony of the witnesses and because they were unduly prejudicial to the defendant.

The law is well-settled that a witness's prior consistent statement may be admitted into evidence where the statements corroborate the witness's in-court testimony. *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991). Prior statements admitted for corroborative purposes cannot be received as substantive evidence. *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984).

> If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this "new" evidence under a claim of corroboration. . . . However, if the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury.

State v. Brooks, 260 N.C. 186, 189, 132 S.E.2d 354, 357 (1963) (citations omitted). "*Brooks* imposes a 'threshold test of substantial similarity.' " *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304 (quoting *State v. Rogers*, 299 N.C. at 601, 264 S.E.2d at 92.) Accordingly, it is clear that "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). Although a statement containing additional facts is not automatically barred from admission, our courts have found error in the admission of statements "when the content went far beyond the witness's in-court testimony." *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304. *See, e.g., State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976); *State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980); *State v. Stills*, 310 N.C. 410, 312 S.E.2d 443 (1984).

Additionally, "[i]n a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions." *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304. "Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *Brooks*, 260 N.C. at 189, 132 S.E.2d at 357. Where a defendant in a noncapital trial makes only a broadside objection to the allegedly incompetent corroborative testimony, the assignment of error is waived. *State v. Benson*, 331 N.C. 537, 549, 417 S.E.2d 756, 764 (1992).

In the present case, the State contends the defendant failed to preserve the assignment of error relating to the corroboration issue because the defendant did not object to the specific portions of the witnesses' statements which purportedly were noncorroborative of their in-court testimony. The record reveals that on the morning the statements were to be offered into evidence, the trial court held a conference in the jury's absence to discuss the defendant's objection to the admission of the statements. The transcript reports the following:

> THE COURT: . . . Now, when we recessed yesterday, the State indicated they were going to offer prior statements of the witness [*sic*] Ferree, Validia Scott and Jenny Harris—Melanie Ferree, Validia Scott and Jenny Harris.
>
> Now, Mr. Dockery, you are objecting?
>
> MR. DOCKERY [defense counsel]: That's correct, Your Honor.
>
> THE COURT: All right. Now, we spent considerable time in chambers this morning trying to sort through this and expedite the ultimate hearing of the evidence by the jury.
>
> Now, let me be sure of the basis of your objection. The State indicated that they have tapes of the conversations, which they are prepared to offer, but in an effort to expedite the consideration of such by the jury, they have reduced those tapes to transcript fashion. Now, are you objecting on the basis that the State needs to establish a foundation to admit the tape?
>
> MR. DOCKERY: No, sir.
>
> THE COURT: All right. Now, you're not raising that point?
>
> MR. DOCKERY: No, sir.
>
> THE COURT: You're just objecting generally that what's about to be offered doesn't corroborate the testimony?
>
> MR. DOCKERY: Yes, Your Honor. They—
>
> * * * *
>
> THE COURT: What's been eliminated at least in the Court's opinion are the gross disparities. And I've attempted to rule out any prejudicial matter that appears in those statements.

And counsel for the defendant and the district attorneys have been present and participated in that process. So what we have left is the excised version of the transcript. . . .

* * * *

. . . You're not objecting to the foundation question? If you object that they have to lay a foundation, we have to go through all that.

MR. DOCKERY: Judge, I recognize that. Let me—my objection is that—if I could just state it for the record?

THE COURT: Yes.

MR. DOCKERY: My objection is what they're trying to do in violation of Rule 403, violation of what the Court said in the Hunt case, is to impeach the testimony of these three witnesses by the use of these prior statements made to the police officers. And the threat is that the jury will not be able to distinguish between impeachment, corroboration, and substantive evidence, and that their offer of this proof is a mere subterfuge to get before the jury that evidence which is otherwise inadmissible. And that's the basis for my objection. I am not objecting to their failure to establish foundation. . . .

* * * *

THE COURT: . . . Your point is it shouldn't come in?

MR. DOCKERY: That's correct.

THE COURT: Because it doesn't in fact corroborate?

MR. DOCKERY: And my understanding this Court has gone in great—and allowed me to watch as it did so, allowed me to—

THE COURT: We cut out—a lot of material has been cut out, and I want the record to be clear that a great amount of material was excised and that what we have left is that portion which appears to be in the ballpark at least for consideration as to whether it corroborates, and I think we made an effort to get any gross disparities out and any prejudicial matter.

MR. DOCKERY: And I also understand that I will be allowed to—

THE COURT: So in the Court's opinion if there is any discrepancy it would be minor in nature and not the gross disparities that we did eliminate.

When the statements were offered during the trial proceedings, the following exchange occurred:

MR. DOCKERY: Judge, I think we've already handled the introduction of these, have we not?

THE COURT: Yes. The Court has sustained your objection in part and overruled it in part. And the basis of your objection is on the record. And the Court has determined that certain portions of the tape should not be received before the jury.

The State thereupon separately acknowledged each statement as corroborative testimony and offered the statements into evidence. At the time each statement was received, the trial judge instructed the jury that (1) the statement should only be considered insofar as the jury found it to corroborate the in-court testimony of the witness; and (2) the statement could not be considered as evidence of the truth of the matter because it was not made under oath in that trial proceeding. The trial judge gave a similar instruction during his charge to the jury.

We agree with the State that because defendant did not enter specific objections indicating which remaining parts of the three statements he believed to be noncorroborative, this assignment of error is waived. *See also, State v. Benson*, 331 N.C. at 549-51, 417 S.E.2d at 764-65.

We note that defendant raised issues relating to impeachment in the objection he stated for the record during the conference. However, we need not address the Rule 607 argument, since "[t]he patent nature of the basis of defendant's objection is borne out by the fact that the trial court responded to the objection in terms of the very basis sought by defendant." *Id.* at 549, 417 S.E.2d at 763. The State offered the evidence only as corroborating evidence, and the trial court instructed the jury as to corroboration only. The defendant made no effort to reiterate an impeachment argument at the time the statements were entered into evidence, nor did he address such an argument in his brief filed to this Court. We therefore deem the issue to have been abandoned pursuant to N.C.R. App. P. 28(b)(5).

[2] Next, defendant claims the trial court erred by denying defendant's motion to dismiss the two second-degree murder charges at the close of the State's evidence based on the insufficiency of the evidence.

Our standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

> 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 to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

Id. (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)). We consider the evidence presented in the light most favorable to the State when determining the sufficiency of the evidence. *Id.* Any contradictions and discrepancies in the evidence are for the jury to resolve, and the evidence admitted favorable to the State, whether competent or incompetent, must be considered by the court in ruling on the motion to dismiss. *Id.* at 216, 393 S.E.2d at 814.

> When as here the motion to dismiss puts into question the sufficiency of circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

Id. (quoting *State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986)).

Defendant argues the State produced no direct evidence that defendant murdered Betty and Cynthia Dunlap, and that the State "relied entirely on conjectural and insufficient circumstantial evidence." Defendant points to the lack of any physical evidence linking defendant to the crimes, the State's failure to produce a

murder weapon, the lack of evidence of motive or intent to kill, and the discrepancies in the physical evidence presented, to support his argument. We disagree.

"The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both." *Earnhardt*, 307 N.C. at 68, 296 S.E.2d at 653. Here, State's witness Melanie Ferree Tucker testified that she noticed defendant attempting to pull something out of his pocket when he was standing behind Cynthia at Queen Esther's, but he put his hand back into his pocket when he noticed Melanie watching him. When Queen Esther later asked Cynthia and her mother to leave, defendant tried grabbing Cynthia, but he was restrained by Queen Esther. Other testimony given by State's witnesses tended to show that defendant, while alone, followed the Dunlaps down to the area where their automobile was parked; he was the only person seen walking from the area shortly after the shots rang out. Jenny Harris testified that after the shots were fired, she observed defendant outside her kitchen window fumbling with something. The following day, the police recovered shells from that area.

Additionally, testimony by various witnesses indicated that defendant was not "acting himself" after the shots were fired when he returned to the drink house. Approximately five minutes after the shots were fired, he directed Queen Esther to drive him to his mother's residence, where he gave a .357 caliber pistol to his nephew for safekeeping. The bullets extracted from the Dunlaps' bodies were consistent with those that can be used in a .357 caliber pistol. The foregoing evidence, together with medical testimony tending to show the fatal shots could have been fired at 10:00 p.m. on the night in question, constitutes substantial evidence to support defendant's conviction on two counts of second-degree murder. As noted above, any contradictions and discrepancies were for the jury to resolve. We therefore conclude the trial court did not err in denying defendant's motion to dismiss.

[3] Finally, defendant contends the trial court erred by denying his motion for a mistrial based on the extraordinary length of the jury proceedings and the likelihood that the jury was coerced to reach a compromise guilty verdict. Jury deliberations commenced on 16 October at approximately 2:00 p.m. and were recessed at or about 5:00 p.m. that day. The jury resumed its deliberations

at 9:30 a.m. on 17 October and deliberations continued until 3:38 p.m. The jury was brought into the courtroom, and the trial judge inquired through its foreman as to the jury's progress. When it appeared to the trial court that the jury was unable to agree and was at that point deadlocked, the trial court gave further instructions pursuant to N.C. Gen. Stat. § 15A-1235(b) (1988). At 12:00 p.m. on 18 October, the trial judge asked the bailiff to inquire as to whether a deadlock remained. The jury foreman reported that the jurors were making progress. Following this inquiry, the defendant moved for a mistrial based on the unreasonable length of the proceedings and that the jurors had been coerced or intimidated into foregoing their individual convictions in order to reach a verdict. The trial court made findings of fact on the matter and denied the motion for a mistrial. The trial judge indicated that if the jury could not reach a unanimous verdict, he would entertain further argument on a motion for a mistrial. Later that same afternoon, the jury reached its verdict.

We find no error in the judge's denial of defendant's motion for a mistrial. N.C. Gen. Stat. § 15A-1235 (1988) provides in part:

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to

require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

The granting or denial of a motion for a mistrial is a matter within the sound discretion of the judge, and is reviewable only in a case of a gross abuse of discretion. *State v. Hall*, 73 N.C. App. 101, 325 S.E.2d 639 (1985). In the case at bar, the defendant made his motion for a mistrial *after* the jury indicated to the trial judge that it was approaching a unanimous verdict. The trial court, in denying the mistrial motion, considered the nature of the charges, the evidence presented in the trial, and the time spent deliberating up to that point in proportion to the total length of the trial proceedings. We find the trial court did not abuse its discretion by denying the defendant's mistrial motion based on deadlock. Furthermore, we find no evidence of coercion or intimidation by the trial court to influence the jury's progress. Accordingly, defendant's assignment of error regarding the denial of his motion for a mistrial is overruled.

No error.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. FRANK TALLEY, JR.

No. 9226SC478

(Filed 18 May 1993)

1. Criminal Law § 1686 (NCI4th)— trial de novo in superior court—more severe sentence

Defendant's rights were not violated by the imposition of a more severe sentence for cruelty to an animal upon trial *de novo* in superior court than the sentence imposed in the district court where there was no evidence in the record that the sentence was increased to penalize defendant for exercising his right to a jury trial.

Am Jur 2d, Criminal Law § 314.

Propriety of increased punishment on new trial for same offense. 12 ALR3d 978.

2. Criminal Law § 1025 (NCI4th)— active sentence—no penalty for notice of appeal

Defendant failed to show that the trial court improperly imposed an active sentence for cruelty to an animal because he gave notice of appeal where the trial court offered defendant alternative sentences of a one-year prison term with a $1,500 fine or a one-year prison term with defendant to be placed on supervised probation with certain conditions attached thereto for a period of three years except for ninety days during which defendant would be eligible for work release; defendant's counsel informed the trial court that defendant did not choose either sentence but instead wanted to serve notice of appeal; and the trial court announced that defendant had rejected probation, sentenced defendant to the active term, and entered notice of appeal on defendant's behalf.

Am Jur 2d, Criminal Law §§ 525 et seq.

3. Evidence and Witnesses § 623 (NCI4th)— pretrial motion to suppress—necessity for writing and affidavit

The trial court did not err in the denial of defendant's motion to suppress seized evidence on the ground that defendant failed to comply with the requirements of N.C.G.S. § 15A-977 where the motion to suppress was oral and was not accompanied by an affidavit containing facts supporting the motion.

Am Jur 2d, Motions, Rules, and Orders § 9.

4. Criminal Law § 976 (NCI4th)— denial of motion for appropriate relief—motion and documents not in record—no appellate review

The trial court's summary denial of defendant's motion for appropriate relief is not reviewable on appeal where the record on appeal does not include the motion for appropriate relief or any supporting documents that might have been filed with the motion. N.C.R. App. P. 9.

Am Jur 2d, Appeal and Error § 498.

5. Animals, Livestock, or Poultry § 19 (NCI4th)— cruelty to animal—sufficient evidence of willfulness

There was sufficient evidence that defendant acted willfully to support his conviction for cruelty to an animal in violation of N.C.G.S. § 14-360 where the evidence tended to show that a mare owned by defendant was 300 to 500 pounds underweight; it would have taken more than six months for the mare to become so emaciated; the owner of a pasture asked defendant several times to remove his horses from the pasture because there was no food in the pasture; each time defendant said he would move the horses but failed to do so; and the mare was euthanized because of its condition.

Am Jur 2d, Animals §§ 28, 29.

What constitutes offense of cruelty to animals. 6 ALR5th 733.

6. Evidence and Witnesses § 1229 (NCI4th)— statements to animal control officer and veterinarian—admissibility

Defendant's statements to an animal control officer and a veterinarian that he had heard if you kick a horse in the hip it will stand up, that he agreed a horse he owned needed to be euthanized, and that his horses had not been seen by a vet were not the result of an impermissible custodial interrogation and were properly admitted in defendant's trial for cruelty to an animal.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 523-529.

7. Criminal Law § 375 (NCI4th)— remarks by trial judge—defendant not prejudiced

Defendant was not prejudiced by the trial judge's statement to the jury that he was speaking loudly because he understood that defense counsel was hard of hearing or by the trial judge's statement, after the jury returned to the courtroom, that "we are waiting for Mr. Bell and his client, Mr. Talley. I do not know where they are."

Am Jur 2d, Trial §§ 276 et seq.

8. Criminal Law § 497 (NCI4th)— deliberations—jury request to review exhibit—failure to submit related exhibit

Where the jury requested during deliberations to examine a specific defense exhibit, the trial court did not err by failing to submit a related exhibit to the jury for its examination. N.C.G.S. § 15A-1233.

Am Jur 2d, Trial §§ 1665, 1666.

9. Criminal Law §§ 1075, 1083 (NCI4th)— misdemeanor—inapplicability of Fair Sentencing Act—findings of mitigating factors unnecessary

The trial court did not err by failing to find certain mitigating factors in sentencing defendant for cruelty to an animal since this offense is a misdemeanor punishable by a maximum term of one year and is not within the scope of the Fair Sentencing Act. Furthermore, the record does not show that the trial court failed to consider such factors.

Am Jur 2d, Criminal Law § 527.

10. Judges, Justices and Magistrates § 27 (NCI4th)— failure of judge to recuse himself—no error

The trial judge did not err by failing, *sua sponte*, to disqualify himself in a prosecution for cruelty to an animal on the ground of bias against defendant.

Am Jur 2d, Criminal Law § 827.

Due process clause of Fourteenth Amendment as requiring disqualification of state or local judge from participation in particular litigation—Supreme Court cases. 89 L. Ed. 2d 1066.

Appeal by defendant from judgment entered 12 February 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 1993.

Defendant was convicted of cruelty to an animal under G.S. § 14-360 before the 24 May 1991 criminal session of Mecklenburg County District Court. Defendant appealed to the Mecklenburg County Superior Court where on trial *de novo* he was again convicted of cruelty to an animal. He was sentenced to one year in prison and fined $1,500.00.

The State's evidence tends to show that on 26 March 1991 Denise Lambiotte, a field team supervisor with the Charlotte Mecklenburg Animal Control Department, received a complaint concerning cruelty to animals. As a result of the complaint, Ms. Lambiotte contacted Mr. Woodrow Redfearn. Mr. Redfearn told Ms. Lambiotte that the defendant placed horses on his property in October 1990 and that he had requested the defendant to remove them several times. Mr. Redfearn testified that he made the requests because there was not any food in the pasture. He also testified that each time he told the defendant of the problem, the defendant said he would take care of it right away.

On 27 March 1991 Ms. Lambiotte and another Animal Control employee visited the property where the animals were allegedly kept. Ms. Lambiotte observed thirteen adult horses and two foals in a pasture. One of the horses, a chestnut mare, was severely emaciated, suffering from extreme hair loss and had what appeared to be an open draining abscess underneath her jaw. Ms. Lambiotte also observed other horses that were in poor health. Ms. Lambiotte returned to her office, consulted with her director, Diane Quisenberry, who instructed her to have a veterinarian, Dr. Barbara Nicks, return with her to the pasture. Ms. Lambiotte, Dr. Nicks and another Animal Control employee returned to the property that afternoon. After taking photographs and compiling a list of the horses and their conditions, Ms. Lambiotte filled out and left two Animal Control Department cruelty warning letters. The letters, which were left attached to the pasture fence, warned that the horses were not being cared for in violation of G.S. § 14-360, and allowed one day to correct the problem in order to avoid legal action. Ms. Lambiotte then returned to her office and dispatched an Animal Control officer to deliver the same letter to defendant's residence. That letter was left on defendant's front door. Because Mr. Redfearn could not remember the defendant's last name, the letters were addressed to Frank Talbert but were left at defendant's residence.

On 28 March 1991 Ms. Lambiotte returned to the pasture. She saw a small amount of hay scattered in the pasture, and noticed that one of the two letters she had left on the fence was gone. Ms. Lambiotte returned to her office where she received a phone call from the defendant. Ms. Lambiotte instructed the defendant to have a veterinarian at the pasture by 3:30 p.m. The defendant agreed, but said he would need until 4:30 p.m. to get his veterinarian, Dr. Gochnauer. Ms. Lambiotte then called Dr. Ennulat, an equine

veterinarian specialist, who agreed to accompany her to the pasture. When Ms. Lambiotte returned to the property the gate was open, the horses were gone and the defendant was not present. Ms. Lambiotte radioed her office and asked that another supervisor call Dr. Gochnauer to see if he had been contacted by the defendant. He had not. Ms. Lambiotte returned to her office, and was advised to contact a police attorney regarding an arrest warrant. On 29 March 1991 an arrest warrant was issued for the defendant.

On 1 April 1991 Ms. Lambiotte observed the horses in another pasture located approximately twenty to twenty-five miles from the first pasture. Ms. Lambiotte drove to a nearby gas station, called her director and instructed two animal control officers to come out to the property. Ms. Lambiotte obtained permission from the pasture owner's son, Mr. Gordon, to enter the property. Ms. Lambiotte then returned to her office, picked up a sworn law officer and went to the magistrate's office where she obtained a "search and seizure warrant." Before leaving the pasture, Ms. Lambiotte left another letter, similar to the previous letters, on the pasture's front gate.

After obtaining the search warrant, Ms. Lambiotte returned to the pasture where she talked with Antonio, an employee of the defendant who had arrived while she was gone. Ms. Lambiotte told Antonio to contact the defendant. Antonio left. The defendant arrived about 2:20 p.m. The defendant told Ms. Lambiotte that the chestnut mare with the abscess had cut her mouth on a fence, and that he had not taken her to see a vet. At 3:15 p.m. Dr. Ennulat arrived. Dr. Ennulat and Ms. Lambiotte, with the defendant's permission, entered the pasture with the defendant. Antonio brought each horse up to be examined. When the chestnut mare, Persian Flame, was offered feed she began heaving, coughed up feed and snorted feed out of her nose. Persian Flame had rain rot over eighty percent of her body and was between 300 and 500 pounds underweight. Ms. Lambiotte testified without objection that it would have taken more than six months for the mare to become so emaciated. The defendant told Ms. Lambiotte that Persian Flame had not been taken to be seen by a vet. Ms. Lambiotte told the defendant that she was going to take Persian Flame. Antonio helped her load Persian Flame onto the Animal Control horse trailer. Persian Flame was taken to the Animal Control shelter.

The next morning Persian Flame was extensively examined. Among other things, it was determined that the abscess under her mouth was caused by a fractured tooth that had not been completely removed. The remainder of the fractured tooth was removed. According to Ms. Lambiotte, it would have taken at least a month to six weeks for the tooth to abscess.

At approximately 9:00 a.m. on 20 April 1991 Ms. Lambiotte was informed by a veterinarian technician that Persian Flame was down in her stall and in distress. Dr. Ennulat, who had also been called, arrived at about 10:15 a.m. and began trauma care. A short while later, the defendant showed up and inquired as to Persian Flame's condition. Dr. Ennulat told Ms. Lambiotte that the horse needed to be euthanized, and Ms. Lambiotte called her director who gave her permission to have the horse euthanized. When Ms. Lambiotte returned she saw Dr. Ennulat and the defendant talking. The defendant said, "I've heard if you kick them in the hip they'll get up." Dr. Ennulat asked the defendant if he agreed that Persian Flame needed to be euthanized. The defendant nodded his head and said, "Yes." Persian Flame was then euthanized, and Ms. Lambiotte arranged for a necropsy, the equivalent of an autopsy, to be performed.

The defendant called three witnesses to testify. Larry Martin testified that the defendant took care of his horses. The defendant then took the stand and testified that he received Persian Flame as a gift. At the time he acquired Persian Flame she was in very poor condition. The defendant testified that he obtained Persian Flame with the intent to "have her foaled." Defendant further testified that Persian Flame did have a foal, and that at that time defendant and Dr. Ennulat, the veterinarian who examined Persian Flame after she foaled, did not find anything wrong with her. In June 1990 the defendant shipped Persian Flame to Florida for the purpose of having her bred. The defendant had obtained the necessary health certificate required by Florida for all horses being transported into or out of state. The defendant also testified that he purchased food for his horses which was given to them.

On cross-examination the defendant testified that when he obtained Persian Flame she was "in decently good condition[,]" but was in a semi-emaciated state. The defendant also testified that Antonio brought him one of the notices that Ms. Lambiotte left

on the fence where the defendant's horses were first located. As a result the defendant called Ms. Lambiotte.

Finally, the defendant called Dr. Darnell Welfare, a veterinarian, to testify. Dr. Welfare testified that he suspected that Persian Flame was kicked in the mouth by another horse causing injury to her tooth, and that septicemia, a bacterial infection usually spread throughout the body by the blood stream, can result if a tooth is not completely removed. Dr. Welfare also testified that if a horse dies with colic, an accumulation of gas in the digestive tract, the colic could be caused by change in diet or the consistency of the diet. According to Dr. Welfare, Persian Flame underwent a change of diet.

From judgment on the verdict, defendant appeals.

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

Michael F. Talley, Fletcher N. Smith, Jr., Charles V. Bell and Charlene Bell-Taylor for the defendant.

EAGLES, Judge.

Defendant raises nine separate arguments on appeal. We find no error.

I

[1] Defendant first argues that the trial court impermissibly sentenced him to the maximum punishment allowable because the defendant gave notice of his intent to appeal and exercised his right to trial by jury. The District Court sentenced the defendant to one year imprisonment, suspended for three years, with a $500 fine. Upon trial *de novo* and conviction in Superior Court, the court fined defendant $1500 and sentenced him to one year imprisonment.

> A defendant's rights are not violated by the imposition of a more severe sentence by the superior court upon trial *de novo* from district court. The imposition of a longer sentence than was given in district court is not an unreasonable condition absent an indication the second sentence was increased to penalize a defendant for exercising his rights. The burden is on the defendant to overcome the presumption that a court

> acted with proper motivation in imposing a more severe sentence.

State v. Daughtry, 61 N.C. App. 320, 324, 300 S.E.2d 719, 721, *disc. review denied and appeal dismissed*, 308 N.C. 388, 302 S.E.2d 253 (1983) (citations omitted).

[2] During the sentencing hearing the trial judge in open court afforded the defendant the opportunity to choose between two different sentences. The first sentence offered would impose a one year prison term, suspended for three years except for ninety days during which the defendant was eligible for work release. It also would place defendant on supervised probation for a three year period which included *inter alia* the following special conditions: (1) that defendant reimburse $1,269.25 for the costs of treating Persian Flame; (2) that defendant provide 200 hours of service to the Charlotte Mecklenburg Animal Control Department; (3) that defendant read books etc. on the care and treatment of horses as assigned by his probation officer; and (4) that he write a fifteen page paper entitled Proper Care, Treatment and Appreciation of Horses. The second sentence offered would impose a one year prison term with a $1,500 fine. After setting out the alternative sentences, the trial judge asked the defendant which sentence he would prefer. The defendant did not respond. The trial judge then asked the defendant:

> I put you on probation under that condition, but if you want me to strike it out and just make it a year, *which is the Court's intention to do that*, I'll be happy to strike the probation part out and just let you go ahead and serve the one year, whichever choice you want; that's up to you.

(Emphasis added). The defendant did not respond to the judge's request. The defendant then conferred privately with his counsel in a conference room. When the defendant returned to the court room, he announced that he wanted to appeal. The trial judge again asked if the defendant would make a choice between the sentence alternatives. Defendant's counsel informed the judge that the defendant did not choose either sentence but instead wanted to serve notice of appeal. The trial judge announced that defendant had rejected probation, and sentenced defendant to the one year active term. He then entered notice of appeal on defendant's behalf.

Defendant argues that the trial judge acted vindictively by imposing the active sentence because he gave notice of appeal and had asked for a trial by jury. We see nothing in the record to support defendant's argument. The record discloses merely that the trial judge offered the defendant alternative sentences which included less active time but also included conditions attached to the probationary period. Defendant failed to accept the probationary sentence with its conditions. Based on the record before us we conclude that the defendant has failed to "overcome the presumption that [the] court acted with proper motivation in imposing a more severe sentence." *Id.* Accordingly, this argument is overruled.

II

[3] Defendant next argues that the trial court erred by denying his motion to suppress all evidence resulting from seizure of Persian Flame. Specifically, defendant argues that department employees allegedly failed to follow the mandates of G.S. § 19A-46, G.S. § 19A-3 and G.S. § 19A-4.

G.S. § 15A-977 requires *inter alia* that all motions to suppress be in writing, be served upon the State and be accompanied by an affidavit containing facts supporting the motion. Here, the trial court specifically denied defendant's motion because it did not comply with the statute's requirements. The trial court ruled:

> THE COURT: All right. Let the record show, first of all, that the motion, not meeting the requirements of Statute 15A 977(a) gives rise to being dismissed summarily by the Court. Therefore the motion to suppress is DENIED.
>
> However, the Court in an effort to expedite the matter after counsel for the defendant has entered a plea of not guilty, the Court did hear evidence and from the evidence will make additional findings in addition to its previous ruling . . . .

Despite the fact that the court heard evidence and made findings, the Court made it clear that the basis for its decision to deny defendant's motion to suppress was defendant's failure to comply with the requirements of G.S. § 15A-977. This was permissible. *See e.g., State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984) (a motion to suppress which is not accompanied by an affidavit is subject to being summarily dismissed.) The record does not disclose precisely which violation of the statute the trial court relied upon,

although it appears that the motion to suppress was oral and appears not to have been accompanied by an affidavit.

III

[4] Defendant next argues that the trial court erred by not providing him and his counsel with a pre-appeal hearing on the defendant's motion for appropriate relief. The trial court summarily dismissed defendant's motion because defendant failed to attach an affidavit to the motion.

N.C.R. App. P. 9 provides, in pertinent part:

> (3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:
>
> * * *
>
> (i) copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in a verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2) . . . .

Here, the record on appeal does not include (1) a copy of defendant's motion for appropriate relief or (2) any supporting documents that might have been filed with that motion. Accordingly, we have no basis on which to review the trial court's summary dismissal of the motion. This assignment is overruled.

IV

[5] By his next assignment defendant claims that the trial court erred by failing to vacate his conviction because there was no showing that he acted willfully. We disagree.

"To be punishable as a violation of G.S. 14-360, the act must first be willful. Willful means more than intentional. It means without just cause, excuse, or justification." *State v. Fowler*, 22 N.C. App. 144, 147, 205 S.E.2d 749, 751 (1974) (citations omitted). "[T]his act does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering, knowingly and wilfully permitted." *State v. Porter*, 112 N.C. 887, 888, 16 S.E. 915, 916 (1893).

Here, the record is replete with evidence from which the jury could find that the defendant acted willfully. For example, Ms.

Lambiotte testified that Persian Flame was 300 to 500 pounds underweight and that it would have taken more than six months for the mare to become so emaciated. Mr. Redfearn testified that he asked the defendant to remove his horses from his pasture several times (more than three or four) because there was not any food in the pasture. Each time the defendant said that he would do it right away. However, defendant ignored Mr. Redfearn's requests. This assignment is without merit.

V

[6] Defendant next argues that the trial court erred by allowing in defendant's post-arrest statements after earlier granting the defendant's motion to suppress post-arrest statements. Specifically, defendant argues it was error for the trial court to admit the following: (1) defendant's statement that he had heard if you kick a horse in the hip it will stand up; (2) that defendant agreed that Persian Flame needed to be euthanized; and (3) defendant's statement that his horses had not been seen by a vet. Based on the record before us we conclude these statements were not the result of an impermissible custodial interrogation in violation of his *Miranda* rights. Moreover, assuming, *arguendo*, that it was error for the trial court to admit the statements, any error was harmless given the overwhelming evidence presented against the defendant. This argument is overruled.

VI

[7] Defendant next argues that the trial court committed reversible error by making remarks adverse to the defendant in front of the jury. Defendant contends the trial court erred by telling the jury that he was speaking loudly because he understood that defense counsel was hard of hearing. Defendant also contends that the trial court erred when it told the jury, after the jury returned to the court room during its deliberations, that "we are waiting for Mr. Bell and his client, Mr. Talley. I do not know where they are. We'll wait for them." Defendant's contentions are without merit.

> [T]he test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury. The effect on the jury of the remark and not the judge's motive in making it, is determinative. Even if it cannot be

> said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice. If so, a new trial must be allowed.

State v. Staley, 292 N.C. 160, 165, 232 S.E.2d 680, 684 (1977) (citations omitted). Here, after careful examination of the record before us, we conclude that the statements made by the trial court were not prejudicial. The record does not reveal a cumulative effect of prejudice resulting from any general tone or trend of hostility or ridicule. This argument is without merit.

VII

[8] By his next argument defendant contends that the trial court erred by failing to allow the jury to see documents requested during its deliberations. The relevant colloquy is quoted below.

> In regard to the second question, may we also see the yellow sheet of paper, vet's certification of health for transportation, from the defendant.
>
> Are you referring, Mr. Foreman, and members of the jury, to Defendant's Exhibit 3 which I hold in my hand?
>
> MR. WILLIAMS: Yes, sir.
>
> THE COURT: Let the record show that Defendant's Exhibit 3 was marked, offered into evidence, was received into evidence. Your request to see that is allowed.

The trial court then instructed the bailiff to give the exhibit to the jury, which he did. After the jury had retired to the jury room to continue their deliberations, the following transpired:

> MR. BELL: We had another paper that was offered into evidence that was marked Defendant's Exhibit Number 2.
>
> THE COURT: Yes, sir, but they did not request that. They referred to a yellow piece of paper. What you have is not yellow, and the jurors indicated what they requested was Exhibit 3 when I asked them.

Defendant argues that "it appears that the jury also wanted to review Defendant's exhibit No. 2 of the health certificate relative to the transportation of defendant's horse, 'Persian Flame,' into the State of Florida which was admitted into evidence. . . ." The

transcript does not support defendant's argument. It is clear that the jury received the document they requested. We hold that the trial court did not abuse its discretion by submitting only Exhibit 3 to the jury. G.S. § 15A-1233.

VIII

[9] Defendant next argues that the trial court erred by failing to consider as mitigating factors, the defendant's honorable discharge from the South Carolina National Guard, his education, his lack of a prior criminal record, his character, his standing in the community and contributions to the community. We note that the offense charged here is a misdemeanor punishable by a maximum term of one year. Accordingly, it is not within the scope of the Fair Sentencing Act. In addition, there is nothing in the record to indicate that the trial court failed to consider these items as mitigating factors. Accordingly, this argument is overruled.

IX

[10] Finally, defendant argues that the trial court erred by failing, *sua sponte*, to disqualify himself due to his own bias against the defendant. We have carefully reviewed defendant's arguments under this assignment and find them to be without merit. *See State v. Vega*, 40 N.C. App. 326, 253 S.E.2d 94, *review denied and appeal dismissed*, 297 N.C. 457, 256 S.E.2d 809, *cert. denied*, 444 U.S. 968, 62 L. Ed. 2d 382 (1979). Accordingly, this argument is overruled.

X

Defendant's remaining assignments have been abandoned pursuant to N.C.R. App. P. 28(b)(5).

No error.

Judges MARTIN and JOHN concur.

JEFFERSON-PILOT LIFE INSURANCE COMPANY, PLAINTIFF-APPELLEE v. ANN L. SPENCER, DEFENDANT-APPELLANT

No. 9221SC178

(Filed 18 May 1993)

1. Unfair Competition § 1 (NCI3d)— life insurance—misrepresentations as to beneficiary—detrimental reliance

Summary judgment was inappropriate where the deceased had two life insurance policies, one with defendant-wife as the beneficiary and the other with his business as the beneficiary; the business had other stockholders; the deceased had inquired about the ownership and beneficiary status of the policies and been told incorrectly that defendant was the beneficiary; plaintiff insurance company filed an action after his death to determine the rights to proceeds of the life insurance policy which listed the company as beneficiary after the husband's death; defendant filed counterclaims for unfair and deceptive practices, among other claims, contending that she would have been the beneficiary of the policy if not for the false information provided by an employee of the insurance company; there was no dispute as to the falsity of plaintiff's representations; and the trial judge granted summary judgment for plaintiff on defendant's counterclaims. N.C.G.S. § 58-63-15(1) provides that making any statement misrepresenting the terms of any policy issued or the benefits or advantages promised thereby is an unfair and deceptive act or practice in the business of insurance and a violation constitutes an unfair or deceptive trade practice as a matter of law. Defendant must show that the representations had the capacity or tendency to deceive and that she suffered actual injury as a proximate result of the misrepresentation. There was no issue of fact as to the ability of defendant's husband to change the beneficiary (the evidence was that he could not because the other shareholders in the company would not have voted for the change) and no issue of fact as to his inability to procure additional insurance after April of 1982, when he was diagnosed with malignant melanoma, but there was an issue of fact as to his financial ability to procure other insurance before 1982 and make other arrangements for defendant's financial well being after his death.

Am Jur 2d, Insurance § 141.

2. Limitations, Repose, and Laches § 48 (NCI4th)— life insurance—beneficiary—erroneous information—unfair practices claim—statute of limitations

Summary judgment should not have been granted for plaintiff on the basis of the statute of limitations on defendant's counterclaim for unfair practices where plaintiff erroneously informed defendant's husband that defendant was the beneficiary of a life insurance policy. The statute of limitations did not begin to run until the husband could no longer make alternative arrangements to provide for defendant; therefore, whether the claim is barred by the statute of limitations is dependent upon the resolution of the factual issue of the husband's financial status from the time of the misrepresentations until his death.

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

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts. 18 ALR4th 1340.

3. Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— life insurance—beneficiary—erroneous statement—constructive fraud—summary judgment

Summary judgment was properly entered for plaintiff insurance company on a counterclaim for constructive fraud arising from erroneous information concerning the beneficiary of a life insurance policy furnished to defendant's husband. Defendant wife failed to present evidence that plaintiff benefited from the misrepresentations or that plaintiff took advantage of its position of trust to hurt herself or her husband.

Am Jur 2d, Fraud and Deceit §§ 423 et seq.

4. Insurance § 945 (NCI4th)— life insurance—beneficiary—erroneous information—negligent misrepresentation

Summary judgment was properly granted for an insurance company on a negligent misrepresentation counterclaim where the insurance company had given defendant's husband erroneous information concerning the beneficiary of his life insurance policy. Although defendant presented evidence that the insurance company in the course of its business failed to exercise care in communicating information to defendant's husband, who

was justified in expecting accurate information, there is no evidence that the insurance company knew the information would be relied upon by defendant or that defendant did in fact rely upon the information to her harm.

Am Jur 2d, Insurance §§ 2009 et seq.

5. Contracts § 118 (NCI4th)— life insurance—beneficiary—erroneous information—breach of contract

Summary judgment was properly granted for plaintiff insurance company as to a breach of contract counterclaim where the insurance company had given erroneous information to defendant's husband concerning the beneficiary of one of his life insurance policies. Defendant was neither a party to the contract nor a third party beneficiary; although she contends that but for the insurance company's misrepresentation she would have been a beneficiary, she did not have the privity necessary to afford her standing to sue on the contract.

Am Jur 2d, Contracts §§ 302-319.

Appeal by defendant from order entered 10 October 1991 by Judge Peter W. Hairston in Forsyth County Superior Court. Heard in the Court of Appeals 1 February 1993.

Bell, Davis & Pitt, P.A., by Stephen M. Russell and D. Anderson Carmen, for plaintiff appellee.

Bowden & Rabil, P.A., by S. Mark Rabil, for defendant appellant.

COZORT, Judge.

Plaintiff insurance company filed an action to determine the rights to proceeds of a life insurance policy. Defendant, the wife of the insured, filed counterclaims grounded in (1) unfair and deceptive trade practices, (2) fraud, (3) negligence and (4) breach of contract, contending she would have been the beneficiary of the policy if not for the providing of false information by an employee of the insurance company to the insured. The trial court granted summary judgment on all of defendant's counterclaims, ruling that the proceeds of the policy be distributed to the insured's business, the designated beneficiary in the policy, and not to his wife, the defendant. We reverse the trial court's granting of summary judgment on the unfair and deceptive trade practice counterclaim and

affirm summary judgment on the remaining counterclaims. The facts follow.

In March 1974, John K. Spencer, Jr., purchased a $100,000 life insurance policy, No. 000832612 (No. 612), from Jefferson-Pilot Life Insurance Company (Jefferson-Pilot). Ann Lanier Spencer, John Spencer's wife, was the beneficiary of the policy. From 1974 to his death on 10 July 1988, John Spencer was the president and manager of a family owned business, Winston Steam Laundry, Inc. (Laundry). Other family members owning stock in the Laundry were John's mother, Kathleen H. Spencer; John's two brothers, C. Huntley Spencer and James Y. Spencer; and his first cousin, William O. Spencer, III. On 21 June 1974, John changed the beneficiary of Policy No. 612 from Ann Spencer to the Laundry. John then transferred ownership of Policy No. 612 to the Laundry on 3 July 1974.

In May 1975, John purchased another life insurance policy from Jefferson-Pilot, Policy No. 861155 (No. 155). John originally designated the Laundry as beneficiary; he changed the beneficiary to Ann Spencer in September 1975. In 1978, Wayne Sykes became the servicing agent for the Jefferson-Pilot policies John purchased. In 1979, John began experiencing health problems and sought a waiver of premium based upon disability. That same year, the Laundry ceased operating because of economic difficulties.

In September 1979, John telephoned Mr. Sykes to inquire about the ownership and beneficiary status of Policies No. 612 and No. 155. Mr. Sykes contacted the home office of the insurance company and requested the information. On 18 September 1979, Jefferson-Pilot responded by memorandum to Mr. Sykes' inquiry and stated incorrectly that "[t]he beneficiary for Policy Number 832612 is Ann Lanier Spencer, wife of the Insured if living; otherwise the surviving lawful children of the Insured, share and share alike." Mr. Sykes then relayed the incorrect information to John.

Two years later, in January 1981, John again inquired as to the ownership and beneficiary status of Policy No. 612. Mr. Sykes again sought the information from the home office. On 22 January 1981, Jefferson-Pilot again responded incorrectly that Ann Spencer was the beneficiary of the policy. The incorrect information was relayed to John. In June 1981, Jefferson-Pilot denied John's application of waiver of premium; it later reversed that decision in December 1981. John suffered a stroke in December 1982. While he was in

the hospital recovering from the stroke, John told Ann, "I have two life insurance policies. . . . Don't forget to look into it. . . . They are one hundred thousand dollars each." At some later date when John was again hospitalized, he told Ann in the presence of at least two of their children, "Don't forget that there are two insurance policies." On 23 June 1983, Jefferson-Pilot informed William Spencer, III, John's cousin and a Laundry shareholder, that the Laundry was the beneficiary of Policy No. 612. John died in July 1988.

On 16 November 1990, Jefferson-Pilot filed interpleader and declaratory judgment actions to determine the rights of Ann Spencer and the Laundry to the proceeds of Policy No. 612. Proceeds from Policy No. 155 were paid to Ann Spencer and Policy No. 155 is not at issue in this case. Ann Spencer filed an answer and counterclaims against Jefferson-Pilot and Sykes alleging (1) unfair and deceptive trade practices, (2) fraud, (3) negligence, and (4) breach of contract. Jefferson-Pilot and the Laundry moved for summary judgment. Judge Peter Hairston granted the motions for summary judgment, allowed the interpleader action, and ordered payment of the policy proceeds to the clerk of court for distribution to the Laundry. Defendant Ann Spencer appeals.

Summary judgment is appropriate if there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990). If the moving party presents evidence to negate an essential element of a claim, the non-moving party may not rest upon the allegations or denials in her pleadings, but must affirmatively take steps to show that there is a genuine issue for trial. If the non-moving party fails to meet her burden, summary judgment is proper. *Id.*

[1] On appeal, defendant Ann Spencer argues that the trial court erred in granting summary judgment because there were genuine issues of material fact as to each of her claims. We address defendant's unfair or deceptive trade practice claim first. Specifically, defendant argues that Jefferson-Pilot's misrepresentations to John that she was the beneficiary of Policy No. 612 constituted an unfair or deceptive trade practice. N.C. Gen. Stat. § 58-63-15(1) (1991) provides that "[m]aking . . . any . . . statement misrepresenting the terms of any policy issued . . . or the benefits or advantages promised thereby" is an unfair and deceptive act or practice in the business of insurance. A violation of § 58-63-15 as a matter of law constitutes an unfair and deceptive trade practice in violation

of N.C. Gen. Stat. § 75-1.1 (1988). *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986). To avoid summary judgment, defendant must show (1) that the representations made by Jefferson-Pilot had the capacity or tendency to deceive; and (2) that she suffered actual injury as a proximate result of Jefferson-Pilot's misrepresentation. *Id.* at 470-71, 343 S.E.2d at 180. Defendant need not show that the statements were made with the intent to deceive. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

Since there is no dispute between the parties as to the falsity of Jefferson-Pilot's representations, we must focus on the element of reliance. This Court addressed a similar factual situation in *Pearce*, in which the wife of a deceased United States Air Force pilot sued the American Defender Life Insurance Company alleging unfair trade practices, breach of contract, breach of fiduciary duty, negligence, fraud, and breach of duty to investigate claims in a fair and equitable manner. After her husband's death in 1979, American Defender paid plaintiff the proceeds of a $20,000 life insurance policy purchased in 1968. The company refused to pay proceeds under a $40,000 accidental death rider because the rider excluded coverage for death occurring while the insured was a member of an aircraft flight crew. The trial court granted American Defender's motion to dismiss; the Court of Appeals vacated and remanded the action. *Pearce*, 316 N.C. at 465, 343 S.E.2d at 177 (citing *Pearce v. American Defender Life Ins. Co.*, 62 N.C. App. 661, 303 S.E.2d 608 (1983)).

On remand, plaintiff presented evidence that in response to her husband's coverage inquiry in 1971, American Defender stated that the basic policy was "in full force and effect regardless of [his] occupation," and that the accidental death rider would be in force if his death occurred while he was in the Armed Forces, but not as a result of an act of war. *Id.* at 463-64, 343 S.E.2d at 176. Plaintiff further presented evidence of a conversation with her husband in which he stated to her that "he knew he was covered, and that while he was on flying status the accidental death, or . . . double indemnity, was in effect, and that [she] didn't need to worry about it." *Id.* at 471-72, 343 S.E.2d at 180. In the same conversation, plaintiff's husband stated that "he had inquired about it when he went on to flying status, and he had been made aware by the company, he had checked into it and that he was

covered." *Id.* at 472, 343 S.E.2d at 180. At the close of plaintiff's evidence, the trial court directed verdict for the defendant on the fraud and unfair trade practices claims. The jury found coverage under the accidental death rider, but the trial court allowed American Defender's motion for judgment notwithstanding the verdict, and this Court affirmed. *Id.* at 465, 343 S.E.2d at 177 (citing *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9 (1985)).

On appeal, the North Carolina Supreme Court considered only the breach of contract, fraud, and unfair trade practice claims. The Court found insufficient evidence to support the first two claims. As to the unfair trade practices claim, the Court reversed, finding that plaintiff had presented sufficient evidence of a deceptive statement made by the defendant, detrimentally relied upon by plaintiff's husband, and proximately causing injury to plaintiff. The Court rejected defendant's contention that the above noted conversation between plaintiff and her husband was hearsay, reasoning that the deceased's state of mind, his belief as to the extent of his life insurance coverage, and the basis of that belief were "directly pertinent to the question of his reliance upon defendant's misrepresentation." *Id.* at 472, 343 S.E.2d at 181. The Court noted that even though all life insurance policies available contained similar aviation exclusion clauses, that fact did not preclude the possibility of the insured's detrimental reliance because "[h]ad he known that his widow would receive only $20,000 in benefits rather than the $60,000 she alleges was his belief, he might have purchased additional basic coverage or made other arrangements to provide for her financial security after his death." *Id.* n.1.

Relying upon *Pearce*, defendant contends that she presented sufficient evidence to show that John Spencer detrimentally relied upon Jefferson-Pilot's statements. Defendant presented evidence that her husband had twice inquired as to the ownership and beneficiary status of two life insurance policies which he had purchased in 1974 and 1975. Jefferson-Pilot falsely represented to him in September 1979 and January 1981 that Ann Spencer was the beneficiary of Policy No. 612. On two separate occasions when he was hospitalized, John Spencer told his wife that he had two $100,000 life insurance policies and not to forget about them. John Spencer died apparently believing his wife was the beneficiary of both policies. He took no further action to provide for her financial well-being.

In oral argument before this Court, plaintiff contended that summary judgment was appropriate because defendant had not met her burden of showing detrimental reliance, contending she had not presented evidence of John's ability after the misrepresentations to change the beneficiary of Policy No. 612, obtain other life insurance, or to provide other means of financial security. We must review the evidence relating to each of John's options.

First, we consider the evidence as to John's ability to change the beneficiary of Policy No. 612 from the Laundry to his wife. Although defendant argues that John could have attempted to obtain the consent of other shareholders in the Laundry to change the beneficiary, she presents no evidence in support of her proposition. The fact that John had power of attorney for his mother from October 1967 to July 1982 is not evidence that he could have convinced her to change the beneficiary designation. Plaintiff, however, presented affidavits from each of the other Laundry shareholders that he or she would not have voted to change the beneficiary from the Laundry to defendant.

Next, we consider John's ability to obtain other insurance. The first inquiry is whether John was insurable. Defendant presented evidence that John could have obtained life insurance from September 1979 until approximately April 1982 when he was diagnosed with malignant melanoma. Defendant presented no evidence concerning John's insurability after April 1982. Plaintiff presented evidence that John could not have obtained a standard life insurance policy in 1979 or 1981; he may have been able to obtain insurance at premiums 50%-200% higher than the standard premium rate; in 1982, Jefferson-Pilot and other carriers would not have issued insurance to an applicant diagnosed with malignant melanoma; in 1983, Jefferson-Pilot and other carriers would not have issued insurance to an applicant who had suffered a stroke; and in 1984, Jefferson-Pilot and other carriers would not have issued insurance to an applicant diagnosed with renal cell carcinoma.

The second inquiry is whether John had the financial ability to obtain additional insurance before 1982. Defendant's deposition contains the only evidence of John's financial status. In her deposition, Mrs. Spencer stated that she knew very little about her husband's financial affairs, that he had not received income from the corporation since 1979, that he owned some stock, that he received social security and disability income, and that he may have applied for

some loans from Wachovia Bank, but she did not have the records and did not know any amounts of loans. She stated that she started to borrow money from her mother during the last two years the Laundry was in operation, but could not state the amount she received. She intended to repay the loans, but her mother died and "[o]f course, I had to support and look after John Kerr all those years and there was a tremendous medical." She also stated that from 1982 to 1986, she was living on funds loaned to her by her mother.

Finally, we consider John's financial ability to make other arrangements for defendant's financial well-being after his death. Defendant's deposition testimony summarized above is the only evidence relating to John's third option. Plaintiff presented no additional evidence.

Reviewing the evidence, we find no issue of fact as to John's ability to change the beneficiary of Policy No. 612 and no issue of fact as to John's ability to procure additional insurance after April 1982. We do find a genuine issue of material fact as to John's financial ability to (1) procure other insurance before 1982 and (2) make other arrangements for defendant's financial well-being after his death. The factual issue of John's financial status must be resolved before judgment can be rendered for either party. Neither party, however, has presented sufficient evidence to resolve the issue. Accordingly, we find summary judgment inappropriate and reverse and remand for resolution of the issue of John's financial status from 1979 until his death.

[2] We next consider plaintiff's argument that defendant's unfair trade practice claim, based upon a violation of N.C. Gen. Stat. § 58-63-15(1), is barred by the statute of limitations. N.C. Gen. Stat. § 75-16.2 (1988) provides that "[a]ny civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." We must determine, then, when defendant's cause of action accrued. Our research revealed no North Carolina cases addressing the issue of accrual of an unfair trade practices claim based upon a violation of N.C. Gen. Stat. § 58-63-15(1). In North Carolina, " 'an action accrues at the time of the invasion of plaintiff's right.' " *Nash v. Motorola Com. & Electronics*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991) (quoting *Rothmans Tobacco Co., Ltd. v. Liggett Group, Inc.*, 770

F.2d 1246, 1249 (4th Cir. 1985)). We find that in the case below the statute of limitations did not begin to run until John could no longer make alternative financial arrangements to provide for defendant. Whether defendant's claim is barred by the statute of limitations, then, is dependent upon the resolution of the factual issue of John's financial status from the time of the misrepresentations until his death. Summary judgment on the basis of the statute of limitations was error.

We now turn our attention to defendant's claims of fraud, constructive fraud, negligence, and breach of contract. Since defendant failed to address the fraud claim in her brief, her appeal as to that issue is deemed abandoned. *See* N.C.R. App. P. 28(5). As to her remaining claims, we note first that defendant asserts the claims in her own right, not in a representative capacity for her husband. Second, we note that defendant was not the designated beneficiary of Policy No. 612.

[3] In *Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. 110, 115-16, 343 S.E.2d 879, 884 (1986) (citations omitted), the North Carolina Supreme Court summarized the law pertaining to constructive fraud as follows:

> Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less "exacting" than that required for actual fraud. When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. "This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so." The superior party may rebut the presumption by showing, for example, "that the confidence reposed in him was not abused, but that the other party acted on independent advice." Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.
>
> In stating a cause of action for constructive fraud, the plaintiff must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of [defendant.]"

Although defendant has presented evidence of a fiduciary duty owed by Jefferson-Pilot to John, the insured, *see R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983), she has failed to present evidence that Jefferson-Pilot benefited from the misrepresentations or that Jefferson-Pilot took advantage of its position of trust to hurt John or her. Therefore, summary judgment was proper as to defendant's constructive fraud claim.

[4] Defendant also alleged that she was proximately injured by Jefferson-Pilot's negligent misrepresentation. Our research revealed no North Carolina cases directly on point. In one of the first North Carolina cases recognizing an action for negligent advice, *Bradley Freight Lines, Inc. v. Pope, Flynn & Co., Inc.*, 42 N.C. App. 285, 291, 256 S.E.2d 522, 525, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 299 (1979), this Court stated that "[c]ases from other jurisdictions characterize a cause of action for negligent advice as one for negligent misrepresentation." Although *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), addressed the liability of *accountants* for negligent misrepresentation, we find the principles set forth in that case equally applicable to the case below. The North Carolina Supreme Court adopted the following definition of negligent misrepresentation:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. at 209, 367 S.E.2d at 614 (quoting Restatement (Second) of Torts § 552 (1977)). The Court reasoned that the approach

> recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely. On the other hand, as the commentary makes clear, it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." . . .
>
> . . . The Restatement's text does not demand that the accountant be informed by the client himself of the audit report's intended use. The text requires only that the auditor *know* that his client intends to supply information to another person or limited group of persons. Whether the auditor acquires this knowledge from his client or elsewhere should make no difference. If he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.

Id. at 214-15, 367 S.E.2d at 617-18. Applying the above principles, we find that defendant has failed to raise a genuine issue of material fact as to her claim for negligent misrepresentation. Although defendant presented evidence that Jefferson-Pilot in the course of its business failed to exercise care in communicating information to John, who was justified in expecting accurate information, there is no evidence that Jefferson-Pilot knew the information would be relied upon by defendant or that defendant did in fact rely upon the information to her harm. Therefore, summary judgment was proper as to defendant's negligent misrepresentation claim.

[5] To assert a claim for breach of contract, defendant must be either a party to the contract or a third-party beneficiary. *See Barber v. Woodmen of the World Life Insurance Society*, 88 N.C. App. 666, 672, 364 S.E.2d 715, 719 (1988), *appeal after remand*, 95 N.C. App. 340, 382 S.E.2d 830 (1989), *disc. review denied*, 326 N.C. 363, 389 S.E.2d 820 (1990). In the case below, defendant was neither. Although defendant contends that but for Jefferson-Pilot's misrepresentation she would have been a beneficiary, we cannot find the privity necessary to afford her standing to sue on the contract. Accordingly, we find that defendant is not a proper party

to assert a breach of contract claim, and summary judgment as to that claim must be affirmed.

The judgment below is reversed and the cause remanded as to the unfair trade practices claim. Summary judgment is affirmed as to defendant's remaining counterclaims.

Reversed in part and remanded; affirmed in part.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. GEORGE WILLS

No. 916SC1019

(Filed 18 May 1993)

1. Assault and Battery § 100 (NCI4th)— self-defense—insufficiency of evidence

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in refusing to instruct the jury on self-defense where the evidence tended to show that the unarmed victim, who was six feet from defendant, walked toward defendant immediately prior to the shooting; defendant admitted that he had never seen the victim with a weapon of any kind and that he could have avoided the scene of the crime by continuing to walk along the highway; defendant shot the victim at least five or six times even after he had fallen to the ground after the first two shots; and evidence that the victim had punched defendant two days earlier and had threatened to assault defendant earlier during the day of the shooting was not sufficient to show that at the time of the shooting defendant was in actual or apparent danger of death or great bodily harm.

Am Jur 2d, Assault and Battery §§ 100, 195.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

2. Evidence and Witnesses § 2917 (NCI4th)— prior shooting of defendant—evidence offered by defendant—State's cross-examination proper

There was no merit to defendant's contention that the State's cross-examination of him and his witness regarding the events surrounding defendant's gunshot wound from two weeks earlier was an attempt to impeach both defendant and his witness as persons of bad, violent character in violation of N.C.R. Evid. 608(b), since, by introducing evidence of his own gunshot wound in his attempt to establish self-defense, defendant opened the door for the State's cross-examination concerning the events immediately surrounding defendant's gunshot wound, and the State's inquiry was a proper attempt to explain, explore, or rebut defendant's proffered evidence.

Am Jur 2d, Witnesses §§ 808, 835, 838, 865.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern cases. 13 ALR4th 796.

3. Criminal Law § 756 (NCI4th)— reasonable doubt—instructions proper

The trial court's instructions on reasonable doubt that it "means exactly what it says" and that reasonable doubt was "one based on reason and common sense reasonably arising out of some or all of the evidence that has been presented or the lack of or insufficiency of that evidence as the case may be" was proper, even though the better practice is to follow the pattern jury instructions on reasonable doubt.

Am Jur 2d, Evidence § 1171; Trial §§ 1168-1175, 1371.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

4. Criminal Law § 1242 (NCI4th)— strong provocation—mitigating factor not established by uncontradicted evidence

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to find as a statutory mitigating factor that defendant acted under strong provocation, since there was a lapse of time between the previous encounter

between defendant and the victim and this shooting, there was no weapon on the victim's person at the time of the shooting, and uncontradicted evidence of strong provocation therefore did not exist. N.C.G.S. § 15A-1340.4(a)(2)i.

Am Jur 2d, Assault and Battery §§ 61, 77, 96.

Withdrawal, after provocation of conflict, as reviving right of self-defense. 55 ALR3d 1000.

Appeal by defendant from judgment signed 9 May 1991 by Judge Howard R. Greeson, Jr., in Halifax County Superior Court. Heard in the Court of Appeals 12 January 1993.

On 9 May 1991, defendant was sentenced to the maximum term of twenty years imprisonment after a jury found him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. G.S. 14-32(a). Defendant admitted shooting the victim, Stephen Whitaker, but asserted the defense of self-defense. Defendant appeals.

The State's evidence tended to show the following: On 25 September 1990 at approximately 5:00 p.m., Mr. Whitaker and his wife, Yvette Whitaker, were arguing. Mrs. Whitaker drove away in her car. Mr. Whitaker followed in a separate car and eventually drove in front of Mrs. Whitaker's car, causing her to stop. Mr. Whitaker walked over to her car and they continued their argument. Defendant and Dalerick "Cakey" Pittman approached the Whitakers on foot. Defendant then pulled a H & R .22 caliber nine shot revolver from his pants. Mr. Whitaker did not have a weapon. Mrs. Whitaker saw defendant and stated, "George, no." Standing approximately six feet from Mr. Whitaker, defendant shot Mr. Whitaker several times and then threw the revolver into some bushes as he ran away.

On 27 September 1990, defendant was taken into custody. Defendant gave a statement in which he stated that he (defendant) had been shot in the neck during an argument with another man approximately two weeks before he shot Mr. Whitaker. Additionally, defendant's statement read as follows:

I have had about four encounters with Yvette's husband, Steve Whitaker, recently. The latest one was Tuesday, September the 25th, 1990 about 2 p.m. Steve [Mr. Whitaker] passed me on [sic] a car as I walked up 301 Highway. He [Mr. Whitaker] yelled, "I'm going to beat your ass if I see you up the street."

> The Sunday before this Steve [Mr. Whitaker] had hit me several times with his fist. I didn't try to fight. Dalerick Pittman who was with me then got him off of me.
>
> Later Tuesday afternoon, September the 25th, 1990 I saw Steve [Mr. Whitaker] chasing Yvette [Mrs. Whitaker] on [sic] his car. He slid his car in front of Yvette's so she would have to stop. He got out of his car and walked up to Yvette's car window. When they passed me it was at Bell and McDaniel Streets. By the time he could stop her they were one block west of me at Bell and Railroad Street. Dalerick "Cakey" Pittman was walking with me. We had just bought some food at SKATS Restaurant. Cakey and I ran up the street toward Steve [Mr. Whitaker]. I handed Cakey a bag with my food in it. I then pulled out a .22 caliber nine shot pistol from my pants. I walked up to Steve Whitaker and asked him why had he done this to me. He said, "Because I will do what I want to do." I raised the pistol and fired at least nine times at Steve Whitaker. I knew I hit him because he fell back against the car and then to the ground.

Defendant's evidence tended to show the following: Mr. Pittman testified *inter alia* that a "few days before" the 25 September 1990 shooting, a fight between the two men started when Mr. Whitaker told defendant that he (defendant) had been warned about "messing" with his (Mr. Whitaker's) wife and that he (Mr. Whitaker) was going to "kick [defendant's] tail." At trial, defendant testified that around noon on the day of the offense charged (25 September 1990), Mr. Whitaker drove by defendant and threatened to beat him (defendant) if he was seen on the street. Defendant testified that later that afternoon after he (defendant) pulled the revolver from his pants Mr. Whitaker stated, " 'I see the gun and you better use it or else.' " Defendant testified that Mr. Whitaker stated that he fought defendant previously because he (Mr. Whitaker) wanted to and because he (Mr. Whitaker) was "grown." Defendant testified that he only intended to "scare" Mr. Whitaker with the revolver "so he [Mr. Whitaker] would leave" but that he (defendant) "just panicked because I was afraid of what he would do to me" and began shooting. Defendant testified that he was afraid of Mr. Whitaker because Mr. Whitaker was bigger than he and because Mr. Whitaker had already beaten him once before. Defendant further testified that he carried the revolver "for protection" because

he did not think that he could defend himself considering his physical condition, having been shot by another man two weeks earlier.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Melissa L. Trippe, for the State.

Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant brings forward six assignments of error. After a careful review of the record, transcripts, and briefs, we find no error. Defendant's assignments of error, Nos. 1, 2, 3, 5, 8, 11, and 12, are not brought forward and are deemed abandoned. N.C.R. App. P. 28(b)(5).

I.

[1] First, defendant contends that the trial court erred in refusing to instruct the jury on self-defense. We disagree.

In *State v. Kinney*, 92 N.C. App. 671, 675-76, 375 S.E.2d 692, 695 (1989), this Court stated:

> A defendant may use deadly force to repel a felonious assault only if it reasonably appears necessary to protect himself from death or great bodily harm. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986). However, a defendant may not use deadly force to protect himself from mere bodily harm or offensive physical contact and use of deadly force to prevent harm other than death or great bodily harm is excessive as a matter of law. *Id.* An assault with intent to kill is justified under self-defense if a defendant is in actual or apparent danger of death or great bodily harm. *State v. Dial*, 38 N.C. App. 529, 248 S.E.2d 366 (1978).
>
> A self-defense instruction is required if any evidence is presented from which it can be determined that it was necessary or reasonably appeared necessary for a defendant to kill the victim to protect himself from death or great bodily harm. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982). It is for the trial court to determine in the first instance whether as a matter of law there is evidence to require a self-defense instruction. *Id.* The court must consider the evidence in the light most favorable to the defendant and where there is

evidence of self-defense, the court must give the instruction even if there are discrepancies or contradictions in the evidence. *State v. Blackmon*, 38 N.C. App. 620, 248 S.E.2d 456 (1978), *disc. rev. denied*, 296 N.C. 412, 251 S.E.2d 471 (1979); *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974).

To merit a self-defense instruction, two questions must be answered in the affirmative: "(1) Is there evidence that the defendant in fact formed a belief that it was necessary to *kill* his adversary in order to protect himself from death or great bodily harm, and (2) if so, was the belief reasonable?" *Bush*, 307 N.C. at 160, 297 S.E.2d at 569. (Emphasis added.) If the answer to either question is "no" then a self-defense instruction is not required. *Id.*

The facts and circumstances surrounding the assault and not a defendant's stated belief are the determinative factors as to whether a defendant acted as an aggressor or in his own defense. *State v. Randolph*, 228 N.C. 228, 45 S.E.2d 132 (1947).

Here, the facts and circumstances do not warrant a self-defense instruction because there is no evidence "from which it can be determined that it was necessary or reasonably appeared necessary for [this] defendant to kill the victim [Mr. Whitaker] to protect himself from death or great bodily harm." *Kinney*, 92 N.C. App. at 675, 375 S.E.2d at 695. Defendant's own testimony taken in the light most favorable to him indicates only that Mr. Whitaker "walk[ed]" towards him immediately prior to the shooting. No other witness testified that Mr. Whitaker moved towards defendant. The State's evidence presented at trial tended to show that at the time Mr. Whitaker was shot, Mr. Whitaker did not have a weapon and had not attempted to strike defendant, who was approximately six feet away. Upon cross-examination, defendant admitted that he had *never* seen Mr. Whitaker with a weapon of any type at any time. Defendant admitted that he (defendant) "could have kept walking up [Highway] 301" and could have avoided the scene of the Whitakers' argument where he eventually shot Mr. Whitaker. "In order for a defendant to be free from fault in causing the attack, he must not have provoked the affray by seeking out his victim." *State v. Lovell*, 93 N.C. App. 726, 728, 379 S.E.2d 101, 103 (1989) (citing *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979) and *State v. Brooks*, 37 N.C. App. 206, 245 S.E.2d 564 (1978)).

The evidence also showed that defendant shot Mr. Whitaker at least five or six times and continued to shoot Mr. Whitaker even after he had fallen to the ground after the first two shots.

Defendant's evidence that Mr. Whitaker had punched defendant two days earlier and had threatened to assault defendant earlier during the day of the shooting is not sufficient "to show that at the time of the shooting defendant was in actual or apparent danger of death or great bodily harm." *Kinney*, 92 N.C. App. at 676, 375 S.E.2d at 695 (victim's past physical abuse of defendant and victim's threat to beat defendant thirty minutes before shooting not sufficient to warrant self-defense instruction); *Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986). Nor are defendant's self-serving statements that he "was scared" and "was afraid that he [Mr. Whitaker] would try to do something to me" an adequate basis for an instruction on self-defense. "[T]hese self-serving statements do no more than indicate merely some vague and unspecified nervousness or fear; they do not amount to evidence that the defendant had formed any subjective belief that it was necessary to kill the [victim] in order to save himself from *death* or *great bodily harm.*" *Bush*, 307 N.C. 152, 159-60, 297 S.E.2d 563, 568 (1982) (emphasis in original). This assignment of error fails.

II.

In his next three assignments of error, defendant argues that he was "deprived of his right to a fair trial by the trial court's failure to prevent cross-examination of the defendant and his witness [Mr. Pittman] designed to suggest that the defendant was a person of bad character and by the prosecutor's persistence in posing questions that implied prejudicial facts without regard to the witness' answers." We find no error.

[2] Defendant contends that the State's cross-examination of defendant and his witness, Mr. Pittman, regarding "[t]he events surrounding the defendant's gunshot wound . . . . was clearly an improper attempt to impeach both the defendant and Pittman as persons of bad, violent character" in violation of N.C.R. Evid. 608(b). We disagree. Through the testimony of two witnesses, *defendant* introduced evidence of the gunshot wound he had suffered two weeks earlier during an incident at which Mr. Pittman was present. In his brief, defendant admits that this evidence was introduced in an attempt to show "why he was in fear of serious bodily

injury from Stephen Whitaker at the time of the shooting [of Mr. Whitaker]." Our Supreme Court has stated:

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Leroux, 326 N.C. 368, 383, 390 S.E.2d 314, 324, *cert. denied*, 498 U.S. 871, 112 L.Ed.2d 155 (1990) (*quoting State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). Accordingly, by introducing evidence of his own gunshot wound in his attempt to establish self-defense, defendant opened the door for the State's cross-examination concerning the events immediately surrounding defendant's gunshot wound.

The State's inquiry regarding the prior shooting of defendant was a proper attempt to explain, explore, or rebut defendant's proffered evidence. *Leroux*, 326 N.C. 368, 390 S.E.2d 314. During the State's cross-examination, defendant admitted *inter alia* he carried a revolver because of his fear of the man (not Mr. Whitaker) who shot him two weeks earlier. This admission helped to negate defendant's assertion of self-defense by rebutting defendant's earlier claim that he carried a revolver because of his fear of Mr. Whitaker. Even if the trial court may have erred by not sustaining defendant's objections to the form of the State's questions or to the admission of the subsequent testimony, it was harmless error. The evidence against the defendant is so overwhelming that we are not convinced that "had the error in question not been committed, a different result would have been reached at the trial." G.S. 15A-1443(a).

III.

[3] Defendant contends that the trial court's instruction defining reasonable doubt was improper and warrants a new trial. We disagree.

Defendant requested the pattern jury instruction for reasonable doubt, N.C.P.I.—Crim. 101.10, and additional language from *State v. Riera*, 276 N.C. 361, 367, 172 S.E.2d 535, 539 (1970). The trial court denied defendant's request and gave the jury the following charge:

> Now a reasonable doubt, members of the jury, means exactly what it says. It's not a mere, possible, academic, or a forced doubt because there are few things in human experience which are beyond a shadow of a doubt or beyond all doubt, nor is it a doubt suggested by the ingenuity of counsel, or even by your ingenuity of mind not legitimately warranted by the evidence and the testimony here in this case.
>
> Your reason and your common sense should tell you that a doubt wouldn't be reasonable if it were founded upon or suggested by any of these type of considerations. A reasonable doubt is a sane sensible doubt, an honest substantial misgiving, one based on reason and common sense reasonably arising out of some or all of the evidence that has been presented or the lack of or insufficiency of that evidence as the case may be. Proof beyond a reasonable doubt is such proof that fully satisfies or entirely convinces you of the defendant's guilt.

Defendant argues that the above instruction constituted reversible error, thus entitling him to a new trial based upon the United States Supreme Court's decision in *Cage v. Louisiana*, 498 U.S. 39, 112 L.Ed.2d 339 (1990). In *Cage*, 498 U.S. at 40-41, 112 L.Ed.2d at 341-42, the United States Supreme Court noted the Louisiana trial court's instruction and commented as follows:

> The instruction provided in relevant part:
>
> > "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or

> mathematical certainty, but a *moral certainty*. State v. Cage, 554 So 2d 39, 41 (La 1989) (emphasis added).
>
> . . . .
>
> . . . The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

We find that the charge given in *Cage, supra,* is sufficiently distinguishable from the charge given here so as not to justify a new trial. *See Hudson,* 331 N.C. 122, 142, 415 S.E.2d 732, 742, *cert. denied,* --- U.S. ---, 122 L.Ed.2d 136, *rehr'g denied,* --- U.S. ---, 122 L.Ed.2d 776 (1992) (holding that trial court did not err in giving instruction that used the term "honest, substantial misgiving" but did not use "the combination of the terms found offensive by the *Cage* Court"); *State v. Montgomery,* 331 N.C. 559, 572, 417 S.E.2d 742, 749 (1992) (discussing the holding in *Hudson,* 331 N.C. 122, 415 S.E.2d 732, and stating that the instruction in *Hudson* "did not equate reasonable doubt with a 'moral certainty' "); *Estelle v. McGuire,* 502 U.S. ---, ---, 116 L.Ed.2d 385, 399 & n.4 (1991) (setting forth the standard of review as being " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."). In the present case, reasonable doubt was not equated with a "grave uncertainty" or "actual substantial doubt" as in *Cage, supra.* In fact, here the trial court told the jury that "reasonable doubt . . . means exactly what it says." "[W]e repeat what this Court has said a number of times, 'The words "reasonable doubt" in themselves, are about as near self-explanatory as any explanation that can be made of them.' *State v. Wilcox,* 132 N.C. 1120, 1137, 44 S.E. 625, 631 (1903); *State v. Phillip,* 261 N.C. 263, 269, 134

S.E.2d 386, 391 (1964)." *State v. Ward*, 286 N.C. 304, 310, 210 S.E.2d 407, 412 (1974), *death sentence vacated*, 428 U.S. 903, 49 L.Ed.2d 1207 (1976).

Here, the trial court instructed the jury regarding the requirement of finding defendant's guilt based upon an evidentiary certainty rather than by a mere "moral certainty" as in *Cage*, *supra*. *See Montgomery*, 331 at 573, 417 S.E.2d at 750 (holding that trial court's reasonable doubt instruction violated the requirements of the Due Process Clause as interpreted in *Cage* where the trial court "joined its definition of a reasonable doubt as an 'honest, substantial misgiving' with a requirement that to convict the jury must be convinced to a 'moral certainty,' rather than to evidentiary certainty"). Furthermore, here the trial court stated that reasonable doubt was "one based on *reason* and common sense *reasonably* arising out of some or all of the *evidence* that has been presented or the lack of or insufficiency of that *evidence* as the case may be." (Emphasis added.) Accordingly, this assignment of error is overruled. Even so, we recommend the use of the pattern jury instruction on reasonable doubt. N.C.P.I.—Crim. 101.10. *See State v. Rogers*, 316 N.C. 203, 218, 341 S.E.2d 713, 722 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988) (the North Carolina Pattern Jury Instructions for Criminal Cases adopt "the definition [of reasonable doubt] developed in our case law").

IV.

[4] Finally, defendant contends that "the trial court erred in failing to find a statutory mitigating factor established by uncontradicted evidence." We find no error.

Defendant contends that the trial court erred by not finding as a statutory mitigating factor pursuant to G.S. § 15A-1340.4(a)(2)(i) that "defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating, based on the evidence at trial of Whitaker's prior confrontations with the defendant and his prior assault of the defendant at a time when he knew that the defendant was injured and still recovering from a gunshot wound." "The trial court's failure to find a mitigating factor will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Foster*, 101 N.C. App. 153, 159, 398 S.E.2d 664, 668 (1990) (*citing State v. Lane*,

77 N.C. App. 741, 336 S.E.2d 410 (1985)). Given the lapse of time between the previous encounter between defendant and Mr. Whitaker and the time of the shooting and given the absence of any weapon on Mr. Whitaker's person at the time of the shooting, we conclude that uncontradicted evidence of strong provocation does not exist. *See State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628, *disc. review denied*, 314 N.C. 119, 332 S.E.2d 486 (1985). Accordingly, this assignment of error fails.

V.

For the reasons stated, we find no error.

No error.

Judges ORR and WYNN concur.

STATE OF NORTH CAROLINA v. MOHAMMED JOMAL THOMPSON

No. 9215SC521

(Filed 18 May 1993)

1. Evidence and Witnesses § 437 (NCI4th)— in-court identification of defendant—no improper photographic identification—no taint from newspaper photograph

A robbery victim's pretrial photographic identification of defendant was not impermissibly suggestive because of the victim's out-of-court exposure to a newspaper article and photograph of defendant, and the trial court did not err in denying defendant's motion to suppress the photographic and in-court identifications, where the evidence tended to establish that all of the photographs shown to the witness in the photographic lineup were in color and all were pictures of black males with similar pigment, age, and physical stature; each male had a similar style of hair and a mustache; the pictures were all stapled together, no names were written on them, and no suggestions were made to the victim as to which photograph to choose; and although the victim had seen defendant's photograph in the newspaper prior to the photographic lineup, she testified on voir dire that her iden-

tification of the photograph was not based on having seen the newspaper picture of defendant. Furthermore, the victim's positive unequivocal identification of defendant as the perpetrator of the crime less than one year after the robbery alleviated any question as to the reliability of the in-court identification as being tainted by the pretrial identification procedures.

Am Jur 2d, Evidence §§ 371-373.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures. 39 ALR3d 1000.

2. Evidence and Witnesses § 2750.1 (NCI4th)— probation officer called to give identification testimony—defendant's opening of door to other testimony

By eliciting testimony that a probation officer's relationship with defendant was a "professional" one, the defense opened the door to questions about the nature of such relationship, even though defendant initially called the probation officer only to verify information about defendant's height, weight, and physical appearance at the time of the crime.

Am Jur 2d, Evidence §§ 336 et seq.

3. Robbery § 4.3 (NCI3d)— armed robbery—sufficiency of evidence

Evidence was sufficient to permit a reasonable inference of defendant's guilt of armed robbery and to take the case to the jury, even though the only eyewitness gave prior inconsistent descriptions of defendant, where the witness positively identified defendant as the man who robbed her with a shotgun both at trial and at the lineup, and all the other elements of armed robbery were supported by ample uncontroverted evidence.

Am Jur 2d, Robbery § 64.

4. Criminal Law § 425 (NCI4th)— defendant's failure to produce rebuttal or alibi evidence—no impermissible comment on failure to take stand

There was no merit to defendant's contention that the trial court erred in failing to sustain defendant's objection to the prosecutor's comments about defendant's failure to testify, since the prosecutor spoke about defendant's failure to offer

rebuttal or alibi evidence, which he was permitted to do, but never impermissibly attacked defendant's failure to take the stand.

Am Jur 2d, Trial §§ 245-249.

5. **Evidence and Witnesses § 2407 (NCI4th)— fingerprints not used to link defendant to crime—denial of request for expert proper**

There was no merit to defendant's contention that the trial court should have granted his post-trial motion for a fingerprint expert, since the fingerprints at the crime scene were not used by the prosecution to link defendant to the crime.

Am Jur 2d, Witnesses § 3.

Right of indigent defendant in state criminal case to assistance of fingerprint expert. 72 ALR4th 874.

Appeal by defendant from judgment entered 8 January 1992 in Alamance County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 27 April 1993.

On 10 December 1990, defendant Mohammed Jomal Thompson was indicted by the Alamance County Grand Jury for the offense of robbery with a dangerous weapon. The State's evidence at trial tended to establish the following:

On 11 April 1990, at approximately 10:30 p.m., a black male entered Ken's Quickie Mart in Graham, North Carolina. The clerk, Frankie Wilson Bowlin, testified that the man carried a silver pistol and told her to "put it in a bag." As she turned to the register, a second black male entered the store and came towards her with a sawed-off shotgun. She handed the first man a bag with the money in it. The second man, while holding the shotgun in her face, repeatedly ordered Ms. Bowlin to open the safe. The store was well lit and Ms. Bowlin was able to observe the second man's face for approximately three minutes as he held the gun on her. The suspects then ran out the door, and Ms. Bowlin observed them walking across the parking lot.

Ms. Bowlin waited until the suspects were gone and then called the police. When the police arrived, Ms. Bowlin was in a highly emotional state. At that time, she gave the following description of suspect number two: Suspect number two was armed with a

shotgun. He was a black male, in his early twenties, approximately six feet tall, medium build, weighing 190 to 200 pounds, with a medium complexion. He wore black pants, a black jacket and a light brown hat with a narrow brim and a light colored band around it. The shotgun was a full length single barrel with a dark brown stock.

Sometime after the robbery, Ms. Bowlin gave a second description to Officer Chester of the Graham Police Department. According to Officer Chester, Ms. Bowlin described suspect number two as follows: Suspect number two is a black male, five feet six inches tall, medium build, 25 to 30 years of age, weighing 190 to 200 pounds, with a medium complexion.

On 5 May 1990, Ms. Bowlin saw a picture of a black male in the newspaper. The caption read, "Durham Teenager Charged in Murder of Roxboro Clerk," and the male pictured was the defendant. Ms. Bowlin called Detective Madden and told him the article had a picture of the man that robbed her. She carried the newspaper article to the police station, initialled it, dated it, and circled defendant's photograph in the article. According to Detective Madden, when Ms. Bowlin brought the article to him, she stated that the photo looked like one of the men who robbed her.

On 14 May 1990, Detective Madden brought a photo lineup for Ms. Bowlin to view at her workplace. Detective Madden told her to take her time, and if she saw anyone involved in the robbery, to point him out. Ms. Bowlin pointed to picture number three and said, "This is the man that had the shotgun." The man pictured in photo number three was the defendant.

Ms. Bowlin testified on voir dire that the identification of the photo in the lineup was not based on having seen the newspaper picture of the defendant. During the same hearing, Ms. Bowlin also made an in-court identification of the defendant as the man who was holding the shotgun on her on the night of 11 April 1990. Her recollection of the description she gave to Sergeant Norwood on the night of the robbery was that defendant was probably 5 feet 9 inches to about 6 feet, weighing approximately 165 pounds.

On voir dire, defendant testified that in April 1990 his height was 5 feet 5 inches, he weighed 130 to 140 pounds, and he was 17 years of age.

At trial, Ms. Bowlin testified to the following concerning the man holding the shotgun: He had nothing on his face; he had on a short brimmed tweed hat with a beige band around it; he was wearing a black jacket and black pants; his height was five feet six or seven; he weighed between 150 and 160 pounds; and he was in his late twenties. Ms. Bowlin testified first, without objection, that she recognized the second man in the courtroom and pointed out the defendant. When asked whether she was positive that defendant was the second man, she said, "I'm positive, I'll never forget that face as long as I live." She testified again, over defendant's objection, that there was "no doubt in her mind as to who[m] the second defendant was with the sawed-off shotgun." At trial, Ms. Bowlin also testified that her identification of the defendant was not related in any way to the photo identification, and that the photo identification did not influence her trial testimony. She stated that her identification of the defendant was based on what she saw in court and what she saw on the night of 11 April 1990.

At trial, defendant's probation officer, Beverly Stuart, testified that in April 1990, the defendant was approximately 17 years of age, his height was approximately 5 feet 3 inches and he weighed 140 to 150 pounds. On cross-examination, over defendant's objection, the State was permitted to question the probation officer about the nature of defendant's probation and about the history of their meetings while under her probationary supervision.

Defendant moved to dismiss at the close of the State's evidence and at the close of all the evidence. Both motions were denied. Upon a jury verdict of guilty to robbery with a dangerous weapon, the defendant moved for appropriate relief and also made a post trial motion for a fingerprint expert. Both of these motions were also denied. Defendant was sentenced to forty years imprisonment. Defendant appeals his conviction.

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

Craig T. Thompson for defendant-appellant.

WELLS, Judge.

Defendant presents six assignments of error for our review. By his first assignment of error, defendant argues that the trial court erred in denying defendant's motion regarding his presence

in the court. Defendant, however, makes no argument and cites no authority in support of his contention. N.C. Gen. Stat. § 1A-1, Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure requires that appellant's arguments "contain citations of authority upon which the appellant relies." *See Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). Because defendant has failed to cite any authority in support of his argument, this assignment of error is deemed abandoned. *Id.*

[1] By his second assignment of error, defendant argues that the trial court erred in denying his motion to suppress the photographic identification and the in-court identification because the identifications were made under circumstances that were unduly suggestive, were speculative, and were likely to result in misidentification. Specifically, defendant contends that the eyewitness identification was irreparably tainted by the out-of-court exposure to the newspaper article and photograph. We disagree.

Our courts have consistently held that pre-trial identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification violate a defendant's right to due process and evidence thereof must be suppressed at trial. *State v. Powell*, 321 N.C. 364, 364 S.E.2d 332, *cert. denied*, 488 U.S. 830, 109 S.Ct. 83, 102 L.Ed.2d 60 (1988). The North Carolina Supreme Court in *State v. Powell*, set forth a two-step process in evaluating identification procedures for due process violations. The first inquiry, when a motion to suppress is made, is whether an impermissibly suggestive procedure was used in obtaining the identification evidence. If the answer is no, the court need not look further. If the answer is yes, the court must then determine whether the suggestive procedure gives rise to a substantial likelihood of misidentification. *Id.*

We note, initially, that the trial court made no findings of fact or conclusions of law as to these issues. Upon review of the entire record, we find that the identification procedures were not impermissibly suggestive. The State's evidence at trial tended to establish that all of the photographs shown to Ms. Bowlin in the photo lineup were in color and all were pictures of black males with similar pigment, age, and physical stature. Each male pictured had a similar style of hair and a mustache. The pictures were all stapled together, no names were written on the photos, and no suggestions were made to Ms. Bowlin as to which photograph

to choose. Although Ms. Bowlin had seen the defendant's photograph in the newspaper prior to the photo lineup, she testified on voir dire that her identification of the photograph in the lineup was not based on having seen the newspaper picture of the defendant. From the totality of the circumstances, we find no inference or interpretation of the facts which would lead us to conclude that the pretrial identification procedure was impermissible. Having concluded that the pretrial photo lineup used in obtaining Ms. Bowlin's out-of-court identification was not impermissibly suggestive, we need not consider whether the procedure gave rise to a substantial likelihood of misidentification. Because the procedure used was permissible, the trial court did not err in denying defendant's motions to suppress the out-of-court identification and the in-court identification of defendant. *State v. Billings*, 104 N.C. App. 362, 409 S.E.2d 707 (1991), *motion to dismiss allowed*, 332 N.C. 347, 421 S.E.2d 155 (1992). Furthermore, Ms. Bowlin's positive unequivocal identification of the defendant as the perpetrator of the crime less than one year after the robbery alleviates any question as to the reliability of the in-court identification as being tainted by pretrial identification procedures. This assignment of error is overruled.

[2] By his third assignment of error, defendant challenges the trial court's failure to sustain defendant's objection to the cross-examination testimony of defendant's probation officer. Defendant argues that the probation officer was called by the defendant to testify about the physical appearance, height and weight of the defendant as he appeared in April of 1990. This direct testimony did not involve defendant's probationary status or prior conduct in association with his probation. The prosecutor, however, was permitted to elicit testimony regarding defendant's prior conviction, the length of time defendant had been on probation, the frequency of defendant's visits, whether defendant missed regularly scheduled meetings, and whether his probation had been modified. Defendant argues that where the probation officer only testified she knew defendant in a "professional capacity," this was not tantamount to stating she knew the defendant as his probation officer, and questions involving defendant's probationary status were therefore improper. We find this to be a difference without a distinction.

The general rule is if a witness' direct testimony raises specific issues, it "opens the door" to cross-examination on those subjects. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). By eliciting

testimony that the probation officer's relationship with defendant was a "professional" one, the defense opened the door to questions about the nature of such relationship. Defendant could have chosen another witness to verify defendant's height, weight, and physical appearance at the time of the crime. Having chosen the probation officer as the verifying witness, however, the defendant may not now complain that allowing the cross-examination was erroneous. This assignment of error is overruled.

[3] Defendant next assigns error to the trial court's denial of defendant's motions to dismiss made at the close of the State's evidence and at the close of all the evidence. Defendant asserts that there was no corroborating evidence to the prosecution witness' eyewitness identification. We disagree.

A court shall submit a case to the jury where there is substantial evidence of each essential element of the crime charged and that the defendant is the perpetrator of the crime. *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289 (1971). There is "substantial evidence" if there is more than a "scintilla of evidence," considering the evidence in the light most favorable to the State, giving the State every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Generally, contradiction, discrepancies, or inconsistencies are properly resolved by a jury, and do not warrant dismissal. *Id.* *See also State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978).

Here, the prosecution's eyewitness gave differing descriptions of the defendant prior to trial. These prior inconsistent statements affect the weight the jury would afford her testimony, not the admissibility of such testimony. *State v. Bridges*, 266 N.C. 354, 146 S.E.2d 107 (1966). *See also State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). Defendant argues that Ms. Bowlin's identification testimony was inherently unreliable, and, without corroborating evidence, the State did not meet its burden of producing substantial evidence that defendant was the perpetrator of the crime.

In reviewing a motion to dismiss, the test is whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. *Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Although Ms. Bowlin gave prior inconsistent descriptions of the defendant, she positively identified the defendant as the man who robbed her with a shotgun both at trial and at the photo lineup. Further, all the other elements of armed robbery

were supported by ample uncontroverted evidence. We find this evidence was sufficient to permit a reasonable inference of defendant's guilt and to take the case to the jury. We find the trial court did not err in denying defendant's motions to dismiss.

[4] Defendant next assigns error to the trial court's failure to sustain defendant's objection to the prosecutor's comments about defendant's failure to testify. Defendant argues that the comments in the prosecutor's closing argument were in clear violation of N.C. Gen. Stat. § 8-54, which our Supreme Court has interpreted to deny counsel leave to comment on the failure of a person charged with a crime to testify on his own behalf. *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

In its closing argument, the prosecution commented on defendant's failure to produce any alibi witnesses, but never directly commented on defendant's failure to take the stand. "Did you hear a single person come in here with an alibi defense as to where he was? Now, sure, I don't know where I was April 11th 1990, and I'm sure you don't either. But he should have." Defendant argues that these statements, and others to the same effect, amount to an impermissible attack on defendant's failure to take the stand. We disagree.

While it is true that the prosecution may not comment on defendant's failure to take the stand, "the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982). The prosecution's statements were directed at defendant's failure to produce rebuttal or alibi evidence, not at his failure to testify on his own behalf. We find no error.

[5] Finally, defendant argues that the trial court should have granted his post-trial motion for a fingerprint expert. Defendant maintains that he should have been allowed an expert witness to examine the fingerprints found at the scene because the fingerprints may have exculpated him.

The fingerprints, however, were not used by the prosecution to link the defendant to the crime and therefore could not be the basis of prejudicial error. The prosecution's case revolved around an eyewitness identification of the defendant as the perpetrator of the crime. During its case in chief, the State called Detective

Madden, who merely testified that the fingerprints taken from the crime scene were unidentifiable and inadmissible as evidence against the defendant. Since the State did not use the smudged prints as evidence of defendant's guilt, we find defendant's contention to be feckless.

For the reasons cited above, we find that the defendant received a fair trial free from prejudicial error.

No error.

Judges GREENE and WYNN concur.

LONNIE R. BOWDEN, EMPLOYEE-PLAINTIFF v. THE BOLING COMPANY, EMPLOYER, THE PMA GROUP, CARRIER, DEFENDANTS

No. 9210IC310

(Filed 18 May 1993)

1. Master and Servant § 69.1 (NCI3d) — workers' compensation — temporary total disability — offer of employment refused

The Industrial Commission did not err by concluding that plaintiff is temporarily totally disabled and entitled to compensation where plaintiff was injured when his left arm got caught between the platens of a rocker-bender machine; the heat and weight of the platens caused extensive third-degree burns, as well as severe muscle and nerve damage to the left arm from below the elbow to the base of the fingertips; plaintiff was released for a trial period to a job suitable and safe for a one-armed person; plaintiff was offered three positions; each position involved feeding small pieces of wood into different machines for 90% of an eight-hour shift; plaintiff had operated the machines involved during his years with defendant and testified that operating these machines posed a significant threat to the safety of his right arm; plaintiff's physician concluded that the jobs were not safe because plaintiff believed them to be unsafe; two former employees testified that the machines could not be operated safely by a worker with only one functional arm; and the Industrial Commission concluded that plaintiff has been totally disabled and unable to earn wages since

the date of his injury. If a person's fear renders the job unsafe, then it is illogical to say that a suitable position has been offered. While the positions offered to plaintiff by defendants may in fact be performed by a person with only one functional arm, the question is whether the jobs could be performed safely by this plaintiff. The evidence presented supports the Industrial Commission's finding.

Am Jur 2d, Workers' Compensation §§ 380, 381, 709.

Right to compensation as affected by refusal to accept, or failure to seek, other employment, or by entering into business for oneself after injury. 63 ALR 1241.

2. Master and Servant § 75 (NCI3d)— workers' compensation— further surgical treatment

There was no error in an Industrial Commission conclusion that further surgical treatment to plaintiff's injured arm was reasonable and necessary within the terms of the Workers' Compensation Act where two doctors offered differing opinions as to the need and potential success of further treatments. The determination of the Commission is conclusive on appeal where the evidence before the Commission is capable of supporting two contrary findings. N.C.G.S. § 97-25.

Am Jur 2d, Workers' Compensation §§ 380, 381, 709.

Right to compensation as affected by refusal to accept, or failure to seek, other employment, or by entering into business for oneself after injury. 63 ALR 1241.

Appeal by defendant from the Opinion and Award of the Full Commission filed 19 December 1991. Heard in the Court of Appeals 12 February 1993.

Smith, Helms, Mulliss & Moore, by George D. Kimberly, Jr., for employee-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog, for employer-appellants.

WYNN, Judge.

On 8 October 1987, plaintiff, an employee of defendant, The Boling Company, was injured when his left arm got caught between

the plates of a rocker-bender machine. Defendants paid the plaintiff benefits for temporary total disability. On 18 May 1988, defendants filed an application to stop payment of benefits on the grounds that plaintiff had refused suitable employment offered to him by The Boling Company. A hearing was held before Deputy Commissioner William Haigh on 12 July 1989. The Deputy Commissioner filed an opinion and award on 11 September 1990 which ruled that plaintiff was entitled to a continuation of temporary total disability benefits and, further, that the defendants were obligated to compensate plaintiff for any future surgeries performed by Dr. Serafin. From the Full Commission's adoption and affirmation of the award and opinion, defendants appeal. We affirm.

The facts pertinent to this appeal are as follows: Plaintiff was 32 years old at the time of his injury. Plaintiff was employed as a machine operator for The Boling Company for approximately eleven years. During that time, he was primarily responsible for operating a rocker-bender machine used to steam and bend pieces of wood for the manufacture of furniture. Plaintiff's injury occurred when the machine collapsed, trapping his left arm between the platens for approximately forty-five minutes. The heat and weight of the platens caused extensive third degree burns, as well as severe muscle and nerve damage to the left arm from above his elbow to the base of his fingertips. Plaintiff underwent treatment at the Burn Unit at North Carolina Memorial Hospital by Dr. H.D. Peterson, receiving multiple debridements and skin grafts of his left arm, wrist and hand.

On 21 March 1988, Dr. Peterson released the plaintiff to return to work for a trial period to a job suitable and safe for a one-armed person. Dr. Peterson also opined that the plaintiff would reach maximum medical improvement in three to six months. Plant supervisors and the plant nurse at The Boling Company determined that three positions were open, suitable and safe for plaintiff to return to work. They prepared written job descriptions of the positions which included: planer operator, double edge trim saw operator and dove-tail foot machine operator. All three positions involved feeding small pieces of wood into different machines for 90% of an eight hour shift. Plaintiff, having worked as a planer operator and double edge trim saw operator during his eleven years at the plant, refused the positions contending that the operation of the machines posed a significant threat to the safety of his

right arm. Plaintiff testified, along with two former employees of The Boling Company, that operation of the machines could not be performed safely by a worker with only one functional arm.

The Boling Company's plant superintendent testified that he had operated all of the machines and had used both arms to do so. The defendants' rehabilitation nurse testified that based upon her observation of the three machines in operation, it was her opinion that the machines could be operated by a person with only one functional arm. Dr. Peterson reviewed the descriptions of the jobs offered to plaintiff and concluded that the jobs were not safe because the plaintiff believed them to be dangerous.

On 11 August 1989, Dr. Peterson rated plaintiff as having a permanent partial impairment equivalent to an above-the-elbow amputation of the left arm—or a 100% disability of the arm. Upon the recommendation of Dr. Peterson, plaintiff was examined by Dr. Donald Serafin at the Duke University Medical Center for a second opinion regarding continued treatment. Dr. Serafin recommended that plaintiff receive several additional surgical procedures including transplants of muscle and nerve tissue to the left arm, as well as tendon and skin grafts.

In the Opinion and Award of Deputy Commissioner Haigh, which was affirmed and adopted by the Full Commission, the following findings of fact were made:

> 7. The three jobs offered by the employer to the plaintiff were not suitable for his capacity, and all of the offered jobs involved the risk of injury to the plaintiff's right upper extremity. The plaintiff's apprehension or fear of performing the jobs tendered by the employer was both reasonable, logical and rational, in that what would be safe for a man with two functional arms would not necessarily be safe for a man with only one functional arm. The plaintiff's response was not a phobic-type response.
>
> 9. Dr. Serafin recommended that additional surgical procedures be performed to prevent infection and increase the function of the plaintiff's left arm. If successful, the surgeries offered by Dr. Serafin would tend to effect a cure by reason of restoration of muscle function in the plaintiff's left forearm, as well as increasing functional ability of the plaintiff's left

wrist and grip, making the grip more precise and achieving extension of the thumb and fingers.

10. The plaintiff has been examined by two psychologists, and each determined that the plaintiff's intellectual ability and functional I.Q. place him in the mild retardation range. The plaintiff's intellectual ability make him a good candidate for vocational rehabilitation and employment once he reaches the end of the healing period.

12. The plaintiff has not yet reached the end of the healing period .... Further Dr. Serafin recommends additional surgical procedures that could tend to effect a cure or give relief.

13. Due to the work related injury and his residual physical limitations, as well as his age, education, prior work experience and functional intellectual ability, the plaintiff has been unable to earn any wages since the accident on October 8, 1987.

From these and other findings the Commission concluded:

1. Based upon the admittedly compensable injury and the residual impairment of the plaintiff's left arm, coupled with the plaintiff's age, education, prior work experience and functional intellectual ability, the plaintiff has been unable to earn wages in any employment since the accident on October 8, 1987 and has been totally disabled since that date.

2. The plaintiff is entitled to compensation at a rate of $167.97 per week since October 8, 1987, and continuing for so long as he remains totally disabled, and so long as he complies with the terms and provisions of the Commission's Order (N.C.G.S. § 97-29).

3. The defendants are responsible for all medical expenses related to the plaintiff's injury on October 8, 1987, and all future medical expenses, . . . which would tend to effect a cure or give relief. (N.C.G.S. § 97-25).

I.

[1] Defendants first contend that the findings of fact made by the Deputy Commissioner and adopted by the Full Commission were not supported by competent evidence and do not justify the legal conclusion that plaintiff has been totally disabled and unable to earn wages since the date of his injury.

To recover under the Workers' Compensation Act, the plaintiff bears the burden of proving the existence and extent of a disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982).

> N.C. Gen. Stat. § 97-2(9) defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986) (quoting *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683).

Defendants argue that the plaintiff is not disabled within the meaning of N.C.G.S. § 97-2(9) because they offered him employment consistent with his medical limitations at no reduction in salary and that plaintiff is barred from compensation because he unjustifiably refused the tendered employment suitable to his capacity.

Boling offered to employ plaintiff at no reduction in wage for any one of three positions. The Industrial Commission's specific finding of fact regarding the plaintiff's ability to perform these jobs states, "the three jobs offered by the employer to the plaintiff were not suitable for his capacity, and all of the offered jobs involved the risk of injury to the plaintiff's right upper extremity." The Commission further found that "[d]ue to the work-related injury and his residual physical limitations, as well as his age, education, prior work experience and functional intellectual ability, the plaintiff has been unable to earn any wages since the accident on 8 October 1987."

The authority to find facts necessary for a worker's compensation award is vested exclusively with the Industrial Commission and those findings must be upheld on appeal if supported by any competent evidence, even if there is evidence to the contrary. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986). Thus our review is limited to "two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings

of fact justify its legal conclusions and decision." *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985); *Cratt v. Perdue Farms, Inc.*, 102 N.C. App. 336, 401 S.E.2d 771 (1991).

Cheri Yates, the rehabilitation nurse for defendants, evaluated the three positions offered to plaintiff and determined that all three jobs could be performed safely by a one-armed person. After reviewing descriptions of the positions, Dr. Peterson concluded that "there is no way that I can say from your analysis of the jobs that they are not dangerous." Further, "if these jobs are absolutely safe, and offer no threat to his right arm, I would certainly put my blessing on them. However, if [plaintiff] fears the machinery that he is working around, there is no way that he can safely return to these jobs." According to Dr. Peterson's testimony, "a safe job [for plaintiff] would be a job that [plaintiff] thought was safe."

According to the job descriptions, each of the positions offered to plaintiff would include potentially operating all three machines: the planer, the double edge trim saw and the foot dove tail machine. Plaintiff testified that during his eleven years at The Boling Company he had operated all three of these machines. Based upon that experience, he determined that operating these machines posed a significant threat to the safety of his right arm and therefore was not safe. Plaintiff offered to return to work for his employer at some other position that would be safe. Mr. Walter L. Cheek and Frankie Wayne Burnette, both former employees of The Boling Company, testified that in their opinion, a person with one functional arm could operate the machines at issue, but that to do so could be dangerous.

Plaintiff argues that operation of the machines by a person with only one functional arm would be unsafe and he is afraid to do so. Defendants argue that even if plaintiff's fear is reasonable, the fear of returning to work after an injury does not render an employee totally disabled under the Workers' Compensation Act. However, we conclude that if a person's fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered. Although plaintiff may be able to perform work involving the use of his right arm, the availability of positions for a person with one functional arm does not in itself preclude the Commission from making an award for total disability if it finds upon supported evidence

that plaintiff because of other preexisting conditions is not qualified to perform the kind of jobs that might be available in the marketplace. *Peoples*, 316 N.C. at 441, 342 S.E.2d at 808. While the positions offered to plaintiff by defendants may in fact be performed by a person with only one functional arm, the question is whether the jobs could be performed safely by this plaintiff. *See id.*

The evidence presented supports the Industrial Commission's finding that plaintiff has been incapable of earning wages since 8 October 1987, and that plaintiff is accordingly entitled to compensation for temporary and total disability pursuant to Section 97-29 until he reaches maximum medical improvement or is no longer totally disabled. Therefore, the Industrial Commission did not err in concluding that the plaintiff is temporarily totally disabled and entitled to compensation.

II.

[2] By defendants' second and final argument, they contend that the Industrial Commission erred in deciding that further surgical treatment to plaintiff's arm, as suggested by Dr. Serafin, is reasonable and necessary within the terms of the Workers' Compensation Act. The Commission concluded that defendants are responsible pursuant to N.C.G.S. § 97-25, "for all medical expenses related to the plaintiff's injury and all future medical expenses, including treatment or supplies which would tend to effect a cure or give relief." N.C.G.S. § 97-25, further provides that "the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary."

Defendants point to the testimony of Dr. Peterson as evidence that further treatment to plaintiff's arm is not "necessary." Dr. Peterson testified that plaintiff was effectively healed as of 12 May 1988 having a 100% permanent partial disability. Dr. Peterson subsequently arranged for plaintiff to obtain a second opinion from Dr. Serafin. Dr. Serafin recommended an operation to cover exposed areas of bone by transplanting muscle tissue from plaintiff's thigh to his arm, wrist and hand. He also recommended an additional surgery involving transplants of muscle and nerve tissue to the left arm and a tendon graft to increase the function of his left arm, wrist and hand. When questioned about whether he would recommend the procedures suggested by Dr. Serafin, Dr. Peterson stated that he did not "think that's the best thing to do, but I don't know because I don't have a mangled arm." Dr.

Peterson stated clearly that the decision for further treatment "is up to the patient." Based on Dr. Peterson's testimony, defendants argue that the procedures suggested by Dr. Serafin will not help plaintiff and thus are not necessary. In this case, Dr. Peterson and Dr. Serafin offered differing opinions as to the need and potential success of further treatments for the plaintiff. Where the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. *Dolbow v. Holland Indus., Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

For the reasons set forth above, the opinion and award of the Industrial Commission is

Affirmed.

Judges EAGLES and COZORT concur.

ESTHER FAY MONTGOMERY (BRAKE) v. TOMMIE EDWARD MONTGOMERY

No. 9214DC350

(Filed 18 May 1993)

1. **Divorce and Separation § 451 (NCI4th); Judgments § 132 (NCI4th)— consent judgment freely negotiated—jurisdiction established for future litigation—consent order binding**

Where the parties to an action freely negotiate and enter into a consent order or judgment, there is no reason why they cannot bind themselves to the jurisdiction of a forum for the purpose of future litigation; thus, an Agreed Order entered into by the parties on 11 May 1987, providing that any future legal action concerning the parties' children would be brought where the children reside, could act as a valid consent to personal jurisdiction and a waiver of the requirements usually necessary to invoke that jurisdiction in an action to modify child support.

Am Jur 2d, Divorce and Separation §§ 963, 971; Judgments §§ 1085, 1088.

2. Divorce and Separation § 451 (NCI4th)— consent judgment—future actions to be brought in children's home state—acknowledgment of jurisdiction—applicability to actions initiated by plaintiff

An Agreed Order entered into by the parties in which defendant agreed to bring all actions regarding the parties' children in the children's home state, and in so doing to waive venue and acknowledge jurisdiction of that state, did not limit jurisdiction to subject matter jurisdiction; furthermore, the Agreed Order covered all actions involving the children, not just those instituted by defendant.

Am Jur 2d, Divorce and Separation §§ 963, 971; Judgments §§ 1085, 1088.

3. Attorneys at Law § 31 (NCI4th)— consent order signed by defendant's attorney—defendant bound by judgment

The trial court erred in determining that an Agreed Order entered into by the parties in Kentucky was ineffective because it was not signed by defendant, since defendant's attorney signed the order; an attorney acting on behalf of his or her client is presumed to have authority to do so at the request of the client; the order was valid on its face; and the courts of North Carolina are required to grant it full faith and credit.

Am Jur 2d, Attorneys at Law § 149.

Appeal by plaintiff from Order entered 27 February 1992 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 10 March 1993.

Bourlon & Associates, by Ann Marie Vosburg, for the plaintiff-appellant.

N. Joanne Foil and Rebekah W. Davis for the defendant-appellee.

WYNN, Judge.

The parties in the present case were married on 17 August 1971 and divorced on 22 February 1982 in the Circuit Court of Harnett County, Kentucky. Three children were born of the marriage: Michael Sean Montgomery, on 20 July 1971; Tommie Edward Montgomery, Jr., on 21 April 1973; and Kimberly Nichole

Montgomery, on 1 February 1979. In a Contract of Settlement dated 17 December 1981, the defendant agreed to pay a total of $500 per month in child support, said amount to be reduced by $125 per month as each child reached the age of eighteen.

In 1987, the plaintiff filed an action for an increase in child support against the defendant in the State of Texas, where she was then residing with the children. The defendant challenged the Texas court's personal jurisdiction over him, however, and that action was subsequently removed to the State of Kentucky. The Kentucky trial court entered an Order from which the plaintiff appealed. While that appeal was pending, the parties entered into an "Agreed Order," dated 11 May 1987, in which the plaintiff agreed to discontinue the appeal and the defendant agreed that any legal action regarding the children would, in the future, be brought where the children reside. Specifically, the Agreed Order provided in part that the defendant

> hereby agrees to bring any and all actions revolving around the parties' minor children in whatever state the children reside waiving venue and acknowledging jurisdiction of the children's resident state. [Defendant] hereby acknowledges that actions involving visitation, child support, custody and any other actions that can be maintained because of the children should be in the children's best interest brought where the children reside.

Two of the parties' three children have reached the age of eighteen, and in keeping with the original child support Order, the plaintiff currently receives $250 per month for the support of her minor daughter. On 22 July 1991, the plaintiff filed a complaint for an increase in child support, based on a change in circumstances. The complaint was filed in the District Court of Durham County, North Carolina, in which county the plaintiff currently resides with the parties' minor child. Pursuant to the Soldiers and Sailors Relief Act, the defendant requested a stay until he returned from Germany, where he was stationed with the U.S. Army. In addition, the defendant requested an extra sixty days in which to submit an answer to the complaint.

Thereafter, on 9 January 1992, the defendant filed a Rule 12(b) Motion to Dismiss, alleging that the North Carolina courts lacked personal jurisdiction over him. Accompanying this motion was an affidavit from the defendant which stated that he had never

resided in North Carolina, did not own any property in North Carolina, and had no contacts at all with the State of North Carolina. The plaintiff replied to that motion, citing the 11 May 1987 Agreed Order as a basis upon which the North Carolina courts should exercise personal jurisdiction over the defendant.

Subsequent to a hearing on the Motion to Dismiss, which took place on 26 February 1992, the action against the defendant was dismissed with prejudice for lack of personal jurisdiction. From that Order, the plaintiff appeals.

I.

[1] The plaintiff first assigns error to the trial court's finding that the defendant did not waive venue and personal jurisdiction when he entered into the 11 May 1987 Agreed Order. In support of this contention, the plaintiff argues that the language of the Agreed Order unambiguously establishes such a waiver, or, in the alternative, that it was clearly the intent of the parties that the Agreed Order effectuate such a waiver. We agree.

Generally, determining whether a court can exercise personal jurisdiction over a nonresident defendant necessitates the implementation of a two-step inquiry: (1) Does a North Carolina statute authorize the court to entertain an action against that defendant; and (2) If so, does the defendant have sufficient minimum contacts with the state so that considering the action does not conflict with "traditional notions of fair play and substantial justice." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 95-96, 414 S.E.2d 30, 35 (1992) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed.2d 95, 102 (1945)). Where the defendant has consented to the jurisdiction of the court, however, that inquiry need not be conducted. *Id.* at 96, 414 S.E.2d at 35; *see also In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978) (personal jurisdiction can be obtained through service of process, the defendant's voluntary appearance, or the defendant's consent), *cert. denied*, 442 U.S. 929, 61 L.Ed.2d 297 (1979); *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985) (same). Essentially, a defendant's consent constitutes his waiving personal jurisdiction where the courts would not otherwise be able to exercise personal jurisdiction. The defendant "may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process" because those legal formalities are a personal privilege which the

defendant is free to relinquish. *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953).

The defendant contends that it is not clear that he could have waived personal jurisdiction by entering into the Agreed Order because the consent by which a defendant waives personal jurisdiction "is given . . . by general appearance or some other action in which the defendant invokes the judgment of the Court." While the cases cited by the defendant do indeed illustrate consent by invoking the judgment of the court, there are many ways in which a defendant may give express or implied consent to the jurisdiction of the court over his person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, n.14, 85 L.Ed.2d 528, 540, n.14 (1985). One means by which a party may consent to personal jurisdiction, encountered most often in the commercial context, is a forum selection provision in a contractual agreement. *Id. See also Johnston County v. R.N. Rouse & Co.*, 331 N.C. at 92-94, 414 S.E.2d at 16. Such provisions do not offend due process so long as they are not unreasonable or unjust and are freely negotiated. *Burger King*, 471 U.S. at 472, n.14, 85 L.Ed.2d at 540, n.14.

While forum selection provisions may be most common in the commercial setting, we find no authority which limits them to that milieu. A consent judgment, such as the Agreed Order in the present case, is a contractual agreement. *Price v. Horn*, 30 N.C. App. 10, 16, 226 S.E.2d 165, 168, *disc. rev. denied*, 290 N.C. 663, 228 S.E.2d 450 (1976). Where the parties freely negotiate and enter into a consent order or judgment, there is no reason why they cannot bind themselves to the jurisdiction of a forum for the purpose of future litigation. Thus, we conclude that the Agreed Order can act as a valid consent to personal jurisdiction and a waiver of the requirements usually necessary to invoke that jurisdiction.

[2] Having decided that an Agreed Order can constitute consent to be subject to the personal jurisdiction of our Courts, we must next determine if the language of the Agreed Order in this particular case established the defendant's consent. The defendant contends that the Agreed Order speaks only to subject matter jurisdiction, and in any event does not apply to the present case because it covers only those actions brought by the defendant, not those brought, as is the instant case, by the plaintiff. We disagree.

Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the

contract. *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 120, 344 S.E.2d 97, 100 (1986). The construction of such language is a matter of law for the court to determine. *Id.*

The defendant agreed to bring all actions regarding the children in the children's home state, and in so doing waive venue and acknowledge jurisdiction of that state. The Agreed Order does not limit jurisdiction to subject matter jurisdiction, as the defendant would have this Court find. Jurisdiction encompasses both subject matter jurisdiction and personal jurisdiction, and we cannot limit it to one or the other without that clearly being provided in the Agreed Order. It is clear also that *all* actions involving the children, not just those instituted by the defendant, were to be brought in the state where the children reside.

Assuming *arguendo* that the language of the Agreed Order is ambiguous, we must inquire into the intent of the parties at the time they entered the agreement. The interpretation of a consent order is not limited to the four corners thereof. *Price*, 30 N.C. App. at 16, 226 S.E.2d at 169. Rather, without extending the meaning of the terms utilized in the Order, "[t]he agreement . . . should be interpreted in light of the controversy and the purposes intended to be accomplished by it." *Id.* Moreover, " 'the entire agreement must be examined with an understanding of the result to be accomplished and the situation of the parties at the moment the contract is made.' " *Haynes v. Haynes*, 45 N.C. App. 376, 382, 263 S.E.2d 783, 787 (1980) (quoting *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975)).

At the time the Agreed Order was entered into, the defendant had caused an action brought against him in Texas to be removed to Kentucky because of the Texas court's lack of personal jurisdiction. The plaintiff gave up her right to appeal the order of the Kentucky court in exchange for the defendant agreeing that all future actions would be brought where the children reside. It is illogical that the plaintiff would have abandoned her appeal for nothing more than the defendant's agreeing to subject matter jurisdiction, which the parties could not alter via a contractual agreement. *Williams v. Holland*, 39 N.C. App. 141, 146, 249 S.E.2d 821, 825 (1978).

Moreover, the Agreed Order clearly states that the parties agree it would be in the best interests of the children to have actions pertaining to them brought in their home state. It does

not serve the spirit of the Agreed Order to recognize these best interests only in actions brought by the defendant. Despite the affidavits submitted by the defendant and his Kentucky counsel, the intent of the parties is clear from the language of the Agreed Order: All actions regarding the children are to be brought in the children's home state, and the parties consent to the jurisdiction of the courts of that state over their persons.

Thus, with regard to the plaintiff's first assignment of error, we find that the Kentucky Agreed Order does constitute the defendant's consent to personal jurisdiction in the District Court of Durham County, North Carolina, and that the trial court erred in finding otherwise.

II.

[3] The plaintiff next assigns error to the trial court's finding that, even if the Agreed Order does indicate the defendant's consent to personal jurisdiction in the state where the children reside, it is ineffective because the defendant did not sign it. We agree with the plaintiff that the trial court erred in this regard.

We are required to give full faith and credit to final judgments entered by other jurisdictions. Final judgments cannotbe collaterally attacked unless the entering court lacked jurisdiction, the procurement of the judgment was fraudulent, or the judgment violates public policy. *J.I.C. Electric, Inc. v. Murphy*, 81 N.C. App. 658, 660, 344 S.E.2d 835, 837 (1986). The defendant in the case at bar contends that the Kentucky Agreed Order is invalid because he did not consent to its entry. Yet the record reflects that the Agreed Order was signed by the attorneys for each party. An attorney acting on behalf of his or her client is presumed to have authority to do so at the request of the client. *Caudle v. Ray*, 50 N.C. App. 641, 644, 274 S.E.2d 880, 882 (1981), *appeal after remand*, 69 N.C. App. 543, 316 S.E.2d 909 (1984). Moreover, this Court has previously refused to find that a foreign judgment violates public policy simply because one party alleges that he has not consented thereto. *J.I.C. Electric*, 81 N.C. App. at 661, 344 S.E.2d at 837.

On its face, the Agreed Order is valid, and the courts in this jurisdiction are required to grant it full faith and credit. The defendant is not without remedy with regard to the Order, however. If he desires to challenge the Order, the proper forum for that challenge is Kentucky, the jurisdiction in which the Order was

entered. *See J.I.C. Electric*, 81 N.C. App. at 660, 661, 344 S.E.2d at 837. Until such time as the Kentucky courts might set aside the Order for lack of consent by the defendant, we will grant it the full faith and credit to which it is entitled. We, therefore, find no merit to the defendant's second assignment of error.

III.

Because we find that, through the Agreed Order, the defendant is subject to the jurisdiction of the North Carolina courts, we find it unnecessary to determine whether his request for a sixty day extension, which was contained in his letter requesting relief pursuant to the Soldier and Sailor's Relief Act, constituted a voluntary submission to the personal jurisdiction of the North Carolina courts.

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

Reversed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. TERRY KEITH McKINNISH

No. 9227SC377

(Filed 18 May 1993)

1. Evidence and Witnesses §§ 2616, 2617 (NCI4th)— letters to wife—threats and promises—not privileged communications

Two letters defendant wrote to his wife after they separated asking her to support his alibi concerning the time they left their apartment to travel to West Virginia on the day of the crimes with which defendant was charged were not privileged communications because both letters show that defendant was not relying on the affection, confidence and loyalty of the marital relationship where one letter contained threats that the wife would serve time if defendant served time, and both letters offered a material reward to the wife if she would support his alibi.

Am Jur 2d, Witnesses §§ 296 et seq.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce. 98 ALR3d 1285.

2. Evidence and Witnesses § 2931 (NCI4th)— defendant's estranged wife—not hostile witness

In a prosecution for rape, robbery, kidnapping and other crimes against a woman who lived in the same apartment complex as defendant, the trial court did not err by failing to declare defendant's estranged wife a hostile witness on the ground that she "sabotaged" his alibi defense by changing her story as to when she and defendant left their apartment for West Virginia on the day of the crimes where the wife testified that she and defendant left "before two-thirty," her testimony did not conflict with her statements to defense counsel that they left around 1:00 p.m., and her testimony in fact tended to support defendant's alibi because the victim testified that her attacker knocked on her door between 2:25 and 2:40 p.m. and remained in her apartment for fifteen minutes.

Am Jur 2d, Witnesses §§ 245-247.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce. 98 ALR3d 1285.

Appeal by defendant from judgments entered 24 October 1991 by Judge Julia V. Jones in Lincoln County Superior Court. Heard in the Court of Appeals 2 April 1993.

Defendant was indicted and convicted of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, first degree rape, first degree kidnapping and felonious breaking and entering. Defendant was sentenced to terms of imprisonment totalling life plus eighty years.

A detailed recitation of the facts underlying defendant's convictions is not necessary here. It is sufficient to note that Ms. Tina Paige testified that she answered a knock at her front door at approximately 2:25 or 2:30 p.m. on 29 July 1990. When she opened the door, she saw the defendant. The defendant forcibly entered her home, led Ms. Paige from room to room, raped her, stabbed her and cut her. At the time of the attack Ms. Paige was living in an apartment or duplex in Iron Station, North Carolina.

Ronnie Matthews, a detective with the Lincoln County Sheriff's Department, testified that he met with the defendant on 29 December 1990. The defendant told Det. Matthews that on the morning of 29 July 1990 he and Mary Ellen Stanley, defendant's wife, (the two had been married in September 1990) left for West Virginia to visit Ms. Stanley's mother. Det. Matthews then traveled to War, West Virginia where he interviewed Ms. Stanley.

In her statement to Det. Matthews, Ms. Stanley said that a little before 2:00 p.m. on 29 July 1990 she went into her bathroom to take a shower. She stayed in the bathroom about 25 minutes. Thereafter, she and the defendant left for West Virginia. The couple arrived in West Virginia about 6:00 or 6:30 p.m. Det. Matthews testified that "there was a discrepancy in the time that he had left to go to West Virginia and the time that Mary Ellen had told me they left would put them at the apartment at the time of the crime." At the time of the attack the defendant and Ms. Stanley were living together in the same apartment or duplex complex as Ms. Paige.

Det. Matthews interviewed the defendant again on the morning of 31 December 1990. Det. Matthews told the defendant of the time discrepancy, and the defendant gave Det. Matthews a statement. Defendant claimed that on the day in question he engaged in consensual intercourse with Ms. Paige. He then returned to his apartment. After about ten minutes Ms. Stanley came out of the bathroom. The couple waited for Ms. Stanley's hair to dry, ate and left for West Virginia. They arrived in West Virginia about 1:30 p.m.

The State did not call Ms. Stanley as a witness but after the State rested, the defendant called Ms. Stanley as a witness. When asked when she and the defendant left for West Virginia, Ms. Stanley testified, "I'd say it was before two-thirty, but I'm not for sure what time." Ms. Stanley did not remember when the couple arrived in West Virginia. The defendant and Ms. Stanley separated in November 1990, and Ms. Stanley has been seeking an annulment since December 1990.

On cross-examination Ms. Stanley testified that she received two letters from the defendant after they separated. In the letters the defendant requested that Ms. Stanley tell the police that she and the defendant left for West Virginia during the morning of 29 July 1990. One of defendant's letters, exhibit 28, read as follows:

Dear Mary,

Hello Sweetheart!

Just a few lines to let you know that I am thinking about you and the kids.

I am doing fine up here just in jail waiting on to go to court over this bull shit.

Mary, why did you tell the dective we left at 2:00 oclock that sunday morning?

You know that . . . told them up here at the jail when me, your mom, Dad came up here that we left at 10:30 or 11:00 oclock that sunday morning. Any way they are trying to give me 2 life sentences in prison over this, your the only one that can save me from spending the rest of my life in prison. Any way your in . . . as I am so we can walk away from this or spend time in prison its up to you mary, Because if I spend time, you will too. Anyway, you have been supenna to court. Mary, ill do anything in this world for you if you will help me. I talked to mom yesterday, we will pay off the bronco and everything else if you will help me.

I am sorry for messing up your life mary. I realy do love you with all of my heart. and i will always will. Please call Mom collect if you are willing to help me, she said she will except the call ok. If you ever do anything else for me, just help me out ok.

Well J.P. stevens was going to hire me as a fixer untill they arrested me on new years day.

We was together when all of this happend mary so stick By the story ok.

So make sure you say that we left at 10:30 or 11:00 sunday morning.

Ever since we split up mary all I had is bad luck. I would love to try and work things out between us if you are interested mary if not, I guess we won't ok. Its up to you honey. Well I better go for now ok. So call mom she is expecting

a phone call from you ok. Please don't write me while I am in jail ok. Well better go for now.

Rember I love you for Ever.

Terry.

The other letter, exhibit 26, reads as follows:

Dear Mary, Tuesday 13th

Hello Sweethart!

Just a few lines to see how you are doing! I am doing alright I guess, just sitting here in jail waiting on trial.

Lesson Mary, Granny said she talked to you on the phone and you told her that we left that sunday morning at 10:30 or 11:00 am sunday morning.

Well I am fixing to go to prison for the rest of my life if you dont get down here and tell my lawyer that we did leave at 10:30 or 11:00 am that sunday morning and I only left your sight for 5 minuts and that was to sweep out the Bronco because we thought that we lost it that monday morning when we took it back at McArms. ok. Mom said she will pay for your gas to and from W. Virginia ok. She wants you to call her Mary so please do so, My life is on the line here and ill do anything in this world to pay back you and [illegible] for it ok. You can call her collect she said.

Well I let my beard grow out now so thats really about it. By the way mary if you come down you can pick up those Reebocks you said you want back ok. there over moms.

Well honey I better close for now its getting late so take care of yourself and give the kids my love ok. i hope to here from you soon.

Love Forever

Terry

P.S. Call mom collect as soon as possible ok. "Love you Mary".

From judgment on the verdicts, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. Sigsbee Miller, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for the defendant.

EAGLES, Judge.

I

[1] Defendant first argues that the trial court erred by "allowing [Ms. Stanley] to testify to the contents of letters she received from defendant, and in admitting those letters into evidence." Defendant argues the letters are privileged confidential marital communications. We disagree.

In *State v. Freeman*, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (1981) our Supreme Court held that in order for a communication to be a confidential communication it must be "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship."

Defendant contends that the letters were "made in reliance on the sanctity of the marital relationship[, and that it] is apparent from the language of the letters that defendant was relying on what he thought would be Ms. [Stanley's] spousal loyalty." The State contends, however, that the letters were not confidential communications because they contained threats and attempted to get Ms. Stanley to misrepresent the time of her departure on the trip to West Virginia. We agree with the State.

In *Freeman v. St. Paul Fire and Marine Ins. Co.*, 72 N.C. App. 292, 324 S.E.2d 307, *disc. review denied*, 313 N.C. 599, 330 S.E.2d 609 (1985), our Court held that a threat communicated by one spouse to another is not a privileged confidential communication. Here, exhibit 28 contains the following statements:

> Any way your in . . . as I am so we can walk away from this or spend time in prison its up to you mary, Because if I spend time, you will too.
>
> We was together when all of this happened mary so stick By the story ok.
>
> So make sure you say that we left at 10:30 or 11:00 sunday morning.

Clearly, these statements constitute unprivileged threats. Accordingly, it was permissible for the court to allow the State to cross-examine Ms. Stanley concerning exhibit 28 and admit it into evidence.

Moreover, both letters show on their face that they were not "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454. In both letters defendant instructed Ms. Stanley to say that she left at 10:30 or 11:00 a.m. on the day in question and offered her material reward in return for her help. Exhibit 28 contains the following statements:

> Mary, ill do anything in this world for you if you will help me. I talked to mom yesterday, we will pay off the bronco and everything else if you will help me.
>
> So make sure you say that we left at 10:30 or 11:00 sunday morning.

Exhibit 26 contains the following statements:

> Well I am fixing to go to prison for the rest of my life if you dont get down here and tell my lawyer that we did leave at 10:30 or 11:00 am that sunday morning and I only left your sight for five minutes and that was to sweep out the Bronco because we thought that we lost it that monday morning when we took it back at McArms. ok. Mom said she will pay for your gas to and from W. Virginia ok. She wants you to call her Mary so please do so, My life is on the line here and ill do anything in this world to pay back you and [illegible] for it ok. You can call collect she said.
>
> By the way mary if you come down you can pick up those Reebocks you said you want back ok. there over moms.

Both letters reflect that defendant was unable to rely on the affection, confidence and loyalty engendered by his marital relationship. Rather, the defendant relied on his offering of material reward in order to attempt to persuade Ms. Stanley to testify in his favor. Accordingly, we agree that the exhibits are not privileged and are admissible on this basis as well.

II

[2] Defendant next argues that the trial court erred by failing to declare Ms. Stanley an adverse witness. "The decision whether to declare a witness hostile or adverse rests within the trial court's sound discretion and will not be reversed absent a showing of abuse." *State v. Duvall*, 50 N.C. App. 684, 699, 275 S.E.2d 842, 854, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981). Here, we find no abuse of discretion.

Defendant argues that Ms. Stanley was an adverse witness because she had separated from the defendant and "sabotaged the defendant's alibi defense" by changing her story as to when she and the defendant left for West Virginia.

Ms. Stanley did testify that she began the process of having her marriage annulled in December of 1990. However, it does not appear that Ms. Stanley "sabotaged" the defendant's alibi defense.

The victim, Ms. Paige, testified that she returned to her apartment between 1:30 and 1:45 p.m. on the day in question. She changed her son's clothes, put him down for a nap, changed her own clothes, fixed herself a bowl of ice cream and sat down on the couch. Ms. Paige had been home for approximately fifteen minutes when she fixed the ice cream. About 2:15 p.m. Ms. Paige received a phone call from her sister. She talked to her for a short while and then sat back down on the couch. About five minutes later the defendant knocked on her door. She testified on direct examination that the defendant knocked on her door at approximately 2:25 or 2:30 p.m. On cross-examination, Ms. Paige admitted telling Det. Matthews that the defendant knocked on her door at 2:40 p.m. The attack lasted approximately fifteen minutes.

Ms. Stanley testified on direct examination that although she was not certain what time she and the defendant left for West Virginia she would "say it was before two-thirty. . . ." At that point a *voir dire* was conducted. During her *voir dire* testimony Ms. Stanley admitted that she told defense counsel on numerous occasions that she and the defendant left for West Virginia around 1:00 p.m. She testified, "It was something around through there. I'm not for sure about the time, though." Ms. Stanley also admitted that she told defense counsel that she "believed it was about twelve or after twelve[ ]" when they left. Upon resumption of direct ex-

amination, Ms. Stanley testified that she and the defendant left "before two-thirty."

We first note that contrary to defendant's assertion, Ms. Stanley's testimony on direct examination is not necessarily in conflict with what she told defense counsel prior to trial. Ms. Stanley twice testified that she and the defendant left for West Virginia "before two-thirty". She did not testify that they did not leave prior to that time. Rather, her testimony is merely that she left "before two-thirty."

Second, we note that Ms. Stanley's testimony is not necessarily in conflict with her statement to Det. Matthews. Her statement does not indicate exactly what time they left for West Virginia. Ms. Stanley told Det. Matthews that she took a shower a little before 2:00 p.m., and that she stayed in the bathroom about twenty-five minutes. The couple arrived in West Virginia at about 6:00 or 6:30 p.m.

Moreover, even assuming *arguendo*, that Ms. Stanley's testimony did conflict, when her testimony is read together with Ms. Paige's testimony it is clear that the defendant's alibi defense was not "sabotaged." Ms. Paige testified that her attacker knocked on her door between 2:25 and 2:40 p.m., and that he remained in her home for approximately 15 minutes. Ms. Stanley testified that she and the defendant left for West Virginia before 2:30 p.m. Accordingly, Ms. Stanley's testimony in fact tends to support an alibi defense. That defense was rejected by the jury when it found the defendant guilty of the crimes charged.

We hold that based on the record before us, the trial court has not abused its discretion by failing to declare Ms. Stanley an adverse witness.

III

Defendant has abandoned his remaining assignments by failure to bring them forward in his brief. N.C.R. App. Pro. 28(b)(5).

No error.

Judges MARTIN and JOHN concur.

STATE OF NORTH CAROLINA v. DEMON MITCHELL

No. 9216SC88

(Filed 18 May 1993)

1. **Riot and Inciting to Riot § 2.1 (NCI3d)— assemblage of persons—can throwing—threat to officers—sufficiency of evidence of riot**

In a prosecution of defendant for engaging in a riot, the evidence was sufficient to show that a riot occurred where it tended to show that 100 to 150 people congregated in the parking lot of a city activity center where a dance was in progress; inside the building was an assembly or gathering of people, of which defendant was a part; the crowd began throwing coins and cans, yelling threats to police officers, kicking the glass doors, and rushing the officers when they fell to the floor; and such evidence was sufficient to show that disorderly and violent conduct took place and that the conduct resulted in injury or damage to persons or property.

Am Jur 2d, Mobs and Riots §§ 36-38.

What constitutes sufficiently violent, tumultuous, forceful, aggressive, or terrorizing conduct to establish crime of riot in state courts. 38 ALR4th 648.

2. **Riot and Inciting to Riot § 2.1 (NCI3d)— willfully engaging in riot—sufficiency of evidence**

Evidence was sufficient to show that defendant "willfully engaged" in a riot in violation of N.C.G.S. § 14-288.2(b) where it tended to show that defendant cursed at an officer, pulled away from his grasp, contested the reason for his arrest, began swinging his head when handcuffed, and then ran into and knocked over a table where an officer was standing trying to calm the crowd.

Am Jur 2d, Mobs and Riots § 36.

What constitutes sufficiently violent, tumultuous, forceful, aggressive, or terrorizing conduct to establish crime of riot in state courts. 38 ALR4th 648.

Appeal by defendant from Judgment entered 18 September 1990 by Judge Jack A. Thompson in the Robeson County Superior Court. Heard in the Court of Appeals 12 February 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General Robin Michael, for the State.

William L. Davis, III for defendant-appellant.

WYNN, Judge.

Defendant was originally charged by warrants with disorderly conduct, larceny, injury to personal property, assault on a law enforcement officer and non-felonious engaging in a riot. In district court, defendant was found guilty of engaging in a riot, disorderly conduct and assault on a law enforcement officer. The remaining charges were dismissed. Defendant appealed his conviction as of right to Superior Court. Defendant was convicted in Superior Court of non-felonious engaging in a riot and sentenced to two years imprisonment.

The State's evidence tended to show the following. On the evening of 3 November 1990, Mrs. Marilyn F. Thompson was managing a teen party at the Parkview Activity Center in Lumberton, North Carolina (hereinafter "Parkview"). Parkview is a public facility, owned and operated by the City of Lumberton. The admission price for the party was two dollars, paid upon entry. At around 10:00 p.m. Mrs. Thompson noticed that a large number of people were congregating in the parking lot near the entrance to the building. Mrs. Thompson called the Lumberton City Police Department and requested assistance in dispersing the crowd.

Officers Peter Monteiro and Donald Ward were dispatched to Parkview. The officers arrived to find between one hundred and one hundred fifty young people in the parking lot of Parkview. Mrs. Thompson instructed the officers to tell the individuals outside to either leave the parking lot or come inside. In attempting to disperse the crowd, Officer Ward encountered the defendant and told him to either leave the premises or go inside. Defendant turned away and began talking with a friend. Officer Ward continued telling others to leave the grounds or go inside. In doing so, Officer Ward ran into defendant again and told him the same. Defendant responded this time by moving toward the entrance to Parkview. As he approached the entrance, he encountered Officer Monteiro,

who also told him to go inside. Officer Monteiro testified that when he advised defendant to go inside the building or leave the premises, defendant stated that he "wasn't paying two dollars to go to a . . . dance." Officer Monteiro then told defendant he would have to leave and defendant started walking toward the entrance. When Officer Monteiro again told him he would have to go inside or leave, defendant replied,"F--- you." At that time Officer Monteiro placed his hand on defendant's arm and advised him that he was under arrest for disorderly conduct. Defendant swung his arm back hitting Officer Monteiro and continued walking to the door. Once inside, Officer Monteiro advised defendant that he was under arrest for disorderly conduct and assault on a law enforcement officer and grabbed defendant's arm. Defendant stated that he had done nothing to be arrested for, pulled away from Officer Monteiro and the two of them "ended up against the wall." Officer Monteiro and Officer Ward told defendant to calm down, to let them cuff him, and that they would take him to the "magistrate's office and get this taken care of." Defendant did settle down and they placed the handcuffs on him. After his hands were cuffed, defendant began pushing and swinging with his head.

At that point, the crowd inside began throwing coins and cans, cursing and threatening the officers with bodily harm. The crowd outside began kicking and hitting the glass doors to the entrance. Officer Ward jumped up on a table and attempted to calm the crowd. Defendant ran for the table knocking it down and sending Officer Ward, Officer Monteiro and defendant to the floor. The crowds rushed the officers, kicking them to the extent that both suffered personal injuries. Defendant fled the scene and turned himself in later that evening at the magistrate's office.

At the close of the State's evidence defendant moved to dismiss the warrant as being fatally defective and moved to dismiss based on insufficiency of the evidence. The court denied both motions. Defendant then put on his own evidence.

Defendant testified that he was complying with the officers' request that he go inside the dance when Officer Monteiro told him again to go inside. Defendant asked Officer Monteiro "why he was talking just to [him]." After an exchange of words, defendant and a friend went inside the door, defendant looked back and said to Officer Monteiro, "F--- you." At that point, Officer Monteiro told defendant that he was under arrest and placed the handcuff

on defendant's right hand. Defendant stated that he would not give Officer Monteiro his other hand because Officer Monteiro would not tell him why he was being arrested. Another exchange occurred between Officer Monteiro and defendant after which defendant gave him his other hand to be cuffed and stated that he would go downtown. After the cuffs where placed on defendant, the crowd started throwing cans and coins and yelling. Officer Ward got on top of the table to calm the crowd. Defendant and Officer Monteiro were leaning against the table and it fell sending all three to the floor. Defendant stated that he was kicked in the head and a friend then pulled him from the crowd and outside. Defendant ran to his home and then turned himself in at the magistrate's office.

Defendant renewed his motions to dismiss at the close of all of the evidence and the court again denied his motions. The jury returned a verdict of guilty of non-felonious engaging in a riot and not guilty of assault on a police officer. From judgment and sentencing defendant appeals.

I.

Defendant assigns as error the trial court's denial of his motion to dismiss at the close of all of the evidence based upon insufficiency of the evidence.

On a motion to dismiss the trial court must determine the sufficiency of the evidence. If the State offers substantial evidence of each essential element of the offense charged, the motion must be denied. 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). In making its determination, the trial court may consider all of the evidence actually admitted, both competent and incompetent. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *Id.*

N.C. Gen. Stat. § 14-288.2(b) provides: "Any person who willfully engages in a riot is guilty of a misdemeanor." Thus, in proving this offense, the State must show (1) that a riot occurred, and (2) that the defendant willfully engaged in the riot.

[1] N.C. Gen. Stat. § 14-288.2(a) sets out the elements for a riot as follows: (1) Public disturbance; (2) Assemblage; (3) Three or more

persons; (4) Disorderly and violent conduct, or the imminent threat of disorderly and violent conduct; and (5) Results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. In the subject case, where the State's evidence tended to show that there were approximately 100 to 150 people in the parking lot of Parkview and more than 100 people inside the building, there clearly was an assembly or gathering of people, of which defendant was a part. *See State v. Riddle*, 45 N.C. App. 34, 37, 262 S.E.2d 322, 325, *disc. rev. denied and appeal dismissed*, 300 N.C. 201, 269 S.E.2d 627 (1980) (The law requires that the State show only that an assemblage, a group or gathering of three or more people occurred). Moreover, the evidence tended to show that the crowd began throwing cans and coins, yelling threats to the police officers, kicking the glass doors and rushed the officers when they fell to the floor. This activity resulted in injury to the officers and damage to Parkview. This evidence was sufficient to show that disorderly and violent conduct took place and that the conduct resulted in injury or damage to persons or property. Thus, the State's evidence was sufficient to show that a riot occurred.

[2] Defendant next argues that, even if a riot did occur, the State produced insufficient evidence that he "willfully *engaged* in [that] riot" as required by the statute. The case law interpreting this statute is sparse, however, it is clear that "mere presence at the scene of a riot may not alone be sufficient to show participation in it." *Riddle*, 45 N.C. App. at 37, 262 S.E.2d at 325 (citing *State v. Brooks*, 287 N.C. 392, 215 S.E.2d 111 (1975)). The statute does not define the word "engage," therefore we must give it its "common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). Webster's defines "engage" as "to employ or involve oneself; to take part: participate; to enter into conflict." *Webster's Third New International Dictionary* (1986). Thus, in using the phrase, "willfully engaged in," we find that the legislature contemplated active participation by the defendant in the riotous activity.

The State's evidence tended to show that defendant cursed at Officer Monteiro, pulled away from his grasp, contested the reasoning for his arrest and began swinging his head when handcuffed. Significantly, when the riotous activity began defendant ran into the table upon which Officer Ward was standing. Defendant then left the scene.

We conclude that the evidence of defendant's resistance to being arrested and the apparent assault on Officer Ward does not by itself appear sufficient to support the charge of participation in riotous activity. However, this conduct when coupled with the defendant's deliberate act of running into the table upon which the officer was standing while the riot was taking place, was clearly sufficient to show that the defendant "willfully engaged" in the riot.

Defendant's remaining assignment of error regarding the sufficiency of the warrant is without merit. As a result, we find no error in his conviction.

No error.

Judges EAGLES and COZORT concur.

DONNA C. REICH v. MICHAEL R. PRICE AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 9121SC954

(Filed 18 May 1993)

1. **Professions and Occupations § 1 (NCI3d) — elements of professional malpractice**

In order to assert a professional malpractice claim, plaintiff must establish (1) the nature of defendant's profession, (2) defendant's duty to conform to a certain standard of conduct, and (3) that breach of the duty proximately caused injury to her.

Am Jur 2d, Negligence §§ 78, 91, 190, 434.

2. **Professions and Occupations § 1 (NCI3d) — director of Employee Assistance Program — professional malpractice — insufficient forecast of evidence**

Summary judgment was properly entered for defendant on plaintiff's claim for professional malpractice where plaintiff's forecast of evidence tended to show that defendant was the director of her employer's Employee Assistance Program, that she consulted with defendant about her marital difficulties

and was told to continue seeing her psychiatrist, that plaintiff later met with defendant in his hotel room to discuss prevention of the termination of her employment for suddenly leaving her job without permission, that while in the hotel defendant and plaintiff consumed alcohol, cocaine and marijuana and engaged in sexual intercourse twice, and that defendant was certified as an Employee Assistance Professional, but plaintiff failed to present evidence sufficient to establish the nature of defendant's "profession," the legal duty owed by defendant to plaintiff, and the standard of care to be observed by defendant.

Am Jur 2d, Negligence §§ 78, 91, 190, 199, 203, 434; Summary Judgment § 29.

3. Trespass § 2 (NCI3d)— intentional infliction of emotional distress—insufficient forecast of evidence

Plaintiff's forecast of evidence was insufficient to establish a genuine issue of material fact as to her claim against defendant for intentional infliction of emotional distress where plaintiff presented evidence that defendant, the director of her employer's Employee Assistance Program, consumed alcohol and drugs with plaintiff and engaged in sexual intercourse with her while she was consulting defendant about marital and employment difficulties; defendant knew plaintiff was seeing a psychiatrist; and after the encounter with defendant, plaintiff twice attempted suicide. The alleged conduct by defendant was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 44.5.

4. Labor and Employment § 225 (NCI4th)— summary judgment for employee—respondeat superior and negligent supervision inapplicable

Defendant employer cannot be held liable for its employee's actions on the basis of respondeat superior or negligent supervision where plaintiff failed to establish a genuine issue of material fact as to her claims against the employee.

Am Jur 2d, Master and Servant § 406.

Appeal by plaintiff from order entered 11 February 1991 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 1992.

Herman L. Stephens and Howard C. Jones II for plaintiff appellant.

Elrod & Lawing, P.A., by Rachel B. Hall and Pamela A. Robertson, for defendant appellees.

COZORT, Judge.

Plaintiff appeals from an order granting defendants summary judgment on claims of professional malpractice, intentional infliction of emotional distress, and negligent employment or retention of an employee. We affirm.

Plaintiff was employed by Southern Bell in 1979. In 1981, plaintiff first contacted Southern Bell's Employee Assistance Program (EAP) seeking assistance with marital difficulties. An employee of EAP referred plaintiff to a psychiatrist. In 1986, plaintiff again contacted EAP for assistance and spoke with defendant Michael R. Price, Director of EAP and a Certified Employee Assistance Professional. Defendant Price suggested that they meet in a local restaurant. At that meeting, defendant Price recommended that plaintiff continue seeing her present psychiatrist.

On 4 June 1986, plaintiff again contacted EAP and asked to speak with defendant Price. Plaintiff explained that she was very upset because she thought she was going to be fired for leaving her job suddenly without permission that morning and going home. Defendant Price was in Wilmington when plaintiff called and was contacted there concerning plaintiff's call. Defendant Price telephoned plaintiff from Wilmington, told her she should not have left her position, and left his telephone number in Wilmington. Plaintiff telephoned defendant Price in Wilmington later that day. According to plaintiff, defendant Price then told her, "If you want to come down here, there's an extra bed in my room." Plaintiff declined.

After considering her options, plaintiff concluded that defendant Price was the only person who could explain her difficulties to her supervisor in order to prevent her employment termination. Plaintiff telephoned defendant Price again and told him she was coming to Wilmington. According to plaintiff, the next day defendant met her at the airport and took her back to his hotel. While

at the hotel, defendant Price and plaintiff consumed alcohol, cocaine, and marijuana. Defendant Price and plaintiff also had sexual intercourse twice. The next day, defendant Price took plaintiff to the airport and she returned to Winston-Salem. After the encounter with defendant, plaintiff attempted suicide twice. Defendant Price admits that he met with plaintiff in Wilmington; however, he denies using drugs and engaging in sexual relations with her.

On 23 April 1990, plaintiff filed suit in Forsyth County Superior Court alleging professional malpractice by Price, intentional infliction of emotional distress by Price, and negligent employment or retention of an employee by Southern Bell. Defendants answered and moved for summary judgment. On 11 February 1991, the superior court granted defendants' summary judgment on all claims. Plaintiff appeals.

Plaintiff first argues that there is a genuine issue of material fact as to her claim against defendant Price for professional malpractice. Specifically, plaintiff argues that as Director of the Employee Assistance Program, defendant Price owed plaintiff a legal duty not to engage in sexual conduct harmful to plaintiff's emotional well-being. We note first that plaintiff did not allege medical malpractice pursuant to N.C. Gen. Stat. § 90-21.12 (1990); rather, she alleges *professional malpractice*. Plaintiff states in her complaint that defendant Price was not qualified or licensed as a practicing psychologist pursuant to N.C. Gen. Stat. § 90-270.11 (1990). There is no dispute between the parties that defendant Price was not a health care provider as defined in N.C. Gen. Stat. § 90-21.11 (1990), because he was not licensed or otherwise registered or certified to engage in any of the medical professions listed in that section. Defendant also was not a Registered Practicing Counselor as defined in N.C. Gen. Stat. § 90-329 et seq. (1990).

[1] In order to assert a professional malpractice claim, plaintiff must establish (1) the nature of defendant's profession, (2) defendant's duty to conform to a certain standard of conduct, and (3) that breach of the duty proximately caused injury to her. Profession is defined as:

> A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual.

Steinbeck v. Gerosa, 4 N.Y.2d 302, 308, 151 N.E.2d 170, 173 (1958) (quoting Black's Law Dictionary 1375 (4th ed. 1951)). Malpractice is defined as "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 10, 330 S.E.2d 242, 249 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986) (quoting Black's Law Dictionary 864 (rev. 5th ed. 1979)). One who undertakes to render services in the practice of a profession owes a duty to exercise that degree of skill, care, and diligence exercised by members of that same profession. *See* Restatement (Second) of Torts § 299A (1965).

[2] In the case at bar, plaintiff has failed to present evidence of each of the elements set forth above. As to the nature of defendant's profession, plaintiff alleges and defendant admits that defendant held a Master's Degree in health sciences, a Bachelor's Degree in psychology, and certification as an Employee Assistance Professional. Defendant states in an affidavit that he received certification from the Employee Assistance Certification Commission and that the certification did not require any proficiency in the area of counseling or rehabilitative counseling. Defendant states that the certification indicates only that defendant was certified to inform Southern Bell Telephone and Telegraph employees about community resources that might assist them with problems possibly affecting their work. There is nothing in the record other than defendant's statements in his affidavit indicating the nature of the Employee Assistance Certification Commission or delineating the specific certification requirements. Defendant's deposition testimony indicates that, in order to be certified, he had to receive three recommendations from people, identified or known in the field, who could "verify that [he] had been involved in the field for nine years, and . . . evaluate how well [he] did the different tasks involved in employee assistance." As noted above, defendant was not qualified or licensed as a practicing psychologist pursuant to N.C. Gen. Stat. § 90-270.1 et seq. Although plaintiff argues that defendant engaged in counseling and the practice of psychology, we find that plaintiff has failed to present evidence sufficient to establish the nature of defendant's "profession."

Plaintiff has failed also to present evidence to establish the duty owed by defendant or that defendant's behavior deviated from accepted standards of practice for Employee Assistance "profes-

sionals." To establish defendant Price's duty, plaintiff presented the affidavit of Dr. Nancy S. Gaby, a practicing psychiatrist, who treated plaintiff from 17 September 1986 through 9 June 1990. Dr. Gaby stated:

> It is also my professional opinion that it is highly inappropriate for any professional person dealing with a person having emotional problems to counsel with such a client in the professional's hotel room and, particularly, to share alcohol and drugs with them and to have sexual intercourse with them. It is also my professional opinion that such conduct creates a substantial likelihood of harm to the client and the client's emotional and mental well-being.

We do not find this testimony sufficient to establish a legal duty between defendant Price and plaintiff or the standard of care to be observed by defendant Price. The statement makes a vague reference to "any professional" and does not address a standard of care for Employee Assistance Directors or members of that profession in the same or similar locality under similar circumstances. Although defendant Price stated in his deposition that sexual conduct between a person in his position and plaintiff would be unethical under the Code of Ethics published by the Association of Labor/Management Administrators and Consultants on Alcoholism (ALMACA), the Code of Ethics does not appear in the record, and defendant's statement that the Code of Ethics is a standard of conduct for people in his field is the only evidence offered to show that Employee Assistance Professionals are held to such conduct. We find that plaintiff has failed to present sufficient evidence to establish the standard of care defendant allegedly breached. Thus, while the allegations made by plaintiff, if true, depict abhorrent conduct by defendant, plaintiff has failed to offer evidence of a professional duty violated by defendant. The trial court's order granting summary judgment on plaintiff's professional malpractice claim was not error.

[3] Plaintiff next argues that there was a genuine issue of material fact as to her claim for intentional infliction of emotional distress. Plaintiff argues that defendant's actions rise to the level of intentional infliction of emotional distress because he acted with reckless indifference to the likelihood that his actions would cause severe emotional distress. Absent some special relationship between defendant Price and plaintiff, we cannot find under the facts of this

case, that the alleged conduct was " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493, 340 S.E.2d 116, 123, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (quoting Restatement (Second) of Torts § 46 Comment (d) (1965)).

[4] In her last argument, plaintiff contends there was a genuine issue of material fact as to defendant Southern Bell's liability for defendant Price's actions. Specifically, plaintiff argues that Southern Bell is liable on the basis of respondeat superior and negligent failure to supervise. We disagree. In *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968), the North Carolina Supreme Court stated:

> If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of *respondeat superior*, notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee, the employee's violation of instructions being no defense to the employer. Conversely, failure to instruct or supervise an employee does not impose liability upon the employer if, in fact, the employee was guilty of no negligence in the performance of his work. In such event, the omission of instructions or supervision, assuming a duty to supply them, would not be a proximate cause of the injury.

Id. (citations omitted). Accordingly, plaintiff's claims based on respondeat superior and negligent failure to supervise must fall because she has failed to establish a genuine issue of material fact as to her claims against defendant Price. The trial court did not err in granting summary judgment for defendants.

The judgment below is

Affirmed.

Judges JOHNSON and LEWIS concur.

JODI ALLISON JONES, BY HER GUARDIAN AD LITEM, LARRY STEVE JONES, AND LARRY STEVE JONES AND WIFE, DEANNE YOUNG JONES, INDIVIDUALLY v. CHRISTIAN LEIGH HUGHES AND C. L. HUGHES, III

No. 9224SC300

(Filed 18 May 1993)

1. **Evidence and Witnesses § 2237 (NCI4th)— community services available to injured plaintiff—testimony of expert admissible**

In an action to recover damages for injuries sustained in an automobile accident, the trial court did not err in admitting expert testimony by the vice president of community services at an Avery County hospital concerning the types of services which plaintiff could have used and how much they would have cost, since the witness based her testimony on appropriate information, and her description of the services offered by private nurses and assistants and the costs of such services could have aided the jury in valuing the services which plaintiff's parents provided for her.

Am Jur 2d, Expert and Opinion Evidence §§ 37, 38.

2. **Evidence and Witnesses § 2237 (NCI4th)— testimony of dentist—qualification as expert—testimony based on adequate information**

In an action to recover damages for injuries sustained in an automobile accident, the trial court did not err in admitting the testimony of a dentist, since he was qualified as an expert; his opinion as to the injuries to plaintiff's teeth was helpful to the jury; and he properly based his opinion upon his own examination of plaintiff, consultation with her orthodontist and endodontist, and a review of their reports.

Am Jur 2d, Expert and Opinion Evidence §§ 37, 38.

3. **Damages § 178 (NCI4th)— automobile accident—evidence of damages—award not excessive**

There was no merit to defendants' contention in an action for damages arising out of an automobile accident that an award of $100,000 for plaintiff's injuries and $20,000 for her parents' health care services was excessive where plaintiff had to have steel wire woven through her gums and a hole

drilled through a bone in her leg; she was in the hospital for 24 days and recovered at home for 57 days; she saw six different doctors or dentists, had three root canals, and would soon experience extraction of her two front teeth; bridgework associated with the extraction will cost $5500 to $5600; she will be required to replace the bridges several times throughout her life at a cost of $39,000 or have false teeth installed at a cost of $48,000; she suffered permanent scarring and disfigurement; and the value of the parents' services was between $11,000 and $18,000 plus mileage.

Am Jur 2d, Damages §§ 1017, 1018.

Appeal by defendants from judgment entered 3 October 1991 by Judge Claude S. Sitton in Avery County Superior Court. Heard in the Court of Appeals 11 February 1993.

Hemphill & Gavenus, by Kathryn G. Hemphill, and Norris & Peterson, P.A., by Allen J. Peterson, for plaintiffs-appellees.

Watson and Hunt, P.A., by Charlie A. Hunt, Jr., for defendants-appellants.

LEWIS, Judge.

Plaintiffs' claim for damages arising out of an automobile accident was tried before a jury at the 30 September 1991 term of Avery County Superior Court. The jury awarded the minor plaintiff $100,000 for her injuries, and awarded her parents $22,200 for her medical expenses and $20,000 for the value of their services rendered in caring for their daughter. Defendants appeal, objecting to the expert testimony on the costs of various healthcare services, the testimony of a dentist, and the denial of their motion for a new trial.

Plaintiff Jodi Allison Jones (hereinafter "Jodi") was injured on 7 September 1987 when the car in which she was riding hit a utility pole. The car was driven by defendant Christian Leigh Hughes and owned by defendant C.L. Hughes, III. Plaintiffs Larry Steve Jones and Deanne Young Jones, Jodi's parents, sued for the injuries incurred by their daughter, and for damages for present and future medical, hospital and drug expenses. Defendants stipulated to their negligence prior to trial. Although plaintiffs administered their daughter's care themselves, the trial court ad-

mitted evidence of various types of health services that plaintiffs could have utilized, and the cost of such services. Plaintiffs introduced evidence that they had spent a total of 1,104 hours caring for Jodi and 120 hours transporting her to doctors and dentists. The court also permitted a dentist to testify that Jodi would have lost one of her teeth as a result of the accident, notwithstanding a subsequent fracture to the same tooth in November 1990.

I. Expert Testimony

Defendants object to the expert testimony of Susan Ware and Dr. Warren, both of whom were properly admitted as experts. We note at the outset that under Rule 702 of the North Carolina Rules of Evidence, expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C.G.S. § 8C-1, Rule 702 (1992). If the expert is in no better position to make a determination than the members of the jury, the testimony is inadmissible. *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991). An expert may base his or her opinion upon

> facts or data in the particular case . . . perceived by or made known to [him or her] at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

§ 8C-1, Rule 703. Thus, an expert need not have first-hand knowledge in order to give an opinion. *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989).

A. Susan Ware's Testimony

[1] Defendants first object to the testimony of Susan Ware, vice president of community services at Sloop Memorial Hospital in Avery County, regarding the types and costs of health care services her agency could have provided for Jodi. Defendants stress that no such care was provided to Jodi, and that Ms. Ware had no knowledge of what care Jodi actually received in the hospital. Defendants therefore claim that Ms. Ware's testimony was irrelevant. Plaintiffs contend the evidence was submitted to the jury for comparison purposes.

Ms. Ware stated that in her opinion Jodi could have used the services of a private nurse or certified nursing assistant. Ms. Ware arrived at this conclusion after considering Jodi's medical records and a summary of her post-accident history and visits to various physicians. She considered previously admitted evidence on the course and length of Jodi's hospital stay, her condition during hospitalization, and her condition while recuperating at home. Her description of a private nurse's services was very similar to the care Jodi's parents actually provided, according to plaintiffs. Ms. Ware testified that the cost of a certified nursing assistant would have been nine dollars per hour, and the cost of a private duty nurse would have been fifteen dollars per hour.

We find the court properly allowed the testimony of Ms. Ware. She was qualified to testify as an expert, and she based her opinion upon appropriate information. Her description of the services offered by private nurses and assistants and the costs of such services could have aided the jury in valuing the services Jodi's parents provided for her. The jury knew that Jodi's parents were not health care professionals and could have taken this factor into consideration in valuing their services. It was up to the jury to weigh the testimony and evidence before them.

B. Dr. Warren's Testimony

[2] Defendant also objects to the testimony of a dentist, Dr. Robert Lee Warren. Jodi had suffered permanent dental injuries as a result of the accident. Tooth number 8 was knocked out of her mouth, and teeth numbers 7, 9 and 10 were knocked out of their normal position. Between the time of the accident and July 1991 Jodi saw an endodontist, Dr. Linebarger, who performed root canals and other endodontic treatment. Dr. Linebarger had noticed a fracture to tooth number 9 after a November 1990 basketball injury. In June 1991, x-rays showed "accelerated root resorption" of teeth numbers 8 and 9, and an orthodontist then referred Jodi to Dr. Warren.

Dr. Warren first saw Jodi in August 1991, almost four years after the accident, and after she had injured her mouth in the basketball game in November 1990. In September 1991 Dr. Linebarger informed Dr. Warren of the fracture in tooth number 9. At trial, Dr. Warren qualified as an expert witness in the areas of general and restorative dentistry. He testified that Jodi had been referred to him, he had seen her as a patient in his office,

and he had reviewed her medical history. He explained his recommended course of treatment, which included extraction of teeth numbers 8 and 9 and the installation of a bridge to replace those teeth, and the length and cost of such treatment. Dr. Warren testified that in his opinion Jodi would have lost tooth number 9 regardless of the trauma caused by the basketball injury.

Defendants emphasize that Dr. Warren knew little about the November 1990 basketball injury or the extent of the resulting trauma, and that therefore he did not have a proper basis for his opinion. Defendants claim that Dr. Warren's "short synopsis of the resorption process and the result of endodontic treatment" was not within his area of expertise since he is not an endodontist. According to defendants, Dr. Warren's testimony was prejudicial because it indicated that Jodi would lose both upper front teeth as a result of the accident instead of only one of them.

We find Dr. Warren's testimony was properly admitted. He was qualified as an expert, his opinion was certainly helpful to the jury, and he properly based his opinion upon his own examination of Jodi, consultations with her orthodontist and endodontist, and a review of their reports.

II. Denial of New Trial Motion

[3] Defendants requested a new trial under Rule 59 of the North Carolina Rules of Civil Procedure, claiming that the jury had manifestly disregarded the instructions of the court, the damages awarded were excessive, the evidence was insufficient to justify the verdict, and errors of law occurred at trial and were objected to by defendants. N.C.G.S. § 1A-1, Rule 59(a)(5), -(6), -(7), -(8) (1990). In their brief defendants have not addressed the first and last of these contentions: manifest disregard of the instructions and errors of law. We therefore decline to address those issues here. We note that a ruling under Rule 59 is within the sound discretion of the trial judge and will not be reversed absent a manifest abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982). In their argument defendants do not object to the award of $22,220 for medical expenses, but do object to the award of $100,000 for Jodi's injuries and $20,000 for her parents' services.

Defendants claim the awarded damages were excessive in light of the fact that the only permanent injuries sustained were to

Jodi's teeth. Here again they raise their objection to Dr. Warren's testimony that Jodi would have lost tooth number 9 as a result of the accident regardless of the subsequent injury. Since we have determined that Dr. Warren's testimony was properly admitted, we find this argument unpersuasive.

We note that Jodi suffered other injuries as well. Immediately after the accident she had to endure two very painful procedures: she had steel wire woven through her gums, and she had a hole drilled through a bone in her leg. She was in the hospital for 24 days, and recovered at home for 57 days. She saw six different doctors or dentists, had three root canals, and would soon experience the extraction of her two front teeth. The bridgework associated with the extraction will cost $5,500 to $5,600. She will be required to either have the bridges replaced several times throughout her life, at a cost of $39,000, or have false teeth installed at a cost of $48,000. Defendants stipulated to the fact that she has suffered permanent scarring and disfigurement.

We do not find a manifest abuse of discretion here. We note that in *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231, *disc. rev. denied*, 301 N.C. 239, 283 S.E.2d 135 (1980), the Court found no abuse of discretion where the jury awarded $23,000 in damages, and the evidence showed no permanent injuries and special damages of only $600. *Id.* at 426, 269 S.E.2d at 234.

Defendants also claim the evidence was insufficient to support the $20,000 award to Jodi's parents. Although Ms. Ware testified that nursing services would have cost between nine and fifteen dollars an hour, defendants claim the services rendered by Jodi's parents were worth nine dollars an hour at the most, due to their lack of training. Using that figure the value of their services would have totalled about $11,000, much less than the $20,000 awarded. The fifteen dollar per hour figure yields a total of over $18,000, not including the professional rate of 25¢ per mile travelled.

It was within the jury's discretion to value the parents' services, taking into consideration the evidence comparing their services to those of a professional. We find no abuse of discretion here.

Affirmed.

Judges JOHNSON and JOHN concur.

STATE OF NORTH CAROLINA v. CURTIS RAY MAY

No. 9127SC1207

(Filed 18 May 1993)

Constitutional Law § 286 (NCI4th)— guilty plea resulting from ineffective assistance of counsel—harmless error analysis inappropriate

A trial court may not use a harmless error analysis to determine whether a criminal defendant, who had ineffective assistance of counsel when he pleaded guilty, is entitled to have the plea set aside and to have a jury trial.

Am Jur 2d, Criminal Law §§ 748, 984.

Appeal by defendant from judgment entered 31 August 1988 in Lincoln County Superior Court by Judge John Mull Gardner. Heard in the Court of Appeals 1 March 1993.

Defendant was arrested on 18 March 1986, pursuant to a warrant charging him with the murder of Dr. Isak Kohener on or about 22 February 1986. Upon a finding that defendant was indigent, the trial court appointed counsel on 19 March 1986, and co-counsel on 24 July 1986.

On 27 October 1986, defendant appeared before Superior Court Judge Donald Stephens and entered pleas of guilty to second degree murder and armed robbery. The next day the court sentenced defendant to consecutive terms of fifty years for the conviction of second degree murder and thirty years for the conviction of armed robbery.

On 7 May 1987, defendant filed a pro se Motion for Appropriate Relief in which he alleged that his guilty pleas were not intelligent and voluntary, and that they resulted from ineffective assistance of counsel. On 12 May 1988, Superior Court Judge Chase Saunders entered an order directing that new counsel be appointed for defendant, that the State file an answer to the motion, and that an evidentiary hearing be held on the motion.

The evidentiary hearing was held on 9, 10 and 12 November 1987, before Superior Court Judge John Gardner. On 1 September 1988, the court entered an order denying defendant's Motion for

Appropriate Relief. In this order, the court made the following findings of fact:

> 22. The advice given the Defendant by his attorneys concerning the likelihood that the Defendant would receive the death penalty resulted from an inadequate investigation of the facts and circumstances of the case and an incomplete and faulty analysis of the applicable law, was motivated in part by a desire to protect the attorneys' own personal interests rather than those of their client, was not the product of an informed professional deliberation and was not within the range of competence demanded of attorneys in criminal cases;
>
> 23. There is a reasonable probability that but for the attorneys' advice the Defendant would not have pleaded guilty and would have insisted on going to trial;
>
> 24. The Defendant's pleas of guilty to second degree murder and armed robbery were neither intelligent nor voluntary;
>
> 25. Even if his attorneys had reasonably and competently advised the Defendant of his likelihood of conviction of first degree murder and the likelihood of his receiving a death sentence and the Defendant had remained firm in his conviction to plead not guilty and had gone to trial, Defendant would have been convicted of first degree murder and received a sentence no less severe than that imposed.

Based upon these findings, the court made the following conclusions of law:

> 1. The Defendant was denied effective assistance of counsel as guaranteed by the United States Constitution and the Constitution of the State of North Carolina;
>
> 2. The violation of the Defendant's Constitutional rights was harmless beyond a reasonable doubt . . . .

From this order the defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David N. Kirkman, for the State.

Bridges & Gilbert, P.A., by Forrest D. Bridges, for defendant.

McCRODDEN, Judge.

The sole issue we consider on this appeal is whether a trial court may use a harmless error analysis to determine whether a criminal defendant, who had ineffective assistance of counsel when he pleaded guilty, is entitled to have the plea set aside and to have a jury trial. For the reasons set forth below, we hold that a harmless error analysis is not appropriate, and we reverse the trial court.

In *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 18 L.Ed.2d 241 (1967), the United States Supreme Court set forth four principles which must guide us in this case. First, whether a defendant's conviction for a crime will withstand his denial of rights guaranteed by the Federal Constitution is a question that must be answered by reference to federal law. 386 U.S. at 21, 17 L.Ed.2d at 709. Second, not all federal constitutional violations are harmful and, therefore, the basis of relief. 386 U.S. at 22, 17 L.Ed.2d at 709. Third, before a federal constitutional error can be found harmless, the court must be able to determine that such error was harmless beyond a reasonable doubt. 386 U.S. at 24, 17 L.Ed.2d at 710-11. Finally, *Chapman* made clear that the Court's prior opinions had "indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. 24, 17 L.Ed.2d 710. Among those cases was *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799 (1963), which dealt with a defendant's right to counsel.

Supreme Court opinions since *Chapman* have provided further guidance in determining whether application of the harmless error analysis is appropriate in various situations. In *Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed.2d 426 (1978), the Court held that, "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." 435 U.S. at 489, 55 L.Ed.2d at 437-38. *Holloway* reversed the convictions of several defendants who had received ineffective assistance of counsel at trial due to counsel's conflicting interests among the defendants. The Court noted:

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently

> the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Id. at 490-91, 55 L.Ed.2d at 438.

We believe that *Holloway* is analogous to the case before us and that it is not altered by *Arizona v. Fulminante*, 499 U.S. ---, 113 L.Ed.2d 302, *reh'g denied*, --- U.S. ---, 114 L.Ed.2d 472 (1991). In that case, a majority of the Supreme Court applied a harmless error analysis to defendant's coerced confession. The majority noted that since *Chapman*, the Court had applied the analysis to "a wide range of errors and has recognized that most constitutional errors can be harmless." 499 U.S. ---, 113 L.Ed.2d at 329. After citing numerous cases to support this statement, the Court concludes that "[t]he common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. ---, 113 L.Ed.2d at 330. The majority in *Fulminante* contrasted these cases with cases involving "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." 499 U.S. ---, 113 L.Ed.2d at 331.

In defendant May's case, the trial court found that defendant's ineffective assistance of counsel led to his decision to enter guilty pleas. It made this finding after holding extensive hearings in order to rule on defendant's motion for appropriate relief. In so doing, the court had a preview of the evidence that would have been presented at trial and, in light of such evidence, made its determination that counsel's ineffective assistance was harmless beyond a reasonable doubt. As thorough as the hearings may have been, they were no substitute for a trial by jury.

There are essentially two ways in which a defendant may be deprived of his liberty consistent with Due Process: by verdict of a jury following a trial at which he was allowed to present a defense; or by a knowing, intelligent and voluntary plea of guilty. *Henderson v. Morgan*, 426 U.S. 637, 49 L.Ed.2d 108 (1976) (White, J., concurring). In this instance the trial court, having specifically

determined that defendant's guilty plea was not in fact voluntary, was not free to engage in "unguided speculation," understandable as that may be. It had no choice but to afford defendant the opportunity to have a trial by jury.

In attempting to respond to defendant's brief, the State has argued that the trial court's determination that defendant was denied effective assistance of counsel was flawed and that counsel, having used the court's own analysis to recommend that defendant enter his plea, was not ineffective. The trial court's findings of fact, however, are supported by competent evidence and, in turn, support the conclusion that defendant was denied effective assistance of counsel. We decline to disturb those findings. *State v. Prevette*, 43 N.C. App. 450, 452, 259 S.E.2d 595, 598 (1979), *disc. rev. denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 64 L.Ed.2d 855 (1980).

Finally we note that our determination that defendant's plea must be set aside is a double-edged sword. On remand, the State may elect to try defendant on the first degree murder charge for which defendant was indicted. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656 (1969).

The order of the trial court is reversed, and this case is remanded for trial.

Reversed and remanded.

Chief Judge ARNOLD and Judge GREENE concur.

STATE OF NORTH CAROLINA v. ANTHONY LAMAR DAVIS

No. 9217SC217

(Filed 18 May 1993)

1. **Homicide § 73 (NCI4th)— solicitation to commit murder— future phone call required before murder—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for solicitation to commit murder of a witness where it tended to show that defendant enticed, counseled

and induced an undercover SBI agent to kill a named person; by discussing such specifics as the manner of the killing and the disposal of the body and by providing a "downpayment" of $50, defendant showed that he had more than just a casual interest in having the third person killed; and the fact that defendant placed a future condition on the solicitation, a phone call, did nothing to negate his specific intent. N.C.G.S. § 14-18.1(b).

Am Jur 2d, Homicide §§ 564, 567.

2. **Evidence and Witnesses § 3172 (NCI4th)— tape and transcript of conversation with SBI agent—admissibility for corroboration**

In a prosecution for solicitation to commit murder the trial court did not err in admitting a tape and a complete transcript of the conversation between defendant and an undercover SBI agent wherein defendant engaged the services of the SBI agent to commit the murder, since the tape and transcript substantially corroborated the agent's trial testimony. Moreover, any derogatory remarks on the tape with regard to African Americans did not prejudice defendant, as he excused all the African Americans from the jury himself, and any evidence of prior acts of bad character referred to on the tape were not prejudicial to defendant.

Am Jur 2d, Evidence § 436.

Admissibility of sound recordings in evidence. 58 ALR2d 1024.

3. **Evidence and Witnesses § 179 (NCI4th)— solicitation to commit murder—testimony by intended victim—relevancy to show motive**

In a prosecution of defendant for solicitation to commit murder of a witness, the trial court did not err in allowing the intended victim to testify that she had been a victim of a crime committed by defendant and that she was prepared to testify against defendant if called upon to do so, since such testimony was highly relevant in that it presented to the jury a motive for defendant's solicitation.

Am Jur 2d, Evidence §§ 251 et seq.; Homicide §§ 280, 564, 567.

Appeal by defendant from judgment and commitment entered 11 July 1991 by Judge William Z. Wood, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 29 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley, for defendant.

LEWIS, Judge.

Defendant was convicted of solicitation to commit murder and has appealed his conviction to this Court. The evidence presented below tended to show that on 7 December 1990 SBI Agent Michael Wilson, posing as a motorcycle gang member, met with defendant at a tatoo parlor in Eden. Agent Wilson's meeting with defendant had been arranged by another SBI agent upon learning that defendant was interested in soliciting the murder of Tammy Dunnington ("Dunnington"), a witness against defendant in another matter. Prior to entering the tatoo parlor, Agent Wilson had been wired so that his conversation with defendant could be recorded.

During Agent Wilson's conversation with defendant many of the particulars of the proposed killing were discussed including where the murder would take place, how it would be done, and even where to dispose of the body. To make sure that Agent Wilson had the right victim, defendant asked Agent Wilson if he had a picture of Dunnington. Agent Wilson produced a picture of Dunnington, thereby confirming her identity as the intended victim. Agent Wilson testified that he felt an agreement was reached with the defendant where he was to kill Dunnington when the defendant's criminal case was set for trial. Throughout the conversation, Agent Wilson requested a retainer fee as a show of good faith and defendant agreed to advance $50 of the $2000 that Agent Wilson was to be paid. At the conclusion of the conversation, defendant went behind a partition in the tatoo parlor and spoke with another individual. Defendant then left the tatoo parlor and the other individual came from behind the partition and gave Agent Wilson a $50 bill.

At the close of all the evidence defendant made a motion to dismiss based on the sufficiency of the evidence. Defendant's motion was denied to which the defendant has assigned error.

The standard by which a motion to dismiss is reviewed on appeal is whether there was substantial evidence of each element of the crime charged. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). In making this determination the evidence is considered in the light most favorable to the State, with the State receiving the benefit of every reasonable inference that can be drawn from the evidence. *State v. Cooley*, 47 N.C. App. 376, 268 S.E.2d 87, *disc. rev. denied and appeal dismissed*, 301 N.C. 96, 273 S.E.2d 442 (1980).

[1] In the present case defendant was indicted for solicitation to commit murder of a witness in violation of both N.C.G.S. § 14-18.1(b) and the common law. The specific provision defendant has been charged under was first codified in 1989 and provides:

> Conspiracy to commit murder or solicitation to commit murder of a . . . witness or former witness against the defendant while engaged in the performance of his official duties or because of the exercise of his official duties, is a Class D felony.

N.C.G.S. § 14-18.1(b) (Cum. Supp. 1992). The essence of defendant's argument is that solicitation is a specific intent crime and that he lacked the specific intent because he had not yet ordered Agent Wilson to proceed with the murder since it was not clear whether Dunnington would testify against him. We agree with defendant that solicitation is a specific intent crime but we disagree that he lacked the requisite specific intent. We are guided by *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977), regarding the crime of solicitation. Therein, the Supreme Court stated that "[t]he gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime." *Id.* at 720, 235 S.E.2d at 199 (citation omitted). When viewing the evidence in the light most favorable to the State, we find more than ample evidence that defendant enticed, counseled and induced Agent Wilson to kill Dunnington. By discussing such specifics as the manner of the killing, the disposal of the body and the exchange of $50, defendant showed that he had more than just a casual interest in having Dunnington killed.

The fact that defendant placed a future condition on the solicitation does nothing to negate his specific intent. As one commentator has stated "because the essence of the crime of solicitation is 'asking a person to commit a crime,' it 'requires neither a direction to proceed nor the fulfillment of any conditions.' " LaFave & Scott,

Substantive Criminal Law, Vol. 2 § 6.1 (4th ed. 1993 Supp.), citing *Gardner v. State*, 396 A.2d 303, *aff'd*, 408 A.2d 1317 (Md. 1979). It is clear that at the conclusion of the meeting with Agent Wilson, defendant had the present specific intent that Dunnington would be killed upon the placement of a future phone call. If defendants can place conditions on their solicitation so as to negate the element of specific intent then the crime of solicitation would become a virtual nullity. We do not believe the legislature intended such a result when it codified the crime of solicitation in 1989. We find no merit to defendant's first assignment of error.

[2] In his second assignment of error defendant claims the trial court erred in admitting a tape and a complete transcript of the conversation between defendant and Agent Wilson for the purpose of corroborating Agent Wilson's trial testimony. During the trial defendant repeatedly objected to the introduction of the tape and transcript and made several requests to have the transcript sanitized. All of defendant's objections were overruled. Although we agree with defendant that the trial court should have redacted several irrelevant comments from the transcript, we do not believe that the trial court's refusal to do so amounted to prejudicial error.

It is well established that prior consistent statements of a witness are admissible to strengthen the witness' credibility. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976). As long as the testimony offered as corroboration is generally consistent with the witness' testimony then slight variations are permissible. *Id.* To be admissible as corroborative testimony, a witness' prior statement is not limited to the specific facts brought out in the witness' present testimony, so long as the prior statement tends to add weight and credibility to the witness' present testimony. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986).

Having reviewed the transcript, we have no doubt that it was corroborative of Agent Wilson's in court testimony. We admit that some new testimony was introduced through the transcript, but we do not believe it went so far beyond Agent Wilson's trial testimony as to amount to reversible error. The majority of the transcript was corroborative and helpful to the jury's understanding of Agent Wilson's testimony. Nevertheless, we have examined the transcript to determine whether any of the new evidence was of such a nature as to have a prejudicial effect on defendant. Defendant points to four pieces of new information introduced through

the transcript which he claims were likely to prejudice him in the eyes of the jury. We feel that only two of these are worth addressing.

Defendant claims that the transcript contained many derogatory remarks about African Americans which were likely to prejudice the jury against him. Having reviewed the transcript we agree that defendant's comments were potentially prejudicial. However defendant failed to state that there were no African Americans on the jury because he had excused them all. Given that defendant excused all the African Americans himself, we hardly see how defendant's comments could have resulted in any prejudice to him.

Defendant also claims that the transcript refers to several acts of bad character that are inadmissible under Rule 404(b). We disagree with this assertion because the majority of the bad acts referred to in the transcript amounted to nonspecific bravado on the part of defendant as to his prior exploits in a barroom fight. In addition, several of defendant's comments were statements of future combative behavior and can hardly be considered prior bad acts. Given that Rule 404(b) is a general rule of inclusion subject to one exception, when the only probative value of the prior acts is to show that defendant had a propensity to act in conformity therewith, *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), we can hardly say that the trial court committed error. The examples of any prior bad acts occurred during defendant's conversation with Agent Wilson. As such these comments were necessary for a complete understanding of the chain of circumstances leading to defendant's arrest. *See id.* However, even if defendant's comments did amount to impermissible evidence of prior bad acts, we would not be compelled to grant defendant a new trial. In order to obtain a new trial it is incumbent upon defendant to show not only that error occurred but that the error was so prejudicial that it is likely a different result would have been reached. *State v. Loren*, 302 N.C. 607, 276 S.E.2d 365 (1981). The burden of proof on this issue is upon defendant. *See* N.C.G.S. § 15A-1443(a) (1988). On the facts of this case we hold that defendant has failed to establish that a different result would have been reached if the alleged "bad acts" had been redacted from the transcript. Defendant's second assignment of error is overruled.

[3] Finally defendant claims the trial court erred in allowing Dunnington to testify concerning the charges pending against de-

fendant. The basis of defendant's claim is that the testimony was irrelevant and even if relevant, it was outweighed by its prejudicial effect. We find the intended victim's testimony to be highly relevant because it presented to the jury a motive for defendant's solicitation. At no point did Dunnington give any specifics about the sexual charges. Instead she testified generally that she had been a victim of a crime committed by defendant and that she was prepared to testify against defendant if called upon to do so. We do not believe the probative value of this evidence to be outweighed by its prejudicial effect. We hold that defendant received a fair trial free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge COZORT concur.

THE AETNA CASUALTY AND SURETY COMPANY v. CONTINENTAL INSURANCE COMPANY AND BRYANT ELECTRIC COMPANY, INC.

No. 9226SC208

(Filed 18 May 1993)

1. **Appeal and Error § 422 (NCI4th)— appellee's cross-assignments of error—no separate brief as appellant**

Where defendant appellee added several cross-assignments of error to the record pursuant to N.C.R. App. P. 10(d), defendant is not entitled to file an "appellant's" brief containing arguments supporting its cross-assignments of error as well as an "appellee's" brief. Therefore, plaintiff's motion to strike defendant's "appellant's" brief is allowed and defendant's cross-assignments of error will not be considered. N.C.R. App. P. 25(b).

Am Jur 2d, Appeal and Error § 691.

2. **Insurance § 824 (NCI4th)— fire loss—builder's risk policies—excess clauses—pro rata payment**

Although "other insurance" clauses in builder's risk policies issued to a general contractor and to an electrical subcontractor are not identical, both are "excess" clauses where they effectively provide that, if there is other insurance covering

the same loss, the insurer will pay only the excess beyond what is payable under the other policy. Accordingly, the trial court properly determined that the excess clauses are mutually repugnant, that neither will be given effect, and that the two builder's risk insurers should share payment of a fire loss covered by both policies on a pro rata basis rather than equally.

Am Jur 2d, Insurance §§ 1789, 1792.

Appeal by plaintiff from order entered 2 December 1991 in Mecklenburg County Superior Court by Judge Forrest A. Ferrell. Heard in the Court of Appeals 9 March 1993.

Johnston, Taylor, Allison & Hord, by Robert L. Burchette and Greg C. Ahlum, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by John P. Barringer, for defendant-appellee Continental Insurance Company and defendant-appellee Bryant Electric Company.

GREENE, Judge.

Plaintiff appeals from an order filed 2 December 1991, ordering that plaintiff and defendant share payment of an insurance claim on a pro-rata basis.

The facts pertinent to this appeal are as follows: In October, 1986, J.A. Jones Construction Company (Jones) entered into a general construction contract with First Union National Bank for certain work on the First Union Tower located in Charlotte, North Carolina. Thereafter, Jones subcontracted Bryant Electric Company, Inc. (Bryant) to provide all of the electrical work on the project. Plaintiff Aetna Casualty and Surety Company (Aetna) was the builder's risk insurance carrier for Jones, and issued to Jones a policy endorsement with a coverage limit of $11,600,000.00. Defendant Continental Insurance Company (Continental) was the builder's risk insurance carrier for Bryant, and provided a policy with a coverage limit of $5,000,000.00.

Aetna's policy contains an "other insurance" clause which provides:

> THIS POLICY DOES NOT COVER ANY LOSS OR DAMAGE WHICH AT THE TIME OF THE HAPPENING OF SUCH LOSS OR DAMAGE IS INSURED BY OR WOULD, BUT FOR THE EXISTENCE OF THIS POLICY

> BE INSURED BY ANY OTHER POLICY OR POLICIES, EXCEPT IN RESPECT OF AN EXCESS BEYOND THE AMOUNT WHICH WOULD HAVE BEEN PAYABLE UNDER SUCH OTHER POLICY OR POLICIES HAD THIS INSURANCE NOT BEEN EFFECTED.

Continental's policy contains an "other insurance" clause which provides:

> If you or anyone else has other insurance covering the same "loss" as the insurance under this Coverage Part, we will pay only the excess over what should have been received from the other insurance. We will pay the excess whether you can collect on the other insurance or not.

In early January, 1988, a fire occurred in the generator/electrical switching room located on the eighth floor of the First Union Tower. Aetna paid the sum of $428,447.78 to make the permanent repairs necessitated by the fire, and thereafter filed a complaint seeking a declaratory judgment as to whether Aetna's policy or Continental's policy provides the primary builder's risk coverage for damage resulting from the fire. The trial court found that the "other insurance" clauses in the Aetna and Continental policies are "mutually repugnant," and determined that Aetna and Continental should share payment of the $428,447.78 fire loss claim pro-rata, based on their respective policy limits. From this order, Aetna appeals.

The issues presented are whether the trial court erred in determining that (I) the "other insurance" clauses of the Aetna and Continental policies are mutually repugnant; and (II) Aetna and Continental should share payment of the fire loss claim on a pro-rata basis.

[1] Before turning to the substantive issues before us, we first address an issue of appellate procedure. Pursuant to Rule 10(d), an appellee, without taking an appeal, "may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d) (1993). The appellee may present for review any questions raised by cross-assignments of error pursuant to Rule 10(d) by stating them in his brief. N.C.R. App. P. 28(c) (1993). "[H]is brief"

as used in Rule 28(c) refers to the single brief which must be filed and served by the appellee within thirty days after the appellant's brief has been served on him. N.C.R. App. P. 13(a)(1) (1993).

In the instant case, Aetna properly and timely filed its notice of appeal from the declaratory judgment order and its proposed record on appeal. Continental, as appellee, properly added to the record pursuant to Rule 10(d) several cross-assignments of error. Thereafter the record was settled, and was filed on 27 February 1992. On 5 April 1992, appellee Continental served on Aetna, by mail, a brief entitled "Brief of Defendant-*Appellant* Continental Insurance Company" (emphasis added). This brief was filed on 6 April 1992, and contains Continental's arguments regarding its cross-assignments of error. Appellant Aetna properly served its brief, by mail, on Continental on 6 April 1992 and filed it on 7 April 1992. Aetna also filed a reply brief pursuant to Rule 28(h) on 20 April 1992, in response to Continental's "appellant's" brief. Thereafter, on 5 and 6 May 1992, Continental served and filed its "Defendant-Appellee's Brief," addressing Aetna's assignments of error.

It is apparent that Continental has misconstrued our Rules of Appellate Procedure. Continental did not appeal from the trial court's order, is not an "appellant," and is not entitled under our rules to file both an "appellant's" and an "appellee's" brief. Accordingly, we grant Aetna's motion to strike Continental's "appellant's" brief, and thus do not consider Continental's cross-assignments of error or Aetna's reply brief. *See* N.C.R. App. P. 25(b) (1993) (granting this Court authority upon motion of a party or on its own initiative to impose a sanction against a party when Court determines the party substantially failed to comply with appellate rules).

I

[2] Aetna argues that the trial court erroneously determined that the "other insurance" clauses in the Aetna and Continental policies are mutually repugnant. Aetna contends that the "other insurance" clause in its policy is a "hybrid super escape and excess" clause, that the clause in the Continental policy is a "standard excess" clause, and that therefore Continental's policy is primary and Aetna's is secondary, or excess.

An excess clause in an insurance policy " 'generally provides that if other valid and collectible insurance covers the occurrence in question, the "excess" policy will provide coverage only for liability above the maximum coverage of the primary policy or policies.' " *Horace Mann Ins. Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 212 (1981) (citation omitted). A standard escape clause " 'provides that there shall be no coverage when there is other valid and collectible insurance.' " *Id.* (citation omitted). A super escape clause is one which expressly provides " 'that the insurance does not apply to any loss covered by other specified types of insurance, including the excess insurance type . . . .' " *Id.* at 555, 284 S.E.2d at 213 (citation omitted).

When a standard escape clause in one policy competes with an excess clause in another policy, the policy with the standard escape clause is considered primary, and the policy with the excess clause is considered secondary, or excess. *Id.* However, when a super escape clause in one policy competes with an excess clause in another policy, the super escape clause is given effect and the insurer whose policy contains the super escape clause is absolved from liability. *Id.* When two policies both contain identical excess clauses, or excess clauses which are worded in such a way that it is impossible to distinguish between them or to determine which policy is primary, "the clauses are deemed mutually repugnant and neither excess clause will be given effect." *North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988); *accord Bowser v. Williams*, 108 N.C. App. 8, 16, 422 S.E.2d 355, 360 (1992), *disc. rev. allowed*, 333 N.C. 343, 426 S.E.2d 703 (1993).

It is undisputed that each policy at issue, were it not for the existence of the other policy, provides coverage for the fire damage. A study of the "other insurance" clauses in the policies leads us to the conclusion that both are "excess" clauses, and, try as we might, we can discern no material difference in them. Although the language used is not identical, both clauses effectively provide that, if there is other insurance covering the same loss, then the insurer will pay only the excess beyond what is payable under the other policy. Accordingly, the trial court properly determined that the excess clauses are mutually repugnant, and neither may be given effect.

II

Aetna argues that, even if the trial court properly deemed the clauses at issue mutually repugnant, the trial court erred in determining that Aetna and Continental should share payment of the fire loss claim on a pro-rata basis, rather than equally.

When neither of two competing insurance policies has an "other insurance" clause and both cover the loss which has been sustained, "liability is allocated pro rata when no contrary policy stipulation is involved." 16 Mark S. Rhodes, *Couch on Insurance 2d* § 62:2 (Rev. ed. 1983); *see also Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 349, 152 S.E.2d 436, 442 (1967) (the rule in other jurisdictions when there are two policies is to hold the two insurers liable to prorate in proportion to the amount of insurance provided by their respective policies). As previously discussed, when excess "other insurance" clauses are deemed mutually repugnant, neither is given effect. In other words, the policies are treated as though they contain no "other insurance" clauses. Thus, payment for the loss should be shared between the insurers just as it would be shared in the case where neither policy contains an "other insurance" clause, i.e., payment for the loss should be prorated. We note that our decision in this regard is consistent with the rule followed by the majority of jurisdictions, as recognized by this Court in *Hilliard. See Hilliard*, 90 N.C. App. at 511-12, 369 S.E.2d at 389.

Accordingly, the trial court's determination that Aetna and Continental must share payment of the $428,447.78 fire loss claim pro-rata, based on their respective policy limits of $11,600,000.00 and $5,000,000.00 is

Affirmed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

STATE OF NORTH CAROLINA v. TERRY DALE ROBINSON

No. 9118SC1298

(Filed 18 May 1993)

Homicide § 5 (NCI4th)— murder—year and a day rule—abrogation of rule between crime and death—rule not applicable

An order dismissing a first degree murder indictment was vacated where defendant assaulted his wife on 18 October 1988, the North Carolina Supreme Court abrogated the common law "year and a day" rule, defendant's wife died on 30 May 1991, and defendant was indicted on 9 September 1991. Allowing defendant to be prosecuted for murder under the limited circumstances here does not violate the holdings in *State v. Vance*, 328 N.C. 613, or *State v. Detter*, 298 N.C. 604. The relevant date on these facts for determining whether the prosecution of defendant violates the *ex post facto* clauses of the North Carolina and Federal Constitutions is the date upon which the victim died and the year and a day rule had been abrogated before that date.

Am Jur 2d, Homicide § 14.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 1323.

Appeal by the State of North Carolina from judgment entered 31 October 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 9 February 1993.

On 18 October 1988, defendant brutally beat his estranged wife, Gina Robinson, with his hands, feet, and a shotgun used as a club. He then ran over her several times with an automobile. Mrs. Robinson remained comatose from the time of the assault until her death on 30 May 1991.

On 5 April 1989, defendant was convicted of assaulting Gina Robinson with a deadly weapon with intent to kill inflicting serious injury. On 9 September 1991, approximately three months after her death and almost three years after the savage assault from which her death resulted, defendant was indicted for first degree murder. Defendant moved to dismiss the indictment because it alleged that the victim's death occurred more than a year and

a day after the assault. Defendant's motion was allowed, the State appeals.

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

Assistant Public Defender John Bryson for defendant-appellee.

MARTIN, Judge.

The sole issue before us in this appeal is whether the prospective abrogation of the common law "year and a day" rule as pronounced in the Supreme Court's recent decision in *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991) should prevent the defendant's prosecution for murder where the murderous act was committed before the date of abrogation, but the victim's death did not occur until after the date of abrogation. We conclude that it should not and vacate the order dismissing the indictment.

Prior to our Supreme Court's decision in *Vance*, the common law in North Carolina required that in order to charge a defendant with murder, the victim must have died within a year and a day of the murderous act. *State v. Orrell*, 12 N.C. (1 Dev.) 139 (1826). However, that rule was judicially abolished in *Vance, supra*, filed on 2 May 1991 with the final mandate issued 22 May 1991. The Supreme Court in *Vance* held that any rationale for the "year and a day" rule was anachronistic today, and that the rule was no longer part of the common law of North Carolina for any purpose. *Vance*, at 619, 403 S.E.2d at 499.

However, the *Vance* court also concluded that:

> [T]he prohibitions against *ex post facto* laws embodied in the fifth and fourteenth amendments to the Constitution of the United States require that we give this decision abolishing the year and a day rule prospective effect only.

Id. at 621, 403 S.E.2d at 500. Thus, the *Vance* court overturned defendant's conviction for second degree murder because the murderous act and the resultant death of the victim both occurred previous to the abolition of the year and a day rule. The *Vance* court expressly followed the proposition that unforeseeable judicial modifications of criminal law may trigger the *ex post facto* clauses of the state and federal constitutions and therefore applied the abolition of the year and a day rule prospectively. *Id.* We are

bound to follow this decision and cannot, as the State invites us to do, reconsider the question of whether or not the prohibition against *ex post facto* laws may be infringed upon by the retrospective operation of a judicial decision. The North Carolina Supreme Court has already answered that question affirmatively as applied to the abrogation of the year and a day rule.

The issue before this Court, however, is not identical to that issue before the *Vance* court. In *Vance*, both the murderous act and the death of the victim occurred at a time when the "year and a day" rule was still the law in North Carolina. There was no question that a retroactive application of the abolition of the rule to those facts would violate *the ex post facto* clauses of the United States and North Carolina Constitutions. However, the facts of the instant case differ in that, while the murderous act occurred before the decision in *Vance* abolishing the "year and a day" rule, Mrs. Robinson's death did not occur until after that decision. We do not believe from the language in *Vance* that the Supreme Court expressly contemplated the unique, and in all probability, rare factual situation presented by this case.

Because *Vance* did not attempt to address the specific issue before this Court, we find little guidance in its language. The only language in the *Vance* decision which points to the date considered by the court to be significant for purposes of *ex post facto* application of the abolition of the year and a day rule is as follows:

> To apply today's decision abrogating the year and a day rule to permit the defendant to be convicted of murder in the present case would, at the very least, permit his conviction upon less evidence than would have been required to convict him of that crime at the time the victim died and would, for that reason, violate the principles preventing the application of *ex post facto laws* . . . (citation omitted). Retroactive application of our decision today, so as to uphold the judgment for murder in the present case, clearly would be to apply this decision to events occurring before this decision and severely disadvantage the defendant. (Emphasis added.)

Vance, at 622, 403 S.E.2d 501. We consider this language to be some evidence that the Supreme Court viewed the critical date, i.e. the day the "events occur," for preventing *ex post facto* application of their decision to abolish the year and a day rule, as being the date the victim dies rather than the date of the murderous

act. Applying that interpretation to the facts in the present case must result in allowing defendant to be tried for murder, since at the date of Mrs. Robinson's death, the "year and a day" rule was no longer the law in this State. Unlike *Vance*, defendant's conviction in this case would not be permitted upon less evidence than would have been required at the time of the victim's death.

Defendant argues, however, that our Supreme Court, in *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) has already decided that the date the murderous act was committed, rather than the date of the victim's death, should be the decisive date in determining whether a change in the law may be applied without violating the *ex post facto* provisions of our constitutions. In *Detter*, the defendant poisoned her husband who died several months later. At the time of the administration of the poison, the penalty for first degree murder was life imprisonment. However, after the poisoning, but before the husband's death, the Legislature enacted N.C. Gen. Stat. 15A-2000 *et seq.* which permitted the imposition of the death penalty as a punishment for first degree murder. The court held that the law in effect at the time of the murderous act (poisoning) controlled rather than the law in effect at the time of the husband's death. *Id.* at 638, 260 S.E.2d at 590. To impose the death penalty on that defendant, said the court, would constitute *ex post facto* legislation.

However, in reaching its decision, the *Detter* court discussed an earlier decision, *State v. Williams*, 229 N.C. 348, 49 S.E.2d 617 (1948), in which the court held that, for the purpose of deciding whether a defendant was guilty of the crime of accessory after the fact to murder, the time of death was the time the murder was committed, rather than the time the fatal blow was struck. Thus, one who rendered aid to the murderer after the murderous act, but before the victim died, could not be guilty of accessory after the fact to murder because the crime was not complete until the resulting death occurred. *Id.* The *Detter* court limited its holding to the facts before it stating:

> [W]hen it becomes necessary to choose between the time the fatal blow is struck or the time of death for some special purpose such as accessory after the fact to murder or to determine if a certain punishment is barred by the *ex post facto* clause the choice should be dictated by the nature of the inquiry.

Id., at 638, 260 S.E.2d at 590.

In our opinion, to allow defendant to be prosecuted for murder under the limited circumstances before us does not violate the holdings in *Vance* or *Detter*. Rather, we conclude from the language in *Vance*, and the purposes behind the abolition of the "year and a day" rule, that defendant should be prosecuted for the brutal and senseless murder of his wife. The facts of the instant case are significantly different from *Vance* and the inquiry different from that in *Detter*. The Supreme Court specifically stated in *Vance* that its primary concern was that a retroactive application of the abolition of the "year and a day" rule would allow the defendant to be convicted of murder upon less evidence than would have been required at the time the victim died thereby violating the *ex post facto* clauses. *Vance* at 622, 403 S.E.2d at 501. Moreover, the "nature of the inquiry" differs from that in *Detter*, where the court was dealing with an *ex post facto* application of a legislative change in punishment rather than a determination as to whether a crime had been completed. In this case, defendant was not vulnerable to a murder charge until Mrs. Robinson actually died. At the time of her death, the law in effect did not require that she have died within a year and a day of defendant's acts. This case is not one like *Vance* in which the defendant committed a murderous act, the victim died more than a year and a day later, and the law was subsequently changed to permit an otherwise impermissible prosecution.

We hold, on the facts before us, that the relevant date of Mrs. Robinson's murder for the purposes of determining whether the prosecution of defendant violates the *ex post facto* clauses of the North Carolina and Federal Constitutions, is the date upon which she died. On that date, the year and a day rule had previously been abrogated. Therefore, to indict this defendant for murder does not violate the mandate in *State v. Vance* that we apply its decision prospectively in order to avoid violation of the *ex post facto* clauses of those constitutions. The order dismissing the bill of indictment must be vacated and this case remanded to the Superior Court of Guilford County for further proceedings.

Vacated and remanded.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. SANDRA MAE JONES

No. 926SC156

(Filed 18 May 1993)

1. **Arson and Other Burnings § 19 (NCI4th)— indictment—arson of mobile home—sufficiency to support second degree arson conviction**

An indictment alleging that defendant did "maliciously burn a mobile home located at Bacon Road, Littleton, North Carolina. At the time of the burning the mobile home was the dwelling of Larry Dowtin" was sufficient to charge defendant with the crime of second degree arson, notwithstanding the indictment incorrectly referred to N.C.G.S. § 14-58.2, the statute defining the crime of first degree arson of a mobile home used as a dwelling.

Am Jur 2d, Arson and Related Offenses §§ 32 et seq.

2. **Indictment, Information, and Criminal Pleadings § 40 (NCI4th)— incorrect reference to arson statute—trial for second degree arson—no amendment of indictment**

No material amendment of the indictment occurred when the State decided to proceed to trial on the charge of second degree arson while the bill of indictment still contained a reference to the statute defining first degree arson of a mobile home used as a dwelling. Furthermore, defendant cannot complain of any amendment of the indictment when her counsel participated in the decision to proceed on the charge of second degree arson.

Am Jur 2d, Indictments and Informations §§ 188 et seq.

Appeal by defendant from judgments and commitments entered 25 October 1991 by Judge Richard B. Allsbrook in Halifax County Superior Court. Heard in the Court of Appeals 4 March 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Ronnie C. Reaves, P.A., by Ronnie C. Reaves and Lynn Pierce, for defendant-appellant.

LEWIS, Judge.

Defendant was indicted under N.C.G.S. § 14-58.2 for burning the mobile home of her estranged lover, Larry Dowtin. However, when the matter came to trial, the State decided to proceed on a charge of second degree arson because the mobile home was unoccupied at the time of the fire. The evidence at trial tended to show that the Littleton Fire Department was called to the scene of a fire at 12:20 a.m. on 2 July 1990. Upon examining the mobile home, broken glass and blood stains were found showing signs of a forced entry. Defendant, who had lived with Mr. Dowtin, was considered a suspect and when questioned by the police told them that she had gone to the mobile home to retrieve her coat and that she had wanted to burn Dowtin's bed so that no other woman could share it with him. She stated that it had not been her intention to burn the mobile home.

The defendant was found guilty of second degree arson and non-felonious breaking and entering but appealed only the arson conviction.

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[1] Defendant first assigns error to the trial court's failure to grant her motion to dismiss made at the conclusion of the State's evidence and again at the conclusion of all the evidence. Defendant claims that her motion should have been granted because the indictment did not sufficiently charge the offense of arson of a mobile home. In support of her contention defendant cites the specific wording of N.C.G.S. § 14-58.2:

> If any person shall willfully and maliciously burn any mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is *occupied at the time of the burning*, the same shall constitute the crime of arson in the first degree.

(emphasis added). There is no dispute that the mobile home was unoccupied at the time of the burning. The bill of indictment made no allegation to the contrary. The specific language in the bill of indictment was that defendant did "maliciously burn a mobile home located at Bacon Road, Littleton, North Carolina. At the time of the burning the mobile home was the dwelling house of Larry Dowtin." Therefore, defendant contends that since the mobile

home was unoccupied, the bill of indictment was fatally defective and the superior court lacked jurisdiction. We do not agree.

In examining the sufficiency of a bill of indictment, the trial judge must determine that:

> (1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction or plea of *nolo contendre* [sic] or guilty to pronounce sentence according to the rights of the case.

State v. Reavis, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973). We believe that the language of the indictment was plain and intelligible and was sufficient to put defendant on notice that she may be tried for second degree arson and to prepare her defense accordingly.

The common law definition of arson is still in force in North Carolina, *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988), and arson has been defined as the willful and malicious burning of the dwelling house of another person. *State v. Eubanks*, 83 N.C. App. 338, 349 S.E.2d 884 (1986). By statute, if the dwelling house is unoccupied then the offense is second degree arson. N.C.G.S. § 14-58 (1986). Combining these definitions we find the elements of second degree arson to be: (1) the malicious and willful (2) burning of a structure; (3) which is the dwelling house of another; and (4) which is unoccupied at the time of the burning. These are the same elements which were alleged in defendant's bill of indictment and thus the trial court had jurisdiction over the defendant. Even though the statutory reference was incorrect, the body of the indictment was sufficient to properly charge a violation. The mere fact that the wrong statutory reference was used does not constitute a fatal defect as to the validity of the indictment. *State v. Reavis*, 19 N.C. App. 497, 199 S.E.2d 139 (1973). We find no merit to defendant's first assignment of error.

[2] For her second assignment of error, defendant claims the trial court erred in instructing the jury on the lesser included offense of second degree arson. In support of her argument, defendant relies on the well established principle that an indictment may not be amended in a material manner without the consent of the

defendant or the grand jury. *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972). Defendant claims that the grand jury indicted her for the burning of a mobile home and that the State amended the indictment when it decided to prosecute her for second degree arson. As further support for her argument, defendant claims that there is no lesser included offense of arson of a mobile home. We are not persuaded by defendant's argument.

It is a well recognized rule in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the indictment contains all the essential elements of the lesser offense. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970). Since we have already held that the bill of indictment was sufficient to charge defendant with the crime of second degree arson, we need not decide whether second degree arson is a lesser included offense of burning a mobile home. Therefore, the only part of defendant's second assignment of error which we will address is whether the decision to proceed on the charge of second degree arson constituted a material amendment of the indictment.

The only possible "amendment" that occurred as to defendant's indictment was the decision to proceed to trial on the charge of second degree arson with the statutory reference to N.C.G.S. § 14-58.2 still on the bill. We feel that this statutory reference amounts to surplusage on the bill of indictment, not a material change. In *State v. Peele*, 16 N.C. App. 227, 192 S.E.2d 67, *cert. denied*, 282 N.C. 429, 192 S.E.2d 838 (1972), this Court held that even striking words from the body of an indictment did not amount to a material amendment. In so doing, this Court relied on the fact that the words stricken were mere surplusage and that defendant still had adequate knowledge of the offense charged.

In the present case, the body of the indictment has not been altered, only an incorrect statutory reference has been retained. The Supreme Court has previously held that the statutory reference in a warrant is surplusage and can be disregarded. *See State v. Smith*, 240 N.C. 99, 81 S.E.2d 263 (1954). We see no reason not to apply the same rationale to this indictment. Defendant cannot complain that she was unaware of the acts for which she was charged and if anything the defendant benefited by the State's decision to proceed on second degree arson because it reduced her level of punishment from a Class C to a Class D felony. We

hold that no material amendment occurred to defendant's indictment when the State opted to proceed on the charge of second degree arson.

In reaching our decision, we note that counsel for the defendant was well aware that the State would proceed on the charge of second degree arson and gave implied consent to the procedure. Therefore, even if we were to hold that defendant's indictment had been materially amended, we would still be compelled to uphold the trial court's instructions because the defendant did not object to the change. When this case came for trial, the trial court put on record that the decision had been made that the case would proceed on the charge of second degree arson. For the record, the trial court stated that counsel for the State and the defense had discussed the matter and agreed that second degree arson was the proper charge. The District Attorney acknowledged his consent to the arrangement while counsel for the defense stood mute. We do not see how defendant can claim that it was error when her counsel participated in the arrangement to alter the indictment to conform to the evidence. As a result we hold that the trial court did not err in instructing the jury on second degree arson.

We have reviewed defendant's remaining assignments of error and find them to be without merit. The trial court did not err in refusing to set aside the jury's verdict or in refusing to grant defendant's motion for a new trial.

We hold defendant received a fair trial free from prejudicial error.

No error.

Judges JOHNSON and JOHN concur.

IN THE MATTER OF KENYON N.

No. 9228DC492

(Filed 18 May 1993)

Infants or Minors § 87 (NCI4th)— juvenile delinquent—admission to assault charge—required inquiries and statements by court

An order adjudicating delinquency based on acceptance of the juvenile's admission to misdemeanor assault with a deadly weapon was vacated, as was a subsequent commitment to the Division of Youth Services by another court based on this adjudication of delinquency, where there was no transcript of the hearing at which the admission was accepted, the only evidence as to the inquiries and statements made to the juvenile at the time the admission was accepted is his testimony in the subsequent proceeding resulting in commitment, it does not affirmatively appear from the record that the provisions of N.C.G.S. § 7A-633(a) were complied with, and the Court of Appeals could not say that the admission was the product of an informed choice.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 53, 60.

Appeal by juvenile from order entered 12 November 1991 in Davidson County District Court by Judge Jessie M. Conley and order entered 26 November 1991 in Buncombe County District Court by Judge Peter L. Roda. Heard in the Court of Appeals 13 April 1993.

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

Office of the Public Defender, by John T. Barrett, for juvenile-appellant.

GREENE, Judge.

Juvenile appeals from the Davidson County District Court's order adjudicating him a delinquent juvenile based on the acceptance of his admission to misdemeanor assault with a deadly weapon. Juvenile also appeals from the order of the Buncombe County District Court committing him to the Division of Youth Services based

on the aforementioned adjudication of delinquency. In addition, juvenile appeals the Buncombe County District Court's finding that commitment was the least restrictive disposition available.

On 8 November 1991, a juvenile petition was filed in Davidson County District Court alleging that the appellant, a fifteen-year-old juvenile, was delinquent. The petition was based on a charge of assault with a deadly weapon pursuant to N.C.G.S. § 14-33(b)(1). The juvenile's admission to the charge was accepted by the trial court and he was adjudicated delinquent on 12 November 1991. The trial judge ordered that a stenographic transcript of the proceedings be prepared, but the tape recording of the proceedings was lost and it was therefore not possible to prepare a transcript. At the time of the Davidson County District Court hearing, the juvenile was already in the legal custody of the Buncombe County Department of Social Services, and the Davidson County District Court ordered the file transferred to Buncombe County District Court for disposition and supervision.

The Buncombe County proceedings were held on 26 November 1991. The juvenile's attorney moved that the proceedings be dismissed and the case returned to Davidson County because the Davidson County District Court's adjudication of delinquency was based on an admission that was not the result of the juvenile's informed choice, and thus was invalid. Without a valid adjudication of delinquency in the Davidson County District Court, the juvenile contends, the Buncombe County District Court could not proceed with disposition. The juvenile was called as a witness, and testified as follows:

> Q . . . What happened in terms of the judge . . . accepting your admission?
>
> A I just told them, "Yes, I did," and then they just took me on back to the (unintelligible).
>
> . . .
>
> Q All right. Did the judge ever ask you if you knew what the charges were all about?
>
> A No.
>
> Q Did the judge ever ask you whether you knew you had the right to not say anything or be silent?

A No.

Q Did the judge tell you you had the right to deny the charges and have a trial?

A No.

Q Did the judge tell you you had the right to make the witnesses get up and testify against you?

A No.

Q Did the judge tell you what the most time you could get . . . [was]?

A No.

Q . . . Did the judge ask you whether or not you'd agree to admit the charges as part of any plea arrangement?

A Yeah, he did.

. . .

Q Did the judge ask whether or not you'd discussed your case fully with your lawyer and were satisfied with your lawyer's services?

A No.

Q Okay. Did the judge ask whether or not you were admitting [the charge] of your own free will, understanding what you're doing?

A No.

The motion to dismiss and return to Davidson County District Court was denied. The trial court then committed the juvenile to the Division of Youth Services for an indefinite period, not to exceed his eighteenth birthday.

The dispositive issue is whether the district court which initially adjudged the juvenile to be delinquent erred in accepting the juvenile's admission.

The acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case. *In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d 486, 487-88 (1977).

As with any guilty plea, the trial court must determine that the admission is a product of the juvenile's informed choice before accepting the admission. N.C.G.S. § 7A-633(b) (1989); *In re Register*, 84 N.C. App. 336, 348, 352 S.E.2d 889, 896 (1987). Accordingly, N.C.G.S. § 7A-633 requires that, prior to acceptance of admissions by juveniles, the trial judge must address the juvenile personally on the following:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

(2) Determining that he understands the nature of the charge;

(3) Informing him that he has a right to deny the allegations;

(4) Informing him that by his admissions he waives his right to be confronted by the witnesses against him;

(5) Determining that the juvenile is satisfied with his representation; and

(6) Informing him of the most restrictive disposition on the charge.

N.C.G.S. § 7A-633(a) (1989).

The fact that these inquiries and statements were made must affirmatively appear in the record of the proceeding, *In re Chavis*, 31 N.C. App. 579, 580-81, 230 S.E.2d 198, 200 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977), and if the record does not so reflect, the adjudication of delinquency based on the admission must be set aside. *In re Johnson*, 32 N.C. App. at 493, 232 S.E.2d at 488.

In the instant case there is no transcript of the Davidson County hearing at which the admission was accepted. Thus, the only record evidence before us as to the inquiries and statements made to the juvenile at the time the admission was accepted is the juvenile's testimony in the Buncombe County proceeding. This testimony reveals that the trial court failed to inquire of the juvenile whether he understood the nature of the charge against him and whether he was satisfied with his representation. The trial court also failed to inform the juvenile that he had a right to remain silent, a right to deny the charges against him, that by his admission he waived his right to confront the witnesses against him, and what constituted the most restrictive disposition possible on the

charge against him. Thus, it does not affirmatively appear from the record that the provisions of N.C.G.S. § 7A-633(a) were complied with, and we are therefore unable to say that the juvenile's admission was the product of an informed choice.

Accordingly, the order adjudicating delinquency based on the admission is vacated. Without a valid adjudication of delinquency, the trial court in Buncombe County was without jurisdiction to commit the juvenile to the Division of Youth Services, *see In re Hughes*, 50 N.C. App. 258, 262, 273 S.E.2d 324, 326 (1981); N.C.G.S. § 7A-649(10) (Supp. 1992), and the order of commitment is likewise vacated. Having so found, we need not address the juvenile's argument that commitment was not the least restrictive permissible disposition.

Vacated and remanded.

Judges WELLS and WYNN concur.

VALERIA LUST v. FOUNTAIN OF LIFE, INCORPORATED, A FOREIGN CORPORATION, AND BARBARA JUNE STEVENS

No. 923SC322

(Filed 18 May 1993)

Judgments § 619 (NCI4th)— foreign judgment—enforcement—presumption of full faith and credit

The trial court correctly allowed plaintiff's motion to enforce a Florida judgment pursuant to the Uniform Enforcement of Foreign Judgments Act and ordered that the Florida judgment be given full faith and credit where the judgment creditor introduced into evidence, without objection, the contents of the court file, which included the judgment entered against defendants in Florida, a certificate from the clerk of court certifying the judgment, and a certificate from a judge certifying that the person named was the clerk of court, that he was the keeper of the records, and that his attestation was in due form of law and by the proper officer. This evidence entitled the judgment creditor to a presumption that the Florida judgment was entitled to full faith and credit; once this presump-

tion was established, defendants were required to bring forth evidence to rebut the presumption of validity and plaintiff was not required to bring forth evidence that none of the defenses available to defendant were valid. N.C.G.S. §§ 1C-1701 to -1708.

Am Jur 2d, Judgments § 930.

Appeal by defendants Fountain of Life, Incorporated, and Jimmy B. Whittington from order entered 14 August 1991 in Pitt County Superior Court by Judge Dexter Brooks. Heard in the Court of Appeals 9 March 1993.

Law Offices of Marvin Blount, Jr., by James F. Hopf and Sharron R. Edwards, for plaintiff-appellee.

Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, P.A., by Robert D. Wheeler, and Robert G. Bowers, Attorney at Law, by Robert G. Bowers, for defendant-appellants.

GREENE, Judge.

Defendants Jimmy B. Whittington (Whittington) and Fountain of Life, Incorporated (Fountain of Life) appeal from the trial court's order granting plaintiff Valeria Lust's motion to enforce a Florida judgment against defendants pursuant to the Uniform Enforcement of Foreign Judgments Act (the Act).

Plaintiff filed an amended petition for injunction and other appropriate relief in the Tenth Judicial Circuit Court of Polk County, Florida, on 8 September 1988. The petition alleged that defendants and others had, through undue influence, induced plaintiff to transfer money and real property to defendants. Plaintiff moved for a default judgment against Whittington, and a default judgment was entered on 7 September 1989. Final judgment was entered against all defendants on 14 February 1990.

Plaintiff seeks, pursuant to the Act, to enforce the Florida judgment against Whittington and Fountain of Life in North Carolina. Plaintiff filed a copy of the Florida judgment against defendants with the Clerk of Superior Court, Pitt County, on 25 February 1991, accompanied by an attestation from and seal of the Clerk of the Circuit Court, Tenth Judicial District, Polk County, Florida, that the copy was a true and correct copy of the original judgment and an attestation from a judge of that court that the Clerk was

the proper custodian of the judgment. Defendants filed notices of defenses on 27 March 1991, stating that the Florida judgment could not be enforced against them because the Florida court which granted the judgment lacked jurisdiction over them. Plaintiff made a motion to enforce the judgment on 22 May 1991. At the hearing on that motion, plaintiff tendered, without objection from defendants, the contents of the case file, which included the authenticated copy of the Florida judgment. On 19 August 1991, the trial court entered an order granting the plaintiff's motion to enforce the judgment and ordered that the Florida judgment was entitled to full faith and credit in North Carolina.

The dispositive issue is whether in an action to enforce a foreign judgment under Article 17, Chapter 1C of the General Statutes, in the absence of any evidence from the judgment debtor, the introduction of a properly authenticated foreign judgment entitles the foreign judgment to full faith and credit.

Article 17, Chapter 1C of the General Statutes (the Act) provides one method whereby plaintiffs may seek the enforcement in North Carolina of judgments from other states. N.C.G.S. §§ 1C-1701 to -1708 (1991). The Act requires that the judgment creditor file with the clerk of superior court a "copy of [the] foreign judgment authenticated in accordance with an act of Congress or the statutes of this State." N.C.G.S. § 1C-1703(a). After filing a properly authenticated copy of the foreign judgment, the judgment creditor must then give notice of the filing to the judgment debtor. N.C.G.S. § 1C-1704(a). If the judgment debtor takes no action within thirty days of receipt of the notice to delay enforcement of the judgment, "the judgment will be enforced in this State in the same manner as any judgment of this State." N.C.G.S. § 1C-1704(b). To delay enforcement of the judgment, the judgment debtor may "file a motion for relief from, or notice of defense to," the judgment on grounds as permitted in the Act. N.C.G.S. § 1C-1705(a).

Upon the filing of such a motion, enforcement of the judgment is stayed until the judgment creditor "move[s] for enforcement of the foreign judgment." N.C.G.S. § 1C-1705(b). If a motion for enforcement is filed, a hearing will be held and the trial court will determine if the "foreign judgment is entitled to full faith and credit." *Id.* The burden of proof on the issue of full faith and credit is on the judgment creditor, and the hearing will be

conducted in accordance with the Rules of Civil Procedure. *Id.* The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit. *See Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969); *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 526, 146 S.E.2d 397, 400 (1966). This presumption can be rebutted by the judgment debtor upon a showing that the rendering court did not have subject matter jurisdiction, did not have jurisdiction over the parties, that the judgment was obtained by fraud or collusion, that the defendant did not have notice of the proceedings, or that the claim on which the judgment is based is contrary to the public policies of North Carolina. *Morris v. Jones*, 329 U.S. 545, 550-51, 91 L. Ed. 488, 495-96 (1947); *Webster v. Webster*, 75 N.C. App. 621, 623, 331 S.E.2d 276, 278, *disc. rev. denied*, 315 N.C. 190, 337 S.E.2d 864 (1985); *White v. Graham*, 72 N.C. App. 436, 440, 325 S.E.2d 497, 499, 500 (1985); N.C.G.S. § 1C-1708.

In this case, at the hearing before the trial court, the judgment creditor introduced into evidence, without objection, the contents of the court file, which included the judgment entered against the defendants in Florida. Attached to the judgment was a certificate signed by E.D. Dixon, Clerk of the Circuit Court for Polk County, Florida, certifying that the judgment was "a true and correct copy of the FINAL JUDGMENT AGAINST DEFENDANTS" which was "filed and recorded . . . on the 19TH day of FEBRUARY, A.D. 1990 . . . and now appearing of record in OFFICIAL RECORD BOOK 2825 at page 1151 in the Public Records of Polk County, Florida." Attached to the certificate was the clerk's seal. Additionally, attached to the judgment was a certificate signed by Oliver L. Green, Jr., Judge of the Circuit Court, Tenth Judicial Circuit, Polk County, Florida. Judge Green certified that E.D. Dixon "is Clerk of the Circuit Court of Polk County, Florida, and keeper of the records and seal thereof, duly elected and qualified to office; . . . and that his said attestation is in due form of law and by the proper officer."

Because the copy of the judgment, as an official record, was "attested by the officer having the legal custody of the record . . . and accompanied with a certificate [from a judge of a court of record of the political subdivision in which the record is kept] that such officer has the custody," it was thus properly authenticated consistent with Rule 44. N.C.G.S. § 1A-1, Rule 44(a) (1990).

This evidence entitled the judgment creditor to a presumption that the Florida judgment was entitled to full faith and credit. Once this presumption was established, the plaintiff was not required, as the defendants suggest, to bring forth evidence that none of the defenses available to defendants were valid. Rather, the defendants were required to bring forth evidence to rebut the presumption of validity. The defendants offered no such evidence. Thus the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the Florida judgment be given full faith and credit.

Affirmed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

STATE OF NORTH CAROLINA v. HEATHER MILLER KENNEDY

No. 928SC257

(Filed 18 May 1993)

Judges, Justices, and Magistrates § 27 (NCI4th)— motion to recuse—DWI defendant—judge's wife injured by impaired driver—motion denied—no error

There was no error in a judge's denial of a DWI defendant's motion for recusal where defendant alleged that the judge could not be impartial because his wife had been seriously injured by an impaired driver. A trial judge's personal views on the particular crime for which a defendant is charged do not, without more, show that he is prejudiced or biased or give rise to a reasonable belief that the trial court could not rule impartially. The defendant's motion and its supporting affidavit do not allege that the trial judge has any strong feelings about defendant herself; rather, they suggest that the trial judge, for personal reasons, has strong feelings about the crime of driving while impaired. Assuming such feelings exist, they are directed to the subject matter of the case and not to defendant and are not indicative of any bias against defendant, nor are they sufficient to give a reasonable person grounds to believe that the judge could not act impartially

in the matter. N.C.G.S. § 15A-1223; Canon 3 of the Code of Judical Conduct.

Am Jur 2d, Judges § 86.

Appeal by defendant from judgment entered 12 December 1991 in Wayne County Superior Court by Judge Wiley F. Bowen. Heard in the Court of Appeals 30 March 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Barnes, Braswell, Haithcock & Warren, P.A., by Glenn A. Barfield, for defendant-appellant.

GREENE, Judge.

Defendant Heather Miller Kennedy appeals from a judgment entered 12 December 1991, based on a jury verdict convicting her of driving while impaired and from the trial court's denial of defendant's motion to recuse the trial judge.[1]

Defendant was arrested 20 October 1990, and charged with driving while impaired. She was convicted in district court on 26 June 1991, and gave notice of appeal to the superior court. Prior to trial in the superior court, on 4 December 1991, defendant's attorney filed a motion that the trial judge recuse himself on the ground that he could not be impartial because

> the Honorable Judge's wife was involved in an accident wherein she was seriously injured, and the person driving the [other] vehicle was at fault in the accident [and] was impaired.

The motion to recuse was accompanied by an affidavit from a local attorney containing the following:

> That it is my belief . . . that the [trial judge] has been especially requested to preside over this session of court [at which most defendants are charged with driving while impaired] . . . because of his feelings toward Driving While Impaired offenders. I have been informed that the [trial judge's] wife was seriously injured in an automobile accident caused by an impaired driver.

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1. Defendant abandons all issues on appeal concerning the judgment and argues only the propriety of the trial court's denial of the motion to recuse.

> I believe that this has an adverse impact upon any person . . . convicted of Driving While Impaired while the [trial judge] is presiding . . . .

Defendant entered a plea of not guilty in superior court on 11 December 1991. The trial judge heard argument on the motion to recuse, and defendant's attorney made a motion to have another superior court judge hear the motion to recuse, stating "that the Affidavit that has been presented along with the Motion [to recuse] . . . present[s] such facts as a reasonable man would find would require Your Honor to refer the case to another Judge." The trial judge denied the motion to have another superior court judge hear the motion to recuse and denied the motion to recuse. The jury returned a verdict of guilty of driving while impaired.

The dispositive issue is whether the trial judge's alleged opinions regarding the crime of driving while impaired constitute proper grounds to require the judge to recuse himself.

Defendant asserts that she is allegedly a member of a class, those accused of driving while impaired, against which the trial judge is biased, and that this bias stems from the fact that the trial judge's wife was seriously injured by an impaired driver. In the alternative, defendant argues that even if these facts are not sufficient to show actual bias, they are enough to raise doubts in the mind of a reasonable person as to whether the judge could rule impartially, and, therefore, give rise to the appearance of partiality. We do not agree.

Both N.C.G.S. § 15A-1223 and Canon 3 of the Code of Judicial Conduct control the disqualification of a judge presiding over a criminal trial when partiality is claimed. *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987).

North Carolina Gen. Stat. § 15A-1223 provides in pertinent part:

> (b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) Prejudiced against the moving party or in favor of the adverse party; . . .

N.C.G.S. § 15A-1223(b)(1) (1988).

The Code of Judicial Conduct provides in pertinent part:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party . . .

Code of Judicial Conduct, Canon 3(C)(1)(a) (1993).

The burden is on the party moving for recusal to " 'demonstrate objectively that grounds for disqualification actually exist.' " *In re Nakell*, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *disc. rev. denied*, 330 N.C. 851, 413 S.E.2d 556 (1992) (citation omitted). The moving party may carry this burden with a showing " 'of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially,' " *id.*, or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially. *See Fie*, 320 N.C. at 628, 359 S.E.2d at 775-76.

The "bias, prejudice or interest" which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him. *See* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 21.4(b) (1984); Leslee Daugherty, *State v. Fie: Determining the Proper Standard for Recusal of Judges in North Carolina*, 65 N.C. L. Rev. 1138, 1142 (1987); *see generally* 46 Am. Jur. 2d *Judges* §§ 167, 168, 169 (1969). "Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case." 46 Am. Jur. 2d at § 168. Accordingly, a trial judge's personal views on the particular crime for which a defendant is charged do not, without more, show that he is prejudiced or biased or give rise to a reasonable belief that the trial court could not rule impartially. Nor does the fact that a judge, for whatever personal reasons, views a particular type of crime as more serious or more deserving of punishment than other crimes give a reasonable person grounds to question whether the trial court can rule impartially. *See United States v. Guglielmi*, 615 F. Supp. 1506, 1511 (W.D.N.C. 1985) (fact that trial judge had previously stated strong views critical of pornographers not grounds for recusal in trial of alleged pornographer);

United States v. Allen, 633 F.2d 1282, 1294 (9th Cir. 1980) (fact that trial judge personally viewed drug smugglers as "cancer" on society not ground for recusal in trial of drug smuggling defendant).

The defendant's motion and its supporting affidavit do not allege that the trial judge has any strong feelings about defendant herself. Rather, they suggest that the trial judge, for personal reasons, has strong feelings about the crime of driving while impaired. Such feelings, assuming *arguendo* that they do exist, are directed to the subject matter of the case and not to defendant herself. As such, they are not indicative of any bias against defendant, nor are they sufficient to give a reasonable person grounds to believe that the judge could not act impartially in the matter. Therefore, there was no error in the trial judge's failure to recuse himself. Having established that there were no facts presented to cause a reasonable person to doubt the trial judge's impartiality, there is also no error in the trial judge's failure to refer the motion to recuse to another judge. *See State v. Crabtree*, 66 N.C. App. 662, 665-66, 312 S.E.2d 219, 221 (1984) (where facts not shown to cause reasonable person to doubt impartiality, not error to fail to hold hearing on motion to recuse or to fail to refer motion to recuse to another judge).

Affirmed.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA v. ROY STEVEN WILLIAMS

No. 926SC134

(Filed 18 May 1993)

Criminal Law § 762 (NCI4th)— instructions on reasonable doubt—references to moral certainty—improper instructions—harmless error

The trial court's instructions on reasonable doubt which included two references to "moral certainty" and one reference to "honest substantial misgiving" violated defendant's rights under the Due Process Clause; however, evidence against de-

fendant was so substantial that the trial court's error in its instructions was harmless beyond a reasonable doubt.

Am Jur 2d, Trial §§ 1370 et seq., 1482.

Appeal by defendant from judgment entered 1 July 1991 in Halifax County Superior Court by Judge William C. Griffin, Jr. Heard in the Court of Appeals 3 March 1993.

Defendant was charged in a true bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury, a violation of N.C. Gen. Stat. § 14-32(a) (1986). His first trial resulted in a mistrial when the jury was unable to reach a unanimous verdict. In the second trial, the jury found defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury, a violation of N.C. Gen. Stat. § 14-32(b). From judgment imposing an active sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General, T. Buie Costen, for the State.

Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant appellant.

McCRODDEN, Judge.

Defendant first assigns as error the trial court's instruction defining for the jury the term "reasonable doubt." Defendant contends that he is entitled to a new trial because the instruction given was indistinguishable from the instruction found unconstitutional in *Cage v. Louisiana*, 498 U.S. ---, 112 L.Ed.2d 339 (1990). We agree that the trial court's instruction violated the principles set forth in *Cage* and applied by our Supreme Court in *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). We do not agree, however, that this error entitles defendant to a new trial.

When requested to give an instruction on reasonable doubt to a jury, a trial court has the duty to define the term but is not required to use an exact formula. *Montgomery, supra.* If the trial court undertakes to define reasonable doubt, however, its instruction must be a correct statement of the law. *Id.*

The Supreme Court in *Cage* condemned a combination of three terms: "grave uncertainty," "actual substantial doubt," and "moral certainty," because they suggested a higher degree of doubt than

is required for acquittal under the reasonable doubt standard. *Cage*, 498 U.S. at ---, 112 L.Ed.2d at 342. Relying on *Cage*, the *Montgomery* Court found that the use of the terms "substantial misgiving" and "moral certainty" in combination in the trial court's reasonable doubt instruction violated the requirements of the Due Process Clause. *Montgomery*, 331 N.C. at 572, 417 S.E.2d at 749-50. The *Montgomery* Court found that there was a "reasonable likelihood" that the jury applied the challenged instruction in a way that violated the Due Process Clause, and therefore held that the trial court's instruction gave rise to error under the Constitution of the United States. *Id.* at 573, 417 S.E.2d at 750.

The *Montgomery* Court distinguished *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), in which the Court concluded that there was no error in the trial court's instruction to the jury on reasonable doubt. Although the trial court in *Hudson* used the term "substantial misgiving," it did not equate reasonable doubt with a "moral certainty." *Montgomery*, 331 N.C. at 572, 417 S.E.2d at 749.

In the case under consideration, the trial court's instruction included two references to "moral certainty" ("satisfied to a moral certainty of the truth of the charge" and "abiding faith to a moral certainty in the defendant's guilt") and one reference to "honest substantial misgiving" ("honest substantial misgiving generated by the insufficiency of the proof"). Although the trial court used these terms in a broader definition of "reasonable doubt," we must, in light of *Cage* and *Montgomery*, find that such instructions violated defendant's rights under the Due Process Clause.

In the instant case, the State argues that the instruction given by the trial court was approved by our Supreme Court in *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954). Although the language in *Hammonds* is distinguishable from the language used here, that case was decided well before *Cage* and *Montgomery* and is not, therefore, determinative.

The determination that the trial court's instruction violated the Due Process Clause does not automatically entitle defendant to a new trial. If the trial court's erroneous instruction was harmless beyond a reasonable doubt, defendant is not entitled to a new trial. *Montgomery*, 331 N.C. at 573, 417 S.E.2d at 750. Whether this error will be considered sufficiently prejudicial to warrant

a new trial will be determined by the evidence involved. *Hammonds*, 241 N.C. at 233, 85 S.E.2d at 139.

The evidence tended to show that defendant and his wife, Starlett Williams ("Williams"), had had marital problems for years prior to September 1990. On a number of occasions, Williams told defendant that she was planning to leave the house in which they and their two children lived. Defendant told Williams that he did not want her to leave, and, on a number of occasions when he had been drinking, he told her that he would kill her if she left with the children.

Although defendant owned two handguns, including a .357 calibre pistol, and a rifle and shotgun, prior to 10 September 1990, he had never armed himself when he threatened to kill Williams. Williams owned a .38 calibre revolver, which she kept, loaded, in the nightstand next to her bed.

On the evening of 10 September 1990, Williams and the defendant began discussing her plans to move away with the children. During the discussion, defendant, who had not been drinking, told Williams that he was going to kill her. Williams responded, "Then you are going to have to do what you are going to do." Williams instructed her daughter Amy to bring the .38 calibre revolver into the living room, and Amy returned to the room with the gun. After being told by defendant to give him the gun, Amy handed the gun to him. As defendant was holding the gun in his left hand, it fired one time. The bullet hit Williams in the cheek, fracturing her jaw and lodging in her spine. The State's evidence tended to show that the defendant "pointed [the gun] right at [William's] face, . . . cocked the trigger, . . . aimed right at . . . [Williams], and . . . pulled the trigger."

Although defendant offered no evidence, he attempted to present his version of the incident through cross-examination of Charles E. Ward ("Ward"), the detective who investigated the shooting. Ward testified that defendant first claimed that "he threw the gun up and the next thing he knew it went off" and that "he thought the gun was on safety and it was an accident." He further testified that, once he informed defendant that the gun did not have a safety, defendant "never mentioned it again." We believe that the evidence against defendant was so substantial that the trial court's error in its instructions was harmless beyond a reasonable doubt. Defendant is not entitled to a new trial.

Defendant next assigns as error the trial court's denial of his plea of former jeopardy and the related motion to limit the prosecution to the charge of guilty of assault with a deadly weapon inflicting serious injury ("the lesser charge"). Defendant's counsel alleges that he learned that the jury in defendant's first trial had unanimously decided that defendant was not guilty of assault with a deadly weapon with intent to kill inflicting serious injury ("the greater charge") and was deadlocked only on the question of defendant's guilt of the lesser charge. Based upon these allegations, defendant argues that his Fifth Amendment right not to be tried twice for the same offense was violated when he was forced to endure a second trial on the greater charge.

Relying on *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982), we find that defendant was not placed in double jeopardy. Even if he had been placed in double jeopardy, the error would have been harmless because defendant was convicted of the lesser offense, the same offense for which he moved to be tried.

No error.

Chief Judge ARNOLD and Judge GREENE concur.

IN RE LICENSE OF MARK T. DELK

No. 9230SC533

(Filed 18 May 1993)

Attorneys at Law § 67 (NCI4th); Judgments § 36 (NCI4th)— attorney discipline—superior court—show cause orders from another county—disbarment order void

A disbarment order is void for lack of jurisdiction over respondent attorney where the superior court judge who issued the original show cause order was not assigned to the county where the ordered hearing was to be held; a subsequent order directing that the original show cause order "remain in effect" was invalid because the original order was void *ab initio*; and a third show cause order was void because it was also issued from another county without respondent's consent.

Am Jur 2d, Attorneys at Law §§ 87, 97-100.

Appeal by respondent from judgment entered 3 February 1992 in Graham County Superior Court by Judge C. Walter Allen. Heard in the Court of Appeals 27 April 1993.

Respondent appeals from an order of disbarment. The facts and procedural history leading up to this appeal are as follows: During the June 1989 term of Graham County Superior Court, respondent Mark T. Delk was convicted by a jury of one felony count of extortion in 88 CRS 438 in violation of N.C. Gen. Stat. § 14-118.4 and one felony count of conspiracy in 88 CRS 439 in violation of N.C. Gen. Stat. § 14-2.4. The court was apprised of the fact that respondent was a practicing attorney yet did not enter an order of professional discipline based upon the convictions. Respondent appealed his convictions to this Court and we found no error in an opinion filed 7 August 1990.

On 24 April 1990, the North Carolina State Bar initiated this action and specifically requested it not be named as a party. At that time respondent's criminal cases were on appeal before this Court. Instead of initiating action in its own forum, the State Bar proceeded in the superior court, requesting Judge J. Marlene Hyatt to sign an order to show cause to initiate a disciplinary hearing. The order was signed and appellant was disbarred on 25 May 1990. We vacated and remanded that order in *In re Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991) (hereinafter Delk I).

Upon resolution of Delk I by this Court, the State Bar contacted Judge Hyatt and asked her to sign a second show cause order. She declined. On 23 October 1991, the State Bar wrote to Judge James U. Downs, the Senior Resident Superior Court Judge for the 30th Judicial District which includes Graham County, and requested that he enter the second order to show cause which the State Bar had prepared. On 28 October 1991, Judge Downs, while assigned to and present in Mecklenburg County, signed the order, which indicated on its face that it was issued for Graham County. On 28 October 1991, Judge Downs was not commissioned to sit in Graham County. The following day, Chief Justice Exum assigned Judge Downs to Graham County for the term beginning on 2 December 1991.

The 28 October 1991 show cause order commanded respondent to travel to Graham County on 2 December 1991 and show cause "why he should not be disciplined." At the 2 December hearing, Judge Downs recused himself, but ordered that the 28 October

1991 show cause order "remain in effect" and that respondent "continue to show cause" on 3 February 1992.

On 5 December 1991, the State Bar wrote to Judge Downs requesting that he sign a third show cause order (for 3 February 1992). On 7 December 1991, Judge Downs, while in Franklin, North Carolina, signed the third show cause order *nunc pro tunc* to 2 December 1991, and mailed it to the Clerk of Superior Court of Graham County from Macon County, with instructions that it should be filed. On 23 January 1992, respondent was served with the third order by the Sheriff of Buncombe County. On 3 February 1991, Judge Allen entered an order disbarring the respondent. From that order respondent appeals.

A. Root Edmonson for plaintiff-appellee.

Mark T. Delk, respondent-appellant, pro se.

WELLS, Judge.

Although respondent sets forth several assignments of error for our review, there is only one dispositive question before us: whether a disbarment order is valid where the judge who issued the show cause order had no assignment to the county where the ordered hearing was to be held. We hold it is not.

Our Court squarely addressed the question of a court's limited authority to issue an order in the absence of a commission in Delk I:

> [J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

Delk, 103 N.C. App. 659, 406 S.E.2d 601 (1991) (Emphasis added.) Our Court also held that where there was no commission by assignment at the time the order was entered, the court is without jurisdiction to enter the order.

The same jurisdictional flaws present in Delk I are also present in the instant case. Here, Judge Downs issued an order to show

cause on 28 October 1991 for and in Graham County Superior Court. At that time, Judge Downs was not assigned to Graham County but was in fact assigned to Mecklenburg County. He was not assigned to Graham County until 29 October 1991, and that commission did not empower him to act until 2 December 1991. Following our Court's mandate in Delk I, we find that because Judge Downs had no assignment for Graham County, he had no jurisdiction or authority to issue the show cause order on 28 October 1991, and that order is therefore a nullity.

Judge Downs could not correct the improper order by directing that the 28 October order "remain in effect" where that order was void, *ab initio*. Furthermore, Judge Downs' attempt on 7 December 1991 to issue a third show cause order for Graham County was also invalid because it was issued from another county.

> [I]t is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending.

Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943) (Emphasis added.) *See also State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

Judge Downs signed the 7 December show cause order in another county without the consent of respondent. The superior court never obtained jurisdiction over respondent because it had no authority to issue the show cause order out of county. Because the show cause orders issued by Judge Downs were void, the order of disbarment entered pursuant to those orders is also void. *See Delk, supra.* Accordingly, we vacate the order by the superior court disbarring the respondent. We need not address respondent's additional assignments of error.

Vacated.

Judges GREENE and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 MAY 1993

AMSCO, INC. v. CITY OF WINSTON-SALEM No. 9221SC278	Forsyth (89CVS5437)	No Error
ANDERSON v. ANDERSON No. 9229SC1166	Rutherford (92CVS709) (91CVS1053) Gaston (92CVS2321)	Dismissed
BROWN v. TOWN OF RICHLANDS No. 914SC1210	Onslow (89CVS24)	Affirmed in part and reversed in part
COMMERCE CENTER ASSOC. v. POPLAR EIGHT, INC. No. 9126SC1009	Mecklenburg (90CVS11681)	Affirmed
GARRETT v. FLAUTT PROPERTIES No. 9210IC1045	Ind. Comm. (966649)	Reversed & Remanded
IN RE BLALOCK No. 929DC1198	Person (91J22) (91J23)	Affirmed
IN RE HARGROVE No. 9211DC1254	Lee (92J75)	Vacated & Remanded
RAYMER BROTHERS, INC. v. CATAWBA AUTO/TRUCK PLAZA, INC. No. 9222SC379	Iredell (89CVS1645)	Reversed & Remanded
RAYMER BROTHERS, INC. v. FUEL CITY, INC. No. 9222SC380	Iredell (89CVS1646)	Reversed & Remanded
STATE v. ATWATER No. 918SC1149	Wayne (90CRS12267) (90CRS14551)	No Error
STATE v. BANKS No. 9219SC1265	Cabarrus (92CRS11479)	Affirmed
STATE v. BRINSON No. 917SC897	Nash (90CRS15935)	Vacated and remanded for new trial

STATE v. CALDWELL No. 9228SC1106	Buncombe (91CRS61728) (91CRS61729) (91CRS61730) (91CRS61731)	No Error
STATE v. CALHOUN No. 9218SC282	Guilford (91CRS56043)	Appeal Dismissed
STATE v. CRAWFORD No. 9126SC1170	Mecklenburg (90CRS84504) (90CRS84508)	No Error
STATE v. HOPE No. 9218SC1120	Guilford (91CRS13714)	No Error
STATE v. PROPST No. 9225SC1178	Catawba (92CRS1708) (92CRS2843)	No Error
STATE ex rel. WEST v. DAVIS No. 923DC1260	Pamlico (91CVD126)	Vacated
TOYOTA OF WILSON, INC. v. JM FAMILY ENTERPRISES, INC. No. 9214SC151	Durham (90CVS1398)	Appeal Dismissed

FILED 18 MAY 1993

BREVARD ELECTRIC CO. v. RELIANCE INS. CO. No. 9229SC303	Transylvania (91CVS173)	Affirmed
CITY OF CHARLOTTE v. HELMS No. 9220DC211	Union (90CVD0484)	Affirmed
COFFMAN v. AMERICAN INDUSTRIAL COATINGS, INC. No. 9210IC1176	Ind. Comm. (833441)	Affirmed
DAVIS v. JOSEY No. 9219SC1160	Rowan (91CVS1031)	Affirmed
DILLON CONSTRUCTION CO. v. ROSS No. 9210DC949	Wake (91CVD632)	Reversed & remanded for a new trial
HALL v. MENDENHALL No. 9223DC347	Yadkin (89CVD102)	Vacated

HORN v. HORN No. 9226DC363	Mecklenburg (83CVD309)	Vacated in part, reversed in part & remanded.
L. J. MARTIN & SON, INC. v. CONSTRUCTION RESOURCES No. 929DC977	Person (91CVD299)	Affirmed
MONEYMAKER v. THOMPSON No. 9230SC403	Cherokee (91CVS60)	Reversed & Remanded
N.C. BD. OF MEDICAL EXAMINERS v. CHUNG No. 9210SC572	Wake (90CVS12250)	Dismissed
PEACOCK v. BURCH No. 9210SC439	Wake (89CVS09535)	Appeal Dismissed
QUEEN v. TOWN OF ELM CITY No. 927SC384	Wilson (90CVS1128)	Affirmed
REED v. HANES DYE & FINISHING CO. No. 9210IC1175	Ind. Comm. (517073)	Affirmed
REED v. VENTERS No. 925DC1325	New Hanover (92CVD2852)	Affirmed
SCHROEDER v. JONES No. 924DC496	Sampson (91CVD40)	Affirmed
SHOOK v. SHOOK No. 9229DC1215	McDowell (91CVD2257)	Affirmed
STATE v. ARTIS No. 928SC1200	Wayne (91CRS12968)	No Error
STATE v. CALDWELL No. 9126SC1098	Mecklenburg (90CRS72958)	No Error
STATE v. DELREAL No. 9221SC374	Forsyth (90CRS29741) (90CRS29742) (90CRS31414) (90CRS31415) (90CRS31416) (90CRS31417) (90CRS31418) (90CRS31419) (90CRS31420) (90CRS31421) (90CRS31422) (90CRS31423)	No prejudicial error

	(90CRS31424) (90CRS31425) (90CRS31426) (90CRS32069) (90CRS32070) (90CRS32071) (90CRS32072) (90CRS32073) (90CRS32074)	
STATE v. FIELDS No. 928SC1128	Wayne (91CRS13202)	No Error
STATE v. GILLIS No. 9211SC1246	Johnston (91CRS14483)	No Error
STATE v. HENSON No. 9229SC221	Rutherford (91CRS2620)	Affirmed
STATE v. HOWINGTON No. 9216SC1146	Robeson (91CRS3702)	No Error
STATE v. KING No. 9217SC1153	Surry (92CRS2339) (92CRS5649)	No Error
STATE v. LONG No. 9226SC1236	Mecklenburg (89CRS78157)	Affirmed
STATE v. LYNCH No. 9215SC1209	Alamance (91CRS20956) (92CRS401) (92CRS402)	No Error
STATE v. MONROE No. 9212SC1174	Cumberland (91CRS46431) (91CRS46430)	No Error
STATE v. NANCE No. 9217SC1125	Rockingham (91CRS1993)	No Error
STATE v. PHIPPS No. 924SC18	Duplin (90CRS6488) (90CRS6583) (91CRS406)	No Error
STATE v. PIERCE No. 922SC964	Martin (91CRS3057)	No Error
STATE v. PURVIS No. 927SC956	Edgecombe (91CRS10844)	Appeal Dismissed

STATE v. RUSSELL No. 9218SC295	Guilford (91CRS32569) (91CRS32570) (91CRS32571) (91CRS32572)	No Error
STATE v. SMITH No. 926SC1264	Bertie (92CRS1115)	No Error
STATE v. SMITH No. 9221SC1293	Forsyth (91CRS40253)	No Error
STATE v. SPENCER No. 922SC205	Hyde (90CRS863)	No Error
STATE v. WARREN No. 9218SC896	Guilford (90CRS66254) (91CRS20215)	No Error
STATE ex rel. INGRAM v. BURROUGHS No. 9220DC971	Anson (87CVD209)	Vacated & Remanded
WELCH v. BECK No. 9218DC1242	Guilford (84CVD5686)	Affirmed
WHITE v. WHITE No. 9217DC1092	Rockingham (91CVD101)	Affirmed
WIMBERLY v. WIMBERLY No. 9222DC1271	Iredell (89CVD1223)	Affirmed
YANDLE v. BROWN No. 9226SC480	Mecklenburg (89CVS17188)	No Error

STATE OF NORTH CAROLINA v. ALBERTO GARCIA-LORENZO

No. 9215SC207

(Filed 1 June 1993)

1. Evidence and Witnesses § 1245.1[1] (NCI4th)— custodial interrogation—no Miranda warnings—public safety exception

The trial court did not err in a second degree murder prosecution resulting in an involuntary manslaughter conviction by denying defendant's motion to suppress his statement that he was alone in the car which struck the victim where the statement was made in response to a question from an officer while defendant was under arrest but before he was given his *Miranda* warnings. Based upon the trial court's findings of fact, which are presumed correct because the record does not include the evidence presented at the pretrial hearing and because the evidence presented at trial supported the court's findings, the court concluded that the officer had an objectively reasonable need to protect another from immediate danger or harm and that defendant's statement was not the result of express questioning or words or actions the officer should have known were reasonably likely to elicit an incriminating response from the defendant. Under *State v. Ladd*, 308 N.C. 272, *Rhode Island v. Innis*, 446 U.S. 291, and *New York v. Quarles*, 467 U.S. 649, the question as to whether defendant was alone in the car was not a question protected under *Miranda*.

Am Jur 2d, Evidence §§ 555-557, 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.

2. Evidence and Witnesses § 1921 (NCI4th)— blood test for alcohol—unconscious defendant—admissible

The trial court did not err in a second degree murder prosecution arising from an automobile striking a pedestrian which resulted in an involuntary manslaughter conviction by

1. New section pending publication of 1994 supplement.

denying defendant's motion to suppress the results of a chemical analysis of his blood. Defendant was extremely violent on the ride to the hospital and at the hospital; the doctors could not understand defendant's responses to their questions; defendant had a high "index of suspicion" of a head injury and the tests defendant needed could not be conducted while he was combative and thrashing around; the physicians determined that they had to sedate defendant to treat him; and defendant was already unconscious when the officer arrived to obtain the blood sample for chemical analysis so that the officer could not advise defendant of his right to refuse the test. Defendant had no constitutional right to refuse the blood test and could not have "willfully refused" to submit to the test under N.C.G.S. § 20-16.2(c) because he was unconscious and officers did not request that he submit to the test. Although defendant contends that his statutory rights were violated in that he was conscious until he was rendered unconscious and the officers did not give him the right to refuse the test, no evidence exists to show that anyone other than the attending physicians made the decision to render the defendant unconscious, no evidence exists to show that defendant was rendered unconscious for any reason other than to treat him medically, there is no evidence of bad faith on the part of the charging officer, and there was a need to obtain a blood sample before defendant's alcohol level dropped.

Am Jur 2d, Evidence § 830.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases. 2 ALR4th 500.

3. Homicide § 218 (NCI4th)— second degree murder—victim struck by defendant's car—breathing machine removed—cause of death

The trial court did not err by not dismissing a charge of second degree murder where the victim was standing on the side of the street talking to people when defendant drove down the street at a high rate of speed, striking the victim and sending his body three or four car lengths down the road; the victim sustained a severe head injury with lacerations on the back of his scalp and was unconscious; he was put on a ventilator; tests showed that he had sustained an injury very high in the spinal column such that the attachment be-

tween the head and the upper spinal column had been disrupted; the injury would impede any further movement below the head, as well as any further breathing capabilities; the extent of the injury was discussed with the victim's family and the medical staff and a decision was reached that the situation was not salvageable; the breathing machine was removed with oxygen still being applied; and the victim died in about twenty minutes. There was testimony at trial that nothing could have been done medically to improve the victim's vegetative state, that the doctor personally did not get the victim to follow commands, and that the autopsy showed that the part of the brain that allows people to be awake was "pretty much" destroyed. The victim was a healthy young adult prior to defendant's act and, but for defendant's act, would not have been in this vegetative state and would not have subsequently died.

Am Jur 2d, Homicide §§ 70, 426.

4. Criminal Law § 1098 (NCI4th)— involuntary manslaughter—aggravating factors—great risk of death to more than one person by means of weapon or device normally hazardous to more than one person—not an element of offense

The trial court did not err when sentencing defendant for involuntary manslaughter arising from an automobile collision with a pedestrian by finding in aggravation that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. Defendant failed to include a transcript of the charge conference or jury instructions and it is presumed that the court instructed the jury properly as to the law arising upon the evidence. The conviction for driving while impaired was arrested and defendant's reckless driving in a neighborhood where he was likely to injure a number of people is not an element of the involuntary manslaughter charge.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 20 September 1991 by Judge Donald W. Stephens in Orange County Superior Court. Heard in the Court of Appeals 4 March 1993.

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

Manuel L. Costa and William M. Sheffield for defendant-appellant.

ORR, Judge.

This action arises out of an automobile accident involving defendant Alberto Garcia-Lorenzo and a pedestrian Coy Maddry, who is now deceased.

On 1 January 1991, during the early hours of the morning, Officer Troy Smith of the Chapel Hill Police Department observed a Mexican male driving a white Ford Pinto down Franklin Street. As Smith watched the Pinto, he saw the right side wheels bounce off the curb and noticed that the driver was having a hard time controlling the vehicle. Smith followed the car down Rosemary Street, where the speed limit was 25 m.p.h., and observed the Pinto driving on the wrong side of the road at a speed that Smith approximated at 45 m.p.h. Smith followed the Pinto down Rosemary Street where he observed that it continued to accelerate until it disappeared onto the gravel portion of Rosemary. Smith approximated that the Pinto was traveling about 60 to 70 miles an hour before it disappeared onto the gravel.

Lou Griffin lives on the gravel portion of Rosemary, and he was having a New Year's Eve party that night which Coy Maddry attended. At trial, Karcsi Fritz Lehr, another guest at the party, testified that he was standing next to Maddry's car with Maddry when he noticed the Pinto coming over the top of the hill at a high speed. Maddry was talking to people inside of the car, and Lehr was standing toward the back of the car. When Lehr saw the Pinto coming over the hill, he yelled, "Move" and then tried to climb up a wall out of the way of the car. The vehicle struck Lehr, running over his foot and also struck Maddry, sending his body three to four car lengths down the road.

At this time, Officer Smith drove down the gravel road where he noticed Lehr and the other friends of Maddry standing beside a damaged gray car. Smith then proceeded to drive toward a wooded area at the direction of Maddry's friends to find the Pinto. On his way to this area, Smith spotted Maddry lying face down on the road. Smith radioed for help and began emergency treatment

on Maddry. Maddry was subsequently taken to UNC Hospital where he died.

Another officer checked on the Pinto and could not find anyone present at the car. Subsequently, Smith found defendant fifty feet from the Pinto lying on the ground behind a fallen tree. The officers pulled defendant out of the terrain onto the road with ropes and a spine board. Smith then searched the area for additional passengers but found none.

The officers then attempted to transport defendant in an ambulance to the hospital. Officer Porterfield testified that defendant kicked, screamed, and spat blood at the officers the entire ride to the emergency room so that she had to handcuff and restrain him. At the hospital, although defendant continued to kick and scream, one of the physicians asked Porterfield to remove the handcuffs. Once the handcuffs were removed, defendant started hitting Porterfield and the attending physicians, so the hospital security restrained defendant with leather straps. In order to determine whether the officers at the scene needed to continue to look for other victims, Officer Porterfield tried to ask defendant in English whether he was alone in the car. Because it was obvious the defendant spoke Spanish, an attending physician asked the defendant this question in Spanish. Defendant responded to the question by saying, "No, alone" several times. Defendant was then sedated and rendered unconscious so that the doctors could treat him.

Approximately five minutes after defendant was sedated, Officer Hill, a chemical analyst, arrived at the hospital, and Porterfield asked Hill to take blood from the defendant for analysis. Subsequently, at the request of Hill, Dr. Garrison drew two vials of blood from defendant at 3:55 a.m. Hill was unable to read defendant his rights because defendant was unconscious. The results of the analysis showed an alcohol content of 0.1456 grams of alcohol per hundred milliliters of blood.

As to Coy Maddry, Doctor Baker testified that he saw Maddry on this same morning. Baker testified that Maddry had sustained a severe head injury with lacerations on the back of his scalp and that he was unconscious. Maddry had contusions and abrasions over several parts of his body, his arms and chest, and he had severe open wounds and fractures of the lower extremities just below the knees. He was put on a ventilator, and he was never able to breathe on his own again.

Over a six-day period, Baker conducted tests on Maddry. These tests showed that Maddry had sustained an injury very high in the spinal column such that the attachment between the head and the upper spinal column had been disrupted. Baker testified that this injury was of such a high level that it would impede any further movement below the head, as well as any further breathing capabilities. Baker discussed the extent of Maddry's injury with Maddry's family, with members of the medical staff, and with the neurosurgery staff, and on 7 January 1991, a decision was reached that Maddry's situation was not salvageable. At this time, the ventilatory support of the breathing machine was removed with oxygen still being applied in the event Maddry started breathing on his own. In about twenty minutes, Maddry's heart failed, and he died.

On 18 February 1991, defendant was indicted for second degree murder, felonious hit and run, and driving while impaired. In September, 1991, a jury found defendant guilty of driving while impaired, not guilty of felonious hit and run, and guilty of involuntary manslaughter. On 20 September 1991, Judge Stephens arrested the judgment on the driving while impaired charge and, after hearing from both the State and the defendant, imposed a ten-year sentence on defendant for the involuntary manslaughter conviction.

From this judgment, defendant appeals, bringing forth four assignments of error.

I.

[1] First, defendant contends that the trial court committed reversible error by denying defendant's motion to suppress defendant's statement that he was alone in the car. We find no error.

Defendant's sole argument in support of this contention is that this statement was made in response to Officer Porterfield's question asking him if he was alone in the car while he was under arrest and before he was advised of his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The State effectively argues, however, that *Miranda* does not apply to exclude defendant's statement in the present case because (1) the statement was not made during an "interrogation", and *Miranda* only applies to "custodial interrogations", and (2) the public safety exception to *Miranda* applies.

The Fifth Amendment requires that statements elicited during a custodial interrogation by law enforcement officers be suppressed unless this questioning was preceded by appropriate warnings and a voluntary and intelligent waiver of the right to remain silent and to have counsel present. *See, Miranda, supra.* "*Miranda* warnings are not required, however, when a defendant is simply taken into custody. . . . The defendant in custody must also be subjected to *interrogation.*" *State v. Ladd*, 308 N.C. 272, 280, 302 S.E.2d 164, 170 (1983) (emphasis in the original) (citations omitted).

In *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980), the United States Supreme Court held:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation. (footnote omitted) But, since the police surely cannot be held accountable for the unforseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. (footnote omitted).

(Emphasis in the original.)

Additionally, in *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court created a public safety exception to the requirement that a police officer must give appropriate warnings to a defendant before a custodial interrogation. In *Quarles*, a police officer apprehended and frisked a rape suspect. Upon finding an empty shoulder holster on the suspect, the officer handcuffed the suspect and asked him where the gun was, without advising him of his right to remain silent. The suspect responded, " '[t]he gun is over there.' " *Id.* at 652.

The Supreme Court held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. Additionally, the Court stated *Miranda* warnings are not required in a situation where "police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656.

In the present case, the trial court held a pre-trial hearing and made findings of fact and conclusions of law on the issue of whether defendant's statement should be suppressed. These find-

ings are conclusive and binding upon an appellate court if they are supported by substantial and competent evidence. *State v. James*, 321 N.C. 676, 685-86, 365 S.E.2d 579, 585 (1988).

After the hearing, the trial court found:

> During the examination, Dr. Cohen asked the defendant what his name was in English. The defendant did not respond. Dr. Cohen asked him what his name was in Spanish. The defendant responded "Alberto." Sgt. Porterfield asked the defendant if he was the only person in the car. The defendant did not respond. Sgt. Porterfield asked Dr. Cohen to ask the defendant if there was anybody else in the car with him. When Dr. Cohen asked the defendant if there was anybody else in the car with him in Spanish, the defendant responded, "no, alone." Dr. Cohen asked "only you" in Spanish. The defendant responded, "yes." Dr. Cohen and the officers were concerned that someone else might have been injured in the accident and lying undiscovered at the scene. The defendant was not advised of his Constitution [sic] Rights at any time.

The record on appeal does not include the evidence presented during the pre-trial suppression hearing. "Where the record is silent upon a particular point, the action of the trial court will be presumed correct." *James*, 321 N.C. at 686, 365 S.E.2d at 585. "Therefore, we must assume that the trial court's findings of fact were supported by substantial competent evidence." *Id.* Additionally, assuming that the evidence at trial was the same as the evidence at this pre-trial hearing, our review of the evidence presented at trial showed substantial and competent evidence to support the trial court's findings of fact.

Based on its findings of fact, the trial court concluded that Officer Porterfield had an "objectively reasonable need to protect another from immediate danger or harm" and that the "defendant's statement was not the result of 'express questioning' or 'words or actions the officer should have known were reasonably likely to elicit an incriminating response from the defendant.' " The trial court's findings of fact support these conclusions. Thus, based on the language in *Quarles*, *Ladd*, and *Innis* cited above, Officer Porterfield's question as to whether defendant was alone in the car was not a question which is protected under *Miranda*, and the trial court did not err in denying defendant's motion to suppress

his statement in response to this question. Accordingly, we overrule defendant's first assignment of error.

II.

[2] Next, defendant contends that the trial court erred by denying defendant's motion to suppress the results of the chemical analysis of his blood based on the argument that defendant had made it clear that he wanted to refuse the test pursuant to his rights under N.C. Gen. Stat. § 20-16.2. We find no error.

Defendant argues that his entire course of conduct indicated a negation of any implied consent to a blood test. Further, he argues that because he was conscious before rendered unconscious at the hospital, the manner in which he was disallowed an opportunity to specifically refuse the blood test violated his rights to due process and illegal search and seizure guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 20 of the North Carolina Constitution.

N.C. Gen. Stat. § 20-16.2 (1989) provides that any person who drives a vehicle on a highway or public vehicular area of this State is deemed to have given consent to a chemical analysis if he is charged with an implied-consent offense. Further, under the statute, the chemical analyst authorized to administer the test must inform him that he has a right to refuse to be tested, both orally and in writing. N.C. Gen. Stat. § 20-16.2(a) (1989). After the person has been informed of his rights under this statute, the charging officer must request the person charged to submit to the type of chemical analysis designated. N.C. Gen. Stat. § 20-16.2(c) (1989). "If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law." N.C. Gen. Stat. § 20-16.2(c) (1989).

However, if the driver is "unconscious or otherwise in a condition that makes him incapable of refusal," and the charging officer has reasonable grounds to believe that the driver has committed an implied-consent offense, the charging officer may direct the taking of a blood sample from the driver by a person qualified under G.S. § 20-139.1 without notifying the driver of his right to refuse the test. N.C. Gen. Stat. § 20-16.2(b) (1989).

In the present case, the trial court held a pre-trial hearing to determine whether the evidence obtained by the blood test of defendant should be suppressed. As we stated above, these findings are conclusive and binding upon an appellate court if they are supported by substantial and competent evidence. *James, supra.*

After the hearing, the trial court found:

> 1. During the early morning hours of January 1, 1991, the defendant was arrested and charged with driving while impaired incident to a collision . . . . Sgt. Shauna Porterfield, who was employed as a sworn law enforcement officer with the Town of Chapel Hill, initially saw the defendant as he was being treated for injuries in an ambulance. She accompanied the defendant in the ambulance to UNC Hospitals [sic] because he became extremely violent, fought with the paramedics and tried to free himself from the stretcher. Sgt. Porterfield handcuffed the defendant during the trip to prevent him from fighting in the ambulance. . . .
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> 2. When the defendant arrived at the hospital, he was taken to the Emergency Department and unhandcuffed. The defendant was lying prone on a spine board with a cervical collar on his neck and bleeding profusely from a wound on the right side of his head. . . . When Drs. Tim Cohen and Herbert Garrison, physicians licensed to practice medicine in North Carolina, began examining the defendant, he responded to questions although he could not be understood. The defendant began thrashing, hitting, kicking and spitting at hospital employees requiring restraint by Sgt. Porterfield and hospital personnel.
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> 4. The defendant had a high "index of suspicion" of a head injury. In determining the nature and extent of any injuries, the physicians needed to have the defendant undergo several tests. These tests could not be conducted while the defendant was combative and thrashing around. The physicians decided to have the defendant paralyzed and summoned anesthesiologists, who sedated him. The defendant lost consciousness for several hours. There were many officers in the department; however, none of them were consulted before the physicians made the decision to paralyze the defendant.

5. After the defendant lost consciousness, Sgt. Porterfield left the examination area. Officer David Hill, a sworn law enforcement officer, arrived at the hospital to administer a chemical test. Officer Hill was certified by the Division of Health Services of the Department of Human Resources as a chemical analyst issued permit number 7166. Sgt. Porterfield advised Officer Hill that the defendant had been arrested and charged with driving while impaired. She requested that Officer Hill perform a chemical analysis by blood test upon the defendant. When Officer Hill went to the area where the defendant was being examined, he found the defendant was unconscious. Officer Hill did not advise the defendant of his rights regarding chemical analysis because he was unconscious. Officer Hill conferred with Dr. Garrison and asked that he collect a blood sample from the defendant for chemical analysis. Dr. Garrison drew blood from the defendant, labelled the sample and gave it to Officer Hill. Officer Hill marked the blood sample, took it to the Chapel Hill Police Department, stored it for the evidence technician and turned it over to the evidence technician for submission for analysis. The defendant did not regain consciousness during the time Officer Hill was present with him.

Again, the record on appeal does not include the evidence presented during this pre-trial suppression hearing. Thus, we must assume that the trial court's findings of fact were supported by substantial competent evidence. *See, James, supra.* Additionally, assuming that the evidence at trial was the same as the evidence at this pre-trial hearing, our review of the evidence presented at trial showed substantial and competent evidence to support the trial court's findings of fact.

Based on its findings of fact, the trial court made the following conclusions of law:

4. The decision to "paralyze" the defendant and, thereby, render the defendant unconscious was a medical decision by physicians treating the defendant solely for his diagnosis, treatment and safety. No officers were involved in this decision in any way.

5. In requesting that Dr. Garrison draw a blood sample for chemical analysis, Officer Hill complied with the requirements of G.S. 20-16.2 and 20-139.1, and the rules and regulations promulgated by the Division of Health Services of the Department of Human Resources.

6. That none of the defendant's state or federal constitutional or statutory rights were violated as contended by the defendant.

Defendant argues the trial court erred in its conclusions and contends that both his constitutional and statutory rights were violated by the admission of the blood sample into evidence. Defendant argues that because he was conscious before rendered unconscious at the hospital, the manner in which he was disallowed an opportunity to specifically refuse the blood test violated his rights to due process and illegal search and seizure guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 20 of the North Carolina Constitution.

First of all, based on the facts of this case, the defendant had no constitutional right to refuse to submit to chemical analysis. *State v. Howren*, 312 N.C. 454, 456, 323 S.E.2d 335, 337 (1984) (the Legislature has given the right to refuse to submit to chemical analysis as a matter of grace, it is not a constitutional right); *Schmerber v. California*, 384 U.S. 757 (1966) (driver arrested for drunk driving has no federal constitutional right to refuse a compulsory blood test on advice of counsel); See, *State v. McCabe*, 1 N.C. App. 237, 239-40, 161 S.E.2d 42, 44-5 (1968) (breathalyzer test may be administered without first advising the accused that he has a right to refuse the test after he was arrested for driving while intoxicated when there was nothing that "shocks the conscience" or "offends a sense of justice."). Thus, defendant's argument that his constitutional rights were violated by the admission of the blood sample because he was not given the right to refuse the test is without merit.

Defendant's argument that his statutory rights were violated by the admission of the blood sample into evidence when he was not given the right to refuse the test is based on the language found in N.C. Gen. Stat. § 20-16.2(c) (1989). The specific language of this provision states that the charging officer "must request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section. . . ." N.C. Gen. Stat. § 20-16.2(c) (1989).

Defendant argues that his "entire course of conduct indicated a negation of any implied consent to a blood test under G.S. 20-16.2." We disagree.

Under N.C. Gen. Stat. § 20-16.2(c), a "willful refusal" is defined as, " 'the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.' " *Mathis v. North Carolina Div. of Motor Vehicles*, 71 N.C. App. 413, 415, 322 S.E.2d 436, 438 (1984) (citation omitted). In the present case, the officers did not request defendant to submit to the chemical test, as he was unconscious at the time of the test; defendant could not, therefore, have "willfully refused" to submit to the test under G.S. § 20-16.2(c).

Defendant also argues, however, that his statutory rights were violated by the officers not giving him the right to refuse the blood test in that he was conscious before rendered unconscious. This Court has held that evidence gained by chemical analysis pursuant to G.S. § 20-16.2 is inadmissible when the defendant is conscious and he is not fully advised of his rights under that statute. *State v. Shadding*, 17 N.C. App. 279, 282-83, 194 S.E.2d 55, 57, *cert. denied*, 283 N.C. 108, 194 S.E.2d 636 (1973); *State v. Fuller*, 24 N.C. App. 38, 40-2, 209 S.E.2d 805, 807-08 (1974). However, when a defendant driver is unconscious, and the charging officer has reasonable grounds to believe the defendant has committed an implied-consent offense, evidence gained pursuant to G.S. § 20-16.2 is admissible without the officer advising the defendant of his rights under the statute. N.C. Gen. Stat. § 20-16.2(b); *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

The facts of the case *sub judice* do not fit squarely under any of these cited cases. The specific facts of this case, as found by the trial court, show that defendant was extremely violent on the ride to the hospital from the scene of the accident and at the hospital once he arrived. Additionally, the doctors could not understand the defendant's responses to their questions. Defendant also had a high "index of suspicion" of a head injury, and the tests defendant needed could not be conducted while he was combative and thrashing around. Thus, the physicians determined they had to sedate defendant to treat him. Defendant was already unconscious when the officer arrived to obtain the blood sample for chemical analysis so this officer did not advise defendant of his right to refuse the test.

Based on these facts, the trial court concluded that defendant was rendered unconscious by the doctors based solely on a medical decision to treat him, that the officers had nothing to do with

this decision, and that defendant's statutory rights were not violated in that the officer who conducted the chemical analysis complied with the requirements of G.S. 20-16.2 and 20-139.1. We agree with the trial court's conclusions and find that the facts of the case support these conclusions.

No evidence exists in the record to show that anyone other than the attending physicians made the decision to render the defendant unconscious, and no evidence exists in the record to show that defendant was rendered unconscious for any reason other than to treat him medically. Additionally, there is no evidence of bad faith on the part of Officer Porterfield, the charging officer, for not giving defendant the opportunity to refuse the blood test before he was rendered unconscious, especially in light of the fact that during the period when defendant was conscious, he was extremely combative and hard to control, thrashing, kicking, and spitting, and in light of the fact that the doctors needed to treat defendant as soon as possible and could only do this by rendering him unconscious. The lack of bad faith is further evident in light of the fact that the chemical analyst in charge of obtaining the blood sample had not arrived before the doctors had to render defendant unconscious. Additionally, we must emphasize that the defendant's blood alcohol level would not remain constant and that the need to obtain a blood sample for chemical analysis before the alcohol level dropped is evident.

Thus, based on the specific facts of this case, we hold that defendant's statutory rights were not violated, and accordingly we overrule defendant's assignment of error.

III.

[3] Next, the defendant assigns error to the trial court's denial of his motion to dismiss the charge of second degree murder. 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 contends that the trial court erred by not dismissing the charges of all degrees of homicide against the defendant based on the argument that the State failed to prove beyond a reasonable doubt that the defendant's act was the proximate cause of Coy Maddry's death. " 'Proximate cause is an element of second degree murder *and* manslaughter.' . . . The acts of the defendant must be a real cause, a cause without which the decedent's death would not have occurred." *State v. Holsclaw*, 42 N.C. App. 696, 699, 257 S.E.2d 650, 652, *disc. review denied, appeal dismissed by*, 298 N.C. 571, 261 S.E.2d 126 (1979) (emphasis in the original) (citation omitted).

> To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death. . . . Criminal responsibility arises only if his act caused or directly contributed to the death. . . . "[T]he act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is a natural result of his criminal act."

State v. Jones, 290 N.C. 292, 298, 225 S.E.2d 549, 552 (1976) (citations omitted).

In the case *sub judice*, the evidence shows that Coy Maddry was standing on the side of the street talking to people inside of a car, when defendant drove onto that road at a high rate of speed and struck Maddry, sending his body three to four car lengths down the road. A police officer found Maddry lying face down on the road, and the officer radioed for help and began emergency treatment on Maddry. Maddry was subsequently taken to UNC Hospital.

Doctor Baker testified that he saw Maddry at the hospital the same morning he was hit by defendant. Baker testified that Maddry had sustained a severe head injury with lacerations on the back of his scalp and that he was unconscious. Maddry was put on a ventilator, and he was never able to breathe on his own again.

Over a six-day period, Baker conducted tests on Maddry. These tests showed that Maddry had sustained an injury very high in the spinal column such that the attachment between the head and

the upper spinal column had been disrupted. Baker testified that this injury was of such a high level that it would impede any further movement below the head, as well as any further breathing capabilities. Baker discussed the extent of Maddry's injury with Maddry's family, with members of the medical staff, and with the neurosurgery staff, and on 7 January 1991, a decision was reached that Maddry's situation was not salvageable. At this time, the ventilatory support of the breathing machine was removed with oxygen still being applied in the event Maddry started breathing on his own. In about twenty minutes, Maddry's heart failed, and he died.

Defendant argues that his act of hitting Maddry with his car, which sent Maddry's body three to four car lengths down the road and disrupted the attachment between Maddry's head and his upper spinal column, was not the proximate cause of Maddry's death. This argument is based on the testimony of the medical examiner who stated that Maddry was not brain dead and that he could have remained alive on a respirator indefinitely and the testimony of Dr. Baker who stated that some observers felt that Maddry responded to input.

"Brain death", as defined in N.C. Gen. Stat. § 90-323, is not the sole criteria in determining whether a person is dead. The statute states, "This specific recognition of brain death as a criterion of death of the person *shall not preclude the use of other medically recognized criteria for determining whether and when a person has died.*" N.C. Gen. Stat. § 90-323 (emphasis added).

At trial, Dr. Baker testified that in his opinion, Maddry "died from a combination of a very severe head injury with a severe injury to the brain stem, in addition to a severe spinal cord injury." Dr. Baker testified also that nothing medically could have been done to improve Maddry's vegetative state and that Maddry would never have been able to breathe on his own again. Further, Dr. Baker testified that based on the autopsy, "the part of the brain that allows people to be awake was pretty much destroyed" and that he personally did not get Maddry to follow commands.

Maddry was a healthy, young adult prior to defendant's act, and but for defendant's act of hitting Maddry, he would not have been in this vegetative state, unable to breathe on his own or to regain consciousness, and subsequently he would not have died. Thus, we hold that sufficient evidence existed at trial for a jury

to find that defendant's act of hitting Maddry was the direct, or proximate cause of Maddry's death. Based on the evidence presented at trial, viewed in the light most favorable to the State, therefore, we hold that the trial court did not err in denying defendant's motion to dismiss. Accordingly, we overrule this assignment of error.

IV.

[4] Finally, defendant contends the trial court erred by finding as a factor in aggravation of punishment that the automobile constituted a device knowingly used by the defendant which created a great risk of death to more than one person. We find no error.

Defendant bases his contention on the ground that the factor the court found in aggravation constituted an element of the offense for which defendant was convicted and that N.C. Gen. Stat. § 15A-1340.4 does not allow evidence necessary to prove an element of the offense to be used to prove any factor in aggravation.

In the present case, the trial court found as a factor in aggravation that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Defendant has failed, however, to include a transcript of the charge conference or jury instructions so that this Court could determine what elements the trial court instructed the jury were necessary to convict the defendant of involuntary manslaughter. We must therefore presume the trial court instructed the jury properly as to the law arising upon the evidence as required. *State v. Murphy*, 280 N.C. 1, 7, 184 S.E.2d 845, 849 (1971).

The law arising from the evidence in the present case would require an instruction on the elements of involuntary manslaughter involving a death by vehicle when impaired driving is involved. N.C.P.I., Crim. 206.55A sets out the following jury instruction outlining the elements of such a case:

> The defendant has been accused of involuntary manslaughter.
>
> Now I charge that for you to find the defendant guilty of involuntary manslaughter, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant was driving a vehicle.

Second, that he was driving that vehicle upon a public vehicular area within the state.

Third, that at the time the defendant was driving that vehicle he had consumed sufficient alcohol that a chemical analysis made at any relevant time after the driving showed the defendant to have an alcohol concentration of 0.10 or more grams of alcohol per 100 milliliters of blood. A relevant time is any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.

And fourth, that the impaired driving by the defendant proximately caused the victim's death. Proximate cause is the real cause, without which the victim's death would not have occurred.

In the case *sub judice*, the defendant was convicted of driving while impaired, which conviction the trial judge arrested as an element of the involuntary manslaughter conviction. Defendant's reckless driving of his automobile in a neighborhood where he was likely to injure a number of people is not an element of the involuntary manslaughter charge. Accordingly, we overrule defendant's final assignment of error.

No error.

Judges WELLS and MARTIN concur.

PRESTON POWELL AND RICHARD POWELL, PLAINTIFFS v. ALLAN T. OMLI, DEFENDANT AND THIRD-PARTY PLAINTIFF v. PEACHTREE FASTENERS, INC. AND SIMPLEX NAILS, INC., THIRD-PARTY DEFENDANTS

No. 9121SC1157

(Filed 1 June 1993)

1. Negotiable Instruments and Other Commercial Paper § 117 (NCI4th)— action on a note—breach of fiduciary duty—failure of consideration—issue of fact

The trial court erred by granting a directed verdict for plaintiffs in an action on a promissory note where defendant

contended that there had been a failure of consideration in plaintiffs' breach of fiduciary duty to defendant, plaintiffs argued that defendant had received full consideration in that he received the benefit of the money even though he never actually held the money, the note stated that "for value received" defendant promised to pay plaintiffs $100,000, and the note did not specify exactly what value defendant had received nor whether there were or were not any other agreements. This question should have been submitted to the jury.

Am Jur 2d, Bills and Notes §§ 1296 et seq.

2. **Negotiable Instruments and Other Commercial Paper § 117 (NCI4th)— action on a note—breach of fiduciary duty—consideration—new trial**

An action on a note was remanded for a new trial where the trial court had erroneously granted a directed verdict for plaintiffs, defendant contended that plaintiffs were not entitled to a new trial because the jury had found that plaintiffs had breached their fiduciary duties to defendant and defendant argued that this breach was the same as a finding of a failure of consideration, but there was evidence that the fiduciary duty did not serve as consideration for defendant's note.

Am Jur 2d, Bills and Notes §§ 1296 et seq.

3. **Appeal and Error § 147 (NCI4th); Damages § 127 (NCI4th)—breach of fiduciary duty—punitive damages—refusal to submit to jury**

The trial court did not err in an action on a note by refusing to submit to the jury the issue of plaintiffs' liability to defendant for punitive damages for breach of fiduciary duty. Defendant failed to object at trial, and, under controlling Georgia law, defendant failed to show clear and convincing evidence that defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

Am Jur 2d, Appeal and Error §§ 545 et seq.; Damages §§ 994, 995.

4. Appeal and Error § 147 (NCI4th)— breach of fiduciary duty—instructions—failure to object to specific errors—appellate review waived—harmless error

Plaintiffs waived appellate review of an alleged error in instructions to the jury on breach of fiduciary duty by failing to call the trial court's attention to the specific alleged errors in the jury charge. However, assuming as plaintiffs contended that the charge should have more closely reflected the language of Georgia cases, any error was harmless because there is no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation in this context.

Am Jur 2d, Appeal and Error §§ 545 et seq.

5. Fiduciaries § 1 (NCI4th)— breach of fiduciary duty—motion for directed verdict denied—no error

The trial court did not err in a breach of fiduciary duty counterclaim by denying plaintiffs' motion for a directed verdict at the close of defendant's evidence where defendant presented ample evidence of plaintiffs' breach of fiduciary duty.

Am Jur 2d, Appeal and Error § 849.

6. Appeal and Error § 156 (NCI4th)— subject matter jurisdiction—lack of proper party—no motion to dismiss

An assignment of error to the denial of a motion to dismiss for lack of subject matter jurisdiction in that proper parties were not joined failed where plaintiffs failed to make a motion to dismiss for lack of subject matter jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) and the trial court was denied the opportunity to rule on that motion. The record reflects that, after stipulating in the order on final pretrial conference that there were no pending motions, plaintiffs moved at trial to dismiss the action pursuant to N.C.G.S. § 1A-1, Rule 17 and N.C.G.S. § 1A-1, Rule 19 for failure to join a necessary party. The denial of those motions was not assigned as error.

Am Jur 2d, Appeal and Error §§ 562 et seq.

7. Appeal and Error § 147 (NCI4th); Evidence and Witnesses §§ 2154, 2148 (NCI4th)— breach of fiduciary duty—report of financial consultant—admitted without timely objection—consultant qualified—report relevant

There was no prejudicial error in the admission of a report from a financial consultant in an action arising from the failure of a company where defendants counterclaimed for breach of fiduciary duty where the report was listed in the order on final pretrial conference, one of the plaintiffs testified about the report during cross-examination, the consultant testified as to the report's preparation and contents, the report was admitted into evidence, the next witness was asked four questions, and plaintiffs made a general objection to the admission of the report. A general objection which is overruled is generally not effective on appeal, plaintiffs failed to make a timely objection, the qualifications of the witness indicate that the court did not err in admitting the report, and the report was relevant.

Am Jur 2d, Appeal and Error §§ 545 et seq.; Expert and Opinion Evidence §§ 5 et seq., 32-38, 55 et seq.

8. Appeal and Error § 421 (NCI4th)— admission of evidence—objection that exhibit and testimony speculative and self-serving—different grounds argued in brief

Plaintiffs could not argue on appeal that testimony and an exhibit constituted the improper opinion of a lay witness where they had made a specific objection at trial based upon the allegedly speculative and self-serving nature of defendant's exhibit and testimony.

Am Jur 2d, Appeal and Error §§ 691 et seq.

9. Evidence and Witnesses § 761 (NCI4th)— testimony from notes not admitted into evidence—substance already admitted—no prejudicial error

Any error was harmless where a defendant in an action arising from the failure of a business testified from personal notes not introduced where plaintiffs did not request to see the notes, plaintiffs did not cross-examine defendant regarding the notes, plaintiffs failed to have the notes marked at trial for preservation in the record, plaintiffs failed to include the notes in the record on appeal, and the components largely

constituting the figure allegedly read into evidence from an unidentified note had already been introduced into evidence.

Am Jur 2d, Appeal and Error § 806.

10. Evidence and Witnesses § 2047 (NCI4th)— failure of business—testimony of potential investor—allegedly speculative—admissible

There was no error in an action arising from the failure of a business in allowing a witness to testify that he would have invested in the business if he had received an up-to-date financial statement. Although plaintiffs contend that the testimony was speculative, it was admissible under N.C.G.S. § 8C-1, Rule 701 since it was based on the witness's perceptions and was helpful to the jury. It was relevant to defendant's earlier testimony regarding his difficulty in obtaining current financial statements and to show defendant's attempts to mitigate his losses by showing his efforts to bring in investors.

Am Jur 2d, Expert and Opinion Evidence §§ 26 et seq., 53, 54, 362.

Appeal by plaintiffs and defendant from judgment filed 10 June 1991 by Judge Preston Cornelius in Forsyth County Superior Court. Heard in the Court of Appeals 22 October 1992.

Plaintiffs, Georgia residents, are the owners of Simplex Nails, Inc., a Georgia corporation which manufactures nails. After negotiations in Winston-Salem, plaintiffs and defendant, a North Carolina resident, entered into an agreement to form Peachtree Fasteners, Inc., (hereinafter "Peachtree") which would produce and sell collated nails. Peachtree was incorporated under Georgia law on 3 August 1987, with headquarters in Americus, Georgia. Defendant and each plaintiff agreed to contribute $100,000.00 in exchange for each receiving a one-third ownership interest in Peachtree. Since defendant did not have $100,000.00 in cash, defendant gave plaintiffs a $100,000.00 promissory note payable to plaintiffs upon demand "secured by a security interest in the undersigned's [defendant's] partnership interest in FY-OM Partnership, a North Carolina general partnership." The security interest was properly perfected under North Carolina law. Of the initial $300,000.00 in capital, $250,000.00 was used to buy equipment and $50,000.00 was

used as working capital. In addition to being a stockholder and director, defendant was hired as president of Peachtree.

Peachtree eventually failed. Each party alleged different reasons for the failure. Plaintiffs' evidence tended to show the following: Peachtree struggled because wholesalers would not purchase the collated nails. Peachtree established two subsidiaries, Advanced Fasteners in Waycross, Georgia, and Sun Supply in Doraville, Georgia, in an attempt to sell the collated nails directly to subcontractors. Plaintiffs contended that Peachtree was not profitable because it was unable to produce a competitive product. Plaintiffs also introduced evidence that defendant previously had been a minority shareholder in another corporation, Federal Fasteners, which also sold collated nails and experienced financial difficulties.

Plaintiffs offered to sell Peachtree to defendant, but defendant was unable to secure the necessary funds. Plaintiffs' evidence further showed that Simplex had to loan money to Peachtree so that Peachtree could pay its debts. Additionally, plaintiff Richard Powell had to personally guarantee a loan to Peachtree, secured by the collator equipment, to provide additional funds for Peachtree to pay its debts. Eventually, the collator equipment had to be sold to pay creditors.

Defendant's evidence tended to show the following: plaintiffs agreed that Peachtree and Simplex would be operated as separate businesses, that defendant would be treated fairly, and that plaintiffs would make Peachtree prosper. Although he was hired as Peachtree's president, defendant's decisions were not followed because plaintiff Richard Powell controlled decisions regarding Peachtree's operations and finances. For example, the creation of Advanced Fasteners, against defendant's judgment, caused financial losses. Loans from Simplex, the corporation owned by plaintiffs, were made to Peachtree at plaintiff Richard Powell's direction without the formal approval of either corporation, without appropriate accounting records, and without defendant's consent or knowledge. Simplex's expenses were often charged to Peachtree and when common customers paid their bills, Simplex was paid first. Funds from Sun Supply, Peachtree's subsidiary, were withdrawn by plaintiffs without appropriate accounting records. Despite their offer to sell Peachtree to defendant and defendant's efforts to attract investors, plaintiffs refused to give defendant current financial information regarding Peachtree's true net worth.

When defendant was fired as president in October 1988, Peachtree's balance sheet showed a stockholders' equity of $181,932.32. Defendant offered evidence that the balance sheet was inaccurate. Defendant's evidence tended to show that the figure on the balance sheet was incorrect largely because Peachtree had paid for many of Simplex's expenses. Thereafter, defendant remained a shareholder and director of Peachtree. Approximately one month after defendant was fired and without defendant's knowledge or consent, plaintiffs caused Peachtree to borrow $250,000.00 and to encumber the collators as security. The $250,000.00 was paid either to Simplex or to plaintiffs directly. Additionally, in December 1988 plaintiffs, without defendant's knowledge or consent, caused Peachtree to sell the collators for $255,000.00 to pay off the Simplex debts. When Peachtree's operations ceased in July 1990, the stockholders' equity had a deficit of $114,171.40.

On 28 November 1988, plaintiffs made a formal demand upon defendant for payment of the $100,000.00 promissory note. Defendant refused payment. Plaintiffs sued on the note by filing a verified complaint in Forsyth County Superior Court on 3 May 1989. On 7 July 1989, defendant answered alleging *inter alia* failure of consideration. Additionally, defendant counterclaimed alleging *inter alia* the claims of fraud and a breach of fiduciary duty by plaintiffs. A jury trial was held on 13 May 1991. The trial court entered a directed verdict against defendant on the promissory note. The value of plaintiffs' claim on the note, including principal, interest, and attorney's fees, was $170,488.46. On 16 May 1991, the jury found that plaintiffs breached a fiduciary duty to defendant, awarding defendant an offset of $60,250.00 against plaintiffs' note claim. After the offset (and its prejudgment interest), plaintiffs received an award of $101,238.46. On 10 June 1991, the trial court denied defendant's motion for a new trial. Plaintiffs and defendant each appeal.

John R. Surratt, P.A., by John R. Surratt and Andrew J. Gerber, for plaintiffs.

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

EAGLES, Judge.

Defendant brings forward three assignments of error. We reverse the entry of directed verdict against defendant on the

promissory note. Plaintiffs bring forward seven assignments of error. As to plaintiffs' appeal, we affirm. Accordingly, we affirm in part, reverse in part, and remand for a new trial to determine the issue of defendant's alleged liability on the promissory note.

DEFENDANT'S APPEAL

I.

[1] In his first assignment of error, defendant contends that the trial court erred by granting plaintiffs' motion for directed verdict on the promissory note. We agree.

Defendant argues that in the determination of his liability on the promissory note "[t]here was a material issue of fact on whether defendant had proven his defense that, because plaintiffs had breached their fiduciary duty to defendant as majority shareholders, there had been a failure of consideration." Defendant gave a $100,000.00 promissory note to plaintiffs. This note read in pertinent part as follows:

> FOR VALUE RECEIVED the undersigned, jointly and severally, promise to pay to Richard Powell and Preston Powell of Americus, Georgia or order, the principal sum of One Hundred Thousand and no/100ths DOLLARS ($100,000.00), with interest from the date hereof at the rate of Prime plus One per cent (prime + 1.0% based on 1st National Bank of Atlanta as the same fluctuates from time to time) per annum/on the unpaid balance until paid or until default, both principal and interest payable in lawful money of the United States of America, at the office of Simplex Nail Company, Americus, Georgia or at such place as the legal holder hereof may designate in writing.

Plaintiffs argue that although "defendant never actually held the money, he did receive the benefit from the money. Defendant authorized plaintiffs to use this borrowed $100,000.00 as capital for Peachtree. . . . As defendant received the benefit of the money promised him, he received full consideration in accordance with the terms of the note." Plaintiffs further argue that "their fiduciary duty to him [defendant] was not bargained for, nor made part of their agreement to loan defendant $100,000.00." However, plaintiffs' argument, *supra*, is not evident from the face of the note. The promissory note simply stated that "for value received" defend-

ant promised to pay plaintiffs $100,000.00; the note did not specify exactly what "value" defendant had "received" nor did it specify whether there were or were not any other agreements. Accordingly, we hold that this question should have been submitted to the jury.

In *Whitehurst v. Corey*, 88 N.C. App. 746, 748-49, 364 S.E.2d 728, 730 (1988), this Court, in overturning a trial court's award of summary judgment in a similar case, stated:

> "[I]t is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parol evidence as between the original parties may well be admissible so far as it is not inconsistent with the express terms of the note." *Borden, Inc. v. Brower*, 284 N.C. 54, 61, 199 S.E.2d 414, 419-20 (1973).
>
> Construing defendants' verified pleadings in their favor as non-movant reveals a material fact dispute concerning the alleged existence and effect of a fiduciary relationship between plaintiff and defendants. These alleged facts are clearly "material" since plaintiff's performance of the alleged fiduciary duties was allegedly part of the consideration for defendants' execution of the promissory note. We also reject plaintiff's argument that defendants have alleged no facts showing detrimental reliance in support of their apparent fraud claim. Defendants' purchase of plaintiff's stock may well evidence their detrimental reliance on plaintiff's alleged representations concerning his intended fiduciary obligations.

Similarly, we conclude that when the evidence presented at trial is viewed in the light most favorable to the non-movant (defendant), a question of fact existed which could only be resolved by a jury. Accordingly, we reverse the trial court's entry of directed verdict on this issue.

II.

[2] Next, defendant argues that "[p]laintiffs are not entitled to a new trial on their note claim because the jury has already found that plaintiffs breached their fiduciary duties to defendant, and that finding is the same as a finding that there was a failure of consideration, which nullifies the agreement under which defendant gave plaintiffs his note." We disagree.

Although defendant correctly points out that the jury found that plaintiffs breached their fiduciary duty, defendant fails to recognize that contrary evidence exists as to this issue; namely, that plaintiffs have brought forth testimony showing that this fiduciary duty did not serve as consideration for defendant's note. Contrary to defendant's assertion, the jury's verdict finding plaintiffs' breach of fiduciary duty does not necessarily infer that the parties had a contemporaneous oral agreement establishing plaintiffs' fiduciary duty to defendant as consideration for defendant's note. Accordingly, we remand for a new trial on this issue.

III.

[3] Finally, defendant argues that "[t]he trial court erred in refusing to submit to the jury the issue of plaintiffs' liability to defendant for punitive damages for breach of fiduciary duty." We disagree.

Defendant failed to object to the trial court's denial of his request for a punitive damages charge and accordingly cannot contest this issue on appeal. N.C.R. App. P. 10(b)(2). Furthermore, defendant concedes that Georgia law controls his counterclaim. Ga. Code Ann. 51-12-5.1(b) (Michie Cum. Supp. 1992) provides that punitive damages may only be awarded when "it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Here, defendant has failed to show the "clear and convincing evidence" required by Ga. Code Ann. 51-12-5.1(b) (Michie Cum. Supp. 1992). Accordingly, this assignment of error fails. We note that in "defendant's requests for jury instructions" filed 16 May 1991 defendant did not request an instruction for his fraud counterclaim.

PLAINTIFFS' APPEAL

IV.

[4] Plaintiffs argue that the trial court committed prejudicial error by presenting an erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983) rather than on several Georgia cases cited in plaintiffs' brief. We disagree.

Defendant argues that "plaintiffs did not object specifically to this part of the charge, as required by Rule 10(b)(2), N.C.R. App. P., and therefore did not give Judge Cornelius a chance to consider the point plaintiffs now raise on appeal." After hearing the proposed instructions read to counsel for both parties, plaintiffs objected as follows:

> MR. SURRATT [plaintiffs' counsel]: Your Honor, we object and except the instructions.
>
> THE COURT: What are you excepting to?
>
> MR. GERBER [plaintiffs' counsel]: Your Honor, I don't believe under Georgia law—
>
> THE COURT: We're not talking about Georgia law. It's North Carolina law.
>
> MR. GERBER: It's our contention Georgia law would apply and there's no unreasonable frustration in this matter.
>
> THE COURT: You already made that argument. The Court's ruled on that. Any others? What other exception do you note for the record?
>
> MR. GERBER: That's all, Your Honor.

N.C.R. App. P. 10(b)(2) provides that "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly* that to which he objects *and* the *grounds* of his objection." (Emphasis added.) By failing to call the trial court's attention to the specific alleged errors in the jury charge, plaintiffs have waived their right to appellate review. N.C.R. App. P. 10(b)(2); *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797 (1986); *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 317 S.E.2d 372 (1984). Assuming *arguendo* that the instruction should have more closely reflected the exact language of the Georgia cases, we find any error to be harmless under G.S. 1A-1, Rule 61 since there is no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation in this context. *See Meiselman*, 309 N.C. 279, 307 S.E.2d 551; *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278 (1978). Plaintiffs have failed to show that the alleged error in the instruction was likely, in light of the entire charge, to mislead the jury. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 361 S.E.2d 909

(1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Accordingly, this assignment of error fails.

V.

[5] Plaintiffs contend that the trial court committed reversible error by denying their motion for a directed verdict on defendant's breach of fiduciary duty claim at the close of defendant's evidence. We disagree.

In *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990), this Court stated:

> A motion for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure presents the question of whether plaintiff's evidence is sufficient to submit to the jury. The trial court must consider the evidence in the light most favorable to the non-movant and conflicts in the evidence must be resolved in favor of the non-movant. Whether a fiduciary relationship exists is determined by the specific facts and circumstances of the case. Generally, "[t]he existence or nonexistence of a fiduciary duty [is] a question of *fact* for the jury."

(Emphasis in original.) (Alterations in original.) (Citations omitted.) Defendant presented ample evidence of plaintiffs' breach of fiduciary duty. Accordingly, the trial court did not err in denying plaintiffs' motion for a directed verdict on this claim at the close of defendant's evidence.

VI.

[6] Plaintiffs' third assignment of error provides "[p]laintiffs assign as error: (3) The court's denial of plaintiffs' Motion for lack of subject matter jurisdiction, pursuant to N.C.R. Civ. P. 12(b)(1), on the ground that the proper parties were not before the court." Plaintiffs failed to make a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, 12(b)(1). Accordingly, the trial court was denied the opportunity to make a ruling on that motion. This assignment of error fails.

This Court's review of the proceedings below is limited to the assignments of error set forth in the record on appeal. N.C.R. App. P. 10(a). Within their third assignment of error, *supra*, plaintiffs in their brief attempt to bring forth the issue that "[t]he trial court committed reversible error by denying plaintiffs' motion to dismiss defendant's counterclaim for failure to join a necessary

party." The record reflects that after stipulating in the "order on final pre-trial conference" that "[t]here are no pending motions," plaintiffs orally moved at trial to dismiss the action pursuant to G.S. 1A-1, Rule 17 and G.S. 1A-1, Rule 19 for defendant's failure to join Peachtree as a necessary party. The trial court's denial of these motions was not assigned as error and is not encompassed within plaintiffs' third assignment of error.

VII.

[7] Plaintiffs contend that "[t]he trial court committed prejudicial error by admitting defendant's exhibit 16 into evidence." We disagree.

Defendant's exhibit 16 was a report written by J. Kevin Foster, a consultant hired by defendant Richard Powell to evaluate Simplex in July 1988. Mr. Foster's 29 July 1988 report included an evaluation of "office personnel job procedures, efficiency and work-load, general ledger closing procedures, financial reporting requirements, inventory valuation and management and to determine procedures for setting-up Sun-Supply as a separate entity from Peachtree Fasteners, Inc."

Mr. Foster testified for defendant at trial. Earlier in the trial, plaintiff Richard Powell testified about Mr. Foster's report during cross-examination without objection. During this time, he was given a copy of the report and admitted that the report's recommendations were not implemented. Later, Mr. Foster testified as to his report's preparation and contents. The report was offered into evidence at the end of Mr. Foster's testimony. The trial court admitted the report without objection from plaintiffs at that time. Mary Jane Whitaker, the next witness, was called to the stand. After Ms. Whitaker had been asked four questions, plaintiffs made a general objection to the admission of defendant's exhibit 16.

Plaintiffs argue that the report should have been excluded pursuant to G.S. 8C-1, Rule 402 and G.S. 8C-1, Rule 701. Initially, we note that "a general objection, if overruled, is ordinarily not effective on appeal." *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986); G.S. 8C-1, Rule 103(a); *see* H. Brandis, 1 *Brandis on North Carolina Evidence* § 27 (3rd ed. 1988). Absent some exceptional situation, error may not be predicated upon the admission of evidence unless a timely objection appears of record. *Forsyth*

Co. Hospital Authority, Inc. v. Sales, 82 N.C. App. 265, 269, 346 S.E.2d 212, 215, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 594 (1986). Here, plaintiffs failed to timely object to the admission of defendant's exhibit 16. We note that this exhibit was listed by defendant in the "order on final pre-trial conference" filed 16 May 1991, thus affording plaintiffs ample time to prepare for a timely objection to the introduction of the exhibit at trial. Furthermore, "[i]f the witness' evidence indicates that he is in fact qualified to give the challenged opinion, even a timely specific objection will not likely be sustained on appeal." *Hamilton*, 77 N.C. App. at 509, 335 S.E.2d at 509 (citations omitted). Here, Mr. Foster had testified at the beginning of his testimony that he was a self-employed financial consultant and that his training and background for that position included a degree in accounting, his experience with a Big Eight accounting firm for five years, his experience as a chief financial officer for a personal consulting firm, and his experience as general manager of the accounting department of a national soft drink company. These qualifications indicate sufficient expertise to allow us to conclude that the trial court did not err in admitting Mr. Foster's report. Finally, we note that the report was relevant since it tended to show the interconnected operations of Peachtree and Simplex, the inadequacies of the financial record keeping, and the degree of control that plaintiffs exercised over Peachtree. Accordingly, this assignment of error fails.

VIII.

[8] Plaintiffs argue that "[t]he trial court committed prejudicial error by admitting defendant's exhibit 26 and testimony relating to it into evidence." We disagree.

Defendant's exhibit 26 was a compilation of defendant's papers used to value Peachtree in the fall of 1988. According to defendant's testimony, these papers included *inter alia* an "evaluation of the financial statements, trying to see what monies were misapplied that should have been applied to Simplex but were applied to Peachtree," "a scratch pad . . . looking at liabilities, assets and so forth trying to figure out what the real worth of the company was," "a scratch mainly looking at the assets of the corporation," "kind of a semiproforma that I worked on that would lay out what the balance sheet would look like and so forth if it was purchased and . . . a Sun Supply Company 1989 proforma . . . . We used some of this information with prospective investors." Plaintiffs ob-

jected to the exhibit on the specific grounds that, "This is pure speculation, self-serving." After the objection was overruled, defendant was permitted to testify that "the numbers we worked on gave us an idea of what we could offer [for Peachtree], but we did need—and that was so general because we needed a current statement. We needed information that was accurate so to come up with exact numbers was impossible until we had those."

A specific objection that is overruled is effective only to the extent of the grounds specified. *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E.2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986). *See* H. Brandis, 1 *Brandis on North Carolina Evidence* § 27 (3rd ed. 1988). Here, plaintiffs objected at trial on the basis of the exhibit and testimony being "pure speculation, self-serving." However, these grounds are not argued in plaintiffs' brief. Plaintiffs argue in their brief that the exhibit and testimony constituted the "improper opinion of a lay witness" admitted into evidence in violation of G.S. 8C-1, Rule 701. Since plaintiffs made a specific objection at trial based upon the allegedly speculative and self-serving nature of defendant's exhibit and testimony, plaintiffs may not argue defendant's qualifications on appeal. *Love*, 79 N.C. App. 465, 339 S.E.2d 487.

IX.

[9] Plaintiffs argue that "[t]he trial court committed prejudicial error by permitting defendant to testify from personal notes not admitted into evidence." We disagree.

Defendant testified that the stockholders' equity in Peachtree was higher than the $181,932.32 reflected in the 31 October 1988 balance sheet. In calculating the amount by which Peachtree was undervalued, defendant testified as follows:

> A [Defendant]: The number that I feel needed to be added back in is one hundred and forty-six thousand seven hundred and fifty-nine dollars. When added to the one eighty-one nine thirty-two, the net worth of the company when I left would be three hundred and twenty-eight thousand six hundred ninety-one dollars.
>
> Q [Mr. Walker, Defendant's counsel]: All right. Now, let's—let me walk you through that and how you came up with it. . . . Now, what did you say that figure was?

MR. SURRATT [Plaintiffs' counsel]: I object, Your Honor. He seems to be testifying and reading from something that's not identified.

THE COURT: Sustained.

Q [Mr. Walker, Defendant's counsel]: Mr. Omli [defendant], what items go into the figure you've testified to?

A: The items that go into that are the salary that needed to be put back into and charged to Simplex.

Q: What else?

A: The heat, light, water.

Q: What else?

A: Rent.

Q: What else?

A: There was a charge for freight that was received back from the Holz-Her company on the material moved to Americus [Georgia].

Q: What else?

A: Because the collators were sold at their value, the depreciation on those collators needs to go back in there.

Q: What else?

A: Some travel expenses that were for Simplex.

Q: All right. What else? Let me ask you if you included the Bostitch deal in this.

A: That needs to be put in there as well.

Q: All right. Again, what—what was the amount of salary?

MR. SURRATT [Plaintiffs' counsel]: Object to reading something that hasn't been identified.

THE COURT: Sustained.

MR. WALKER [Defendant's counsel]: All right. Well, fine. Your Honor, I do think that Mr. Omli has testified and I am entitled to put the number on the board that he did testify to. Will you allow me to do that?

THE COURT: Yes.

(Mr. Walker writing on the board.)

MR. SURRATT: Your Honor, he didn't testify to those numbers and he's read them from something that's not in evidence.

THE COURT: You may cross-examine him as to those figures.

MR. SURRATT: We objected and you sustained it.

THE COURT: Overruled. Proceed.

Q [Mr. Walker, Defendant's counsel]: So, Mr. Omli, what do you—is your—what do you contend this figure represents, this three hundred twenty-eight thousand six hundred ninety-one dollars?

A: That is the true net worth, stockholders' equity of the company, when I was fired.

MR. WALKER: I don't have any other questions, Your Honor.

G.S. 8C-1, Rule 612(a) provides that "If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial . . . in which the witness is testifying." In *State v. Peacock*, 236 N.C. 137, 139-40, 72 S.E.2d 612, 615 (1952), our Supreme Court stated that

> The use of notes to quicken the memory is well recognized procedure in this jurisdiction, if the memorandum is one which had been made by the witness, or in his presence, or under his direction. *Story v. Stokes*, 178 N.C. 409, 100 S.E. 689; *S. v. Coffey*, 210 N.C. 561, 187 S.E. 754; *S. v. Smith*, 223 N.C. 457, 27 S.E.2d 114. . . . "It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however, mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause." *Jewett v. U.S.*, 15 F.2d 955 (1926).
>
> It is customary for such notes to be made available to the opposing counsel so that he may examine and cross-examine relative thereto, but in this case the record fails to disclose any effort on the part of defendant to obtain the notes or

> to use them in cross-examination. In the absence of a request for an examination of the notes or some other effort to make them available, defendant's exceptions based upon this phase of the examination are without merit. *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E.2d 32; Stansbury, paragraph 32, page 48.

Here, plaintiffs did not request to see the notes nor did plaintiffs cross-examine defendant regarding the notes. Additionally, plaintiffs failed to have the notes marked at trial for preservation in the record. Plaintiffs failed to include these notes in the record on appeal.

Assuming *arguendo* that the trial court erred by allowing defendant to testify as to the precise dollar figure of stockholders' equity, that error was harmless in light of defendant's earlier testimony and exhibits admitted into evidence without objection. Earlier in the trial, defendant testified and introduced evidence (defendant's exhibit 15) of those items which he felt had been subtracted from the stockholders' equity reflected on the 31 October 1988 balance sheet. Defendant testified at that time as follows:

> I had looked at the statements and it was very obvious that there were things like the half of my salary that was discussed earlier, travel expenses, some things like the bill for the rent where they collated the nails. There were a number of expenses that should have been charged to Simplex Nails because they belonged there that had been charged to Peachtree and Richard [Powell, plaintiff] agreed that was so. In fact, there were some remarks wrote on that sheet that he wrote and then also in agreement had a computer sheet run showing some of those that would be taken out of—as expenses out of Peachtree and put where they belonged, over to Simplex. It was very substantial. It was a lot of money and *it would make a big difference on the net worth of the company.*
>
> Q [Defendant's counsel]: . . . This is Defendant's Exhibit 15. What is that, please?
>
> A: This is a computer run and it says that it's adjustments by R.F. Powell. This is some of the adjustments that should be made—including officers' salaries, heat, light and water, building rent and so forth—that should be adjusted to where

> they belong, which is at Simplex, and they should be taken off the books of Peachtree.

(Emphasis added.) Defendant's exhibit 15 was then admitted into evidence without objection, defendant read some of the specific dollar amounts that were next to each of the expenditure categories on the sheet, and defendant testified that he "never could find them [the adjustments] as being made on the statements whatsoever." Similarly, defendant's exhibit 29, a check register showing a check to Stanley Bostitch, was admitted into evidence without objection. Defendant was permitted to testify without objection that this expense should not have been paid for by Peachtree. Since the components largely constituting the figure that defendant allegedly read into evidence from an unidentified note had already been introduced into evidence, we conclude that any error that occurred was harmless. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."); *State v. Brooks*, 83 N.C. App. 179, 349 S.E.2d 630 (1986); H. Brandis, 1 *Brandis on North Carolina Evidence* § 30 (3rd ed. 1988).

X.

[10] Finally, plaintiffs argue that "[t]he trial court committed prejudicial error by permitting Ronald Stevens' speculative testimony." We disagree.

Mr. Stevens testified that if he had received an "up-to-date" financial statement in 1988, he would have invested two hundred and fifty thousand dollars in Peachtree. Plaintiffs waived this objection later by allowing Mr. Stevens to testify without objection that "I committed to the fact that if we had an up-to-date financial statement from Peachtree then I would be there with the money" and by asking Mr. Stevens on cross-examination that "if the financials from—from this business in Georgia had turned out to be a lot worse than those projections that Mr. Omli made, that would affect your thinking about buying it, wouldn't it?" Mr. Stevens' testimony was admissible pursuant to G.S. 8C-1, Rule 701 since it was based on Mr. Stevens' perceptions and was helpful to the jury. The evidence was relevant to defendant's earlier testimony regarding his difficulty in obtaining current financial statements and to show defendant's attempts to mitigate his losses from

Peachtree by showing his efforts to save the company by bringing in investors.

XI.

In conclusion, we reverse and remand for a new trial as to defendant's liability on the $100,000.00 promissory note. The remaining issues are affirmed.

Affirmed in part; reversed and remanded in part.

Judges ORR and JOHN concur.

CYNTHIA J. KUDER, PLAINTIFF v. THOMAS E. SCHROEDER, DEFENDANT

No. 9220DC425

(Filed 1 June 1993)

Husband and Wife § 3 (NCI4th)— repayment for wife's support through law school—oral agreement unenforceable

Plaintiff wife was not entitled to recover for breach of an oral agreement allegedly entered into by the parties after their marriage that plaintiff would forego her career as a veterinarian and work as a teacher in a community college to provide total financial support for their family while defendant husband obtained an undergraduate degree, worked on a master's degree, and obtained a law degree, and that defendant husband would thereafter provide the family's total support so that plaintiff could devote her full time to being a wife and mother, since each spouse has a personal duty arising from the marital relationship to support the other, and this duty of support may not be abrogated or modified by the agreement of the parties to a marriage.

Am Jur 2d, Husband and Wife §§ 8, 329-338.

Judge WYNN concurring.

Judge GREENE dissenting.

Appeal by plaintiff from order filed 30 January 1992 in Moore County District Court by Judge Michael E. Beale. Heard in the Court of Appeals 1 April 1993.

Plaintiff brought this action seeking a divorce from bed and board, child support, and alimony. Additionally, plaintiff asserted claims for breach of contract, unjust enrichment, and punitive damages related to the breach of contract claim. Defendant answered in apt time and moved to dismiss.

In an order dated 27 February 1991, the trial court dismissed plaintiff's alimony claim on the grounds that she had not alleged that she was a dependent spouse. Plaintiff has not appealed from that order. In a subsequent order entered 22 January 1992, the trial court dismissed plaintiff's claims for breach of contract, unjust enrichment, and punitive damages on the grounds that plaintiff had failed to state a claim upon which relief could be granted. It is from that order that plaintiff has appealed.

Evans and Riffle Law Offices, by John B. Evans, for plaintiff-appellant.

Brown & Robbins, by G. Les Burke and Carol M. White, for defendant-appellee.

WELLS, Judge.

A motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the sufficiency of a complaint to state a claim upon which relief can be granted. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). While the allegations in the complaint must be taken as true, the complaint must nevertheless be sufficient to satisfy the elements of some cognizable claim. *Id. See also Harris v. Duke Power Co.*, 83 N.C. App. 195, 349 S.E.2d 394 (1986), *aff'd*, 319 N.C. 627, 356 S.E.2d 357 (1987).

Plaintiff's claims at issue in this appeal are based upon the following essential allegations:

Plaintiff and defendant were married in March of 1978. One child was born to their marriage in June of 1984. After plaintiff and defendant were married, they entered into an oral agreement that plaintiff would forego her career as a veterinarian and would work as a teacher in a local community college to support their family in order that defendant might pursue his undergraduate

education at the University of North Carolina in Chapel Hill. Defendant agreed that upon the completion of his undergraduate studies, he would provide the family's total support, so that plaintiff could then give up her employment and devote her full time to being a wife and mother. Pursuant to this agreement, plaintiff did work and provide the sole support for their family. Plaintiff and defendant subsequently amended or extended their agreement to allow defendant to obtain a master's degree and a law degree. Following his graduation from law school, defendant was unable to earn sufficient income to fully support the family, but in December of 1989, defendant obtained a position with a law firm which provided him with sufficient income to fully support the family. Three months later, in April of 1990, defendant told plaintiff he no longer loved her and that there was no hope for their marriage; whereupon, the parties separated.

Plaintiff contends that the oral agreement asserted by her in her complaint is a valid and binding contract, entitling her to damages for its breach. Taking plaintiff's allegations as true, we are sympathetic to her apparent dilemma, and certainly would not condone defendant's apparent knavish ingratitude, but we do not find support in the law of this State for such a claim and therefore hold that the trial court correctly dismissed plaintiff's claims.

Under the law of this State, there is a personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse. *See N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987). So long as the coveture endures, this duty of support may not be abrogated or modified by the agreement of the parties to a marriage. *See Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945). *See also generally Lee, N.C. Family Law*, §§ *16.4 and 183* (4th ed. 1980)

Plaintiff's reliance on our decision in *Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988) is misplaced. In that case, we sanctioned a claim for remuneration for services performed in a business (farming) enterprise by a person who was cohabiting with, but not married to, a deceased cohabitor. The facts and ruling in that case are in no sense relevant to the facts and issues presented in the case now before us.

For the reasons stated, the trial court's order must be and is

Affirmed.

Judge GREENE dissents in a separate opinion.

Judge WYNN concurs in a separate opinion.

Judge GREENE dissenting.

I agree with the majority, but for a different reason, that the trial court correctly dismissed plaintiff's breach of contract action. I, however, would reverse the trial court's dismissal of plaintiff's claim for unjust enrichment.

I reiterate the allegations of plaintiff's complaint in order to provide a fuller appreciation of the facts at issue. Plaintiff and defendant were married on 17 March 1978, in Sanford, North Carolina. On 19 June 1984, the parties' only child was born. During the entire course of the marriage, plaintiff, a veterinarian, worked as a teacher at a local community college. She provided total financial support for the family. Upon their marriage, plaintiff and defendant agreed that plaintiff would remain in her teaching position in order to ensure a steady source of income for the family while defendant returned to school full-time to complete his undergraduate education at the University of North Carolina. Plaintiff also agreed that she would have only one child while defendant was in school. In return, defendant agreed that he would provide the family's total financial support upon the completion of his undergraduate studies, at which time plaintiff could achieve her goal of becoming a full-time wife and mother. Pursuant to this agreement, plaintiff taught and provided the family's sole source of income, including the income for defendant's education, with the expectation that she would soon be able to remain at home and raise a family.

Defendant obtained his undergraduate degree as planned; however, defendant decided upon graduation that he wanted to earn a Master's degree as well. The parties decided to extend their original agreement for a period which would allow defendant to achieve this goal. After two years, however, defendant discontinued his efforts to obtain a Master's degree and decided instead to enroll in law school at UNC. Again, the parties extended their original agreement in order to allow defendant to complete law school. Plaintiff continued to work and provide all of the family's

income. Defendant continued to devote his time to completing his education.

Upon graduation from law school, defendant told plaintiff that, instead of entering the private practice of law, he wanted to start his own legal research business. The parties, plaintiff reluctantly, once more extended their original agreement, with plaintiff continuing to work in order to ensure a steady income for the family until defendant's business became profitable. Plaintiff, who by this time had reached the age of forty, also agreed to forego having more children. In his first two years of self-employment, defendant failed to earn enough money to fully support the family.

In December, 1989, defendant obtained a position with a law firm in Charlotte, North Carolina, with a starting salary of approximately $38,000.00 per year. For the first time during eleven years of marriage, defendant was able to provide total financial support for the family. Three months later, however, in April, 1990, defendant told plaintiff that he no longer loved her and that there was no hope for their marriage, and the parties separated.

Breach of Contract

I agree with the majority that arising out of the marital relationship there is the equal duty of each spouse to support the other spouse, and that a spouse may not recover for support provided in the discharge of the duties imposed by the marital status. It has long been observed by our Courts, however, that a husband and wife are free to contract for the performance of services or the rendering of support *outside* those duties. *See Dorsett v. Dorsett*, 183 N.C. 354, 356, 111 S.E. 541, 542 (1922) (wife entitled to compensation where, pursuant to an agreement with her husband, she renders services outside the home); *accord Ritchie v. White*, 225 N.C. 450, 455, 35 S.E.2d 414, 417 (1945); *see also* N.C.G.S. § 52-10 (1991) (contracts between husband and wife not inconsistent with public policy are valid). In my opinion, the type of support furnished by plaintiff in the instant case is outside the scope of the marital duty of support as recognized by our Courts. Therefore, plaintiff and defendant were not precluded from entering, as husband and wife, into the agreement at issue.

Even assuming, as the majority apparently does, that plaintiff's contribution to defendant's educational endeavors falls within her spousal duty of support, I question the continued validity of the

rule that the duty of support arising out of the marital relationship cannot be modified by the agreement of the parties. Our Legislature currently recognizes the validity of contracts which modify or abrogate the marital duty of support, provided that such contracts are entered into before marriage and are in contemplation of marriage, or are entered into upon separation of the parties. *See* N.C.G.S. § 52B-1 *et seq.* (1987); N.C.G.S. § 52-10.1 (1991). Parties are also permitted before, *during*, or after marriage to provide in a written agreement for distribution of marital property in a manner deemed by the parties to be equitable. N.C.G.S. § 50-20(d) (Supp. 1992). Moreover, our Courts recognize the validity of an agreement of the type at issue provided that the parties to such agreement are unmarried cohabiting partners. *See Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988) (citing *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976)). I find it incongruous that, given a cohabiting partner on the one hand and a spouse on the other hand, both of whom pursuant to an agreement provide total financial support for their partner in order for that partner to obtain a degree, an advanced degree, or a professional license with the expectation that both parties would benefit therefrom, upon the dissolution of the relationship, the cohabiting partner is entitled to compensation for such contribution to the educational achievements of his partner, but a spouse who made the same contribution is not. I am at a loss to understand the "public policy" supporting such a rule.

In the instant case, I agree with the majority that the trial court properly dismissed plaintiff's claim for breach of contract, but for a different reason. It is a basic principle of contract law that, even if the parties intend to contract, an agreement which is not reasonably certain as to its material terms is indefinite and will not be—because it *cannot* be—enforced by our Courts. *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 2-9 (3d ed. 1987) [hereinafter *Calamari & Perillo*]. Generally, "material terms" include such items as subject matter, price, payment terms, quantity, quality, duration, time and place of performance, and so forth. *Calamari & Perillo* at § 2-9.

A review of the allegations in plaintiff's amended complaint relating to the terms of her alleged express oral contract with defendant, taken as true, reveals the agreement's pervasive and fatal lack of definiteness. Among other things, plaintiff fails to

allege that the parties agreed on any specific time period during which defendant was to complete his various educational efforts and plaintiff was to begin her pursuit as a full-time wife and mother. Nor is there any mention of the intended duration of plaintiff's role as full-time wife and mother. In addition, the parties never agreed on what amount of financial support plaintiff was obligated to provide for the parties' living expenses while defendant was in school or for defendant's educational expenses. Likewise, the complaint fails to allege the amount of financial support defendant was expected to provide once the parties switched breadwinner roles. Therefore, I would affirm the trial court's order dismissing this claim. *See Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. App. 1983). Even though plaintiff's contract claim was properly dismissed, however, I believe that the trial court erred in dismissing plaintiff's claim for unjust enrichment, an issue which the majority fails to address.

Unjust Enrichment

" 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988) (citation omitted); *Calamari & Perillo* at § 15-2 (citation omitted). In order to state a claim for unjust enrichment, the plaintiff's allegations must reveal that she rendered to the defendant services or support which conferred on the defendant a measurable benefit, that defendant accepted the services or support, and that "the services [or support] were rendered and accepted between the two parties with the mutual understanding that plaintiff was to be compensated for her efforts." *Suggs*, 88 N.C. App. at 544, 364 S.E.2d at 162; *Booe*, 322 N.C. at 570, 369 S.E.2d at 556. In other words, the beneficial services or support must not have been conferred officiously or gratuitously. *Booe*, 322 N.C. at 570, 369 S.E.2d at 556. In North Carolina, it is presumed that services or support provided by one spouse for the other are rendered gratuitously; however, this presumption may be rebutted "by proof of an agreement to [compensate], or of facts and circumstances permitting the inference that [compensation] was intended on the one hand and expected on the other." *Francis v. Francis*, 223 N.C. 401, 402, 26 S.E.2d 907, 908 (1943). The measure of damages in a claim for unjust enrichment is the reasonable value of the services or support to the defendant. *Booe*, 322 N.C. at 570, 369 S.E.2d at 556.

Courts in other jurisdictions when faced with situations such as the one presented by the facts of this case have allowed plaintiff spouses to go forward with their claims for restitution on the theory of unjust enrichment. *See, e.g., Pyeatte*, 661 P.2d at 207; *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981). Allowing such claims is eminently reasonable when one considers that, in North Carolina, the alternative leaves the non-student supporting spouse with virtually no remedy. This is so because the non-student supporting spouse has no right to alimony because he is not a "dependent" spouse. *See* N.C.G.S. §§ 50-16.1(3) and 50-16.2 (1987). Indeed, he has demonstrated the capability of supporting not only himself, but his spouse, and, often, children as well. And although North Carolina recognizes as distributional factors for purposes of equitable distribution of marital property contributions made by one spouse to help educate or develop the career potential of the other spouse, or which increase the value of the other spouse's professional license, N.C.G.S. §§ 50-20(b)(2) and 50-20(c)(7), (8) (Supp. 1992); *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987), this remedy is of little value in cases where the student spouse leaves the supporting spouse immediately or soon after obtaining his professional license. This is so because the parties, after sacrificing in order to educate the student spouse, ordinarily have accumulated no marital assets of significant value. There is more often than not little, if any, marital property to distribute to the supporting spouse to "reimburse" him for his contribution to the student spouse's education. *Cf. Geer*, 84 N.C. App. at 478-81, 353 S.E.2d at 431-33 (generally approving of trial court's distributive award to husband who supported wife through medical school, which award was calculated by computing husband's total out-of-pocket payments directly attributable to wife's medical education). In addition, there will likely have been *no* increase in the value of the student spouse's professional license at this early point in his career.

In the instant case, plaintiff alleges in her amended complaint that she and defendant entered into an oral agreement pursuant to which, in exchange for plaintiff's provision of the family's financial support while defendant obtained an undergraduate degree, nearly obtained a Master's degree, obtained a law degree and law license, and embarked on his own business, plaintiff would be compensated. Her intended compensation was the opportunity to become, upon completion of defendant's education, a full-time wife and mother. Plaintiff alleges that, when the time arrived for defendant to fulfill

his obligations under the agreement, defendant told plaintiff that he no longer loved her and that their marriage was over, after which the parties separated. Plaintiff also alleges that her provision for eleven years of financial support for both defendant's living expenses so that he did not have to work, as well as defendant's educational expenses, has been of great value to defendant and has increased his earning potential, and that to permit defendant to retain the benefit of the services and support of plaintiff would unjustly enrich defendant.

Arguably, as previously discussed, plaintiff's contribution to defendant's educational accomplishments is outside the scope of her marital duty of support, and therefore is not presumed gratuitous. However, even assuming that her contribution falls within such duty, the allegations in plaintiff's complaint are sufficient to rebut the presumption that her efforts were rendered gratuitously. Based on the allegations in her complaint, I conclude that plaintiff has stated a claim for unjust enrichment, and would hold that the trial court erred in dismissing it. In doing so, I do not address the broader question of a spouse's right to bring an unjust enrichment claim, or a breach of contract action, against the other spouse beyond the facts presented in the instant case.

Judge WYNN concurring.

I concur fully in the majority opinion and write separately to point out that the law provides different protection for married couples and unmarried cohabitants, and to address the issue of unjust enrichment, on which the dissenting opinion invites comment.

First, the dissent submits that there is something incongruous in allowing an unmarried but cohabiting partner to enter into a valid contract regarding the support of the other partner, but not affording a married partner this same privilege. The marital relationship is bestowed special protections by the laws of North Carolina, protections that a cohabiting partner cannot claim. These include, for example: the right to have property held as tenants by the entireties, N.C. Gen. Stat. § 39-13.6 (1984); the right, upon the death of one's spouse, to dissent from an unfavorable bequest in the deceased's will, in favor of a larger portion of the estate, N.C. Gen. Stat. § 30-1 (1992); an entitlement to a year's allowance upon the death of one's spouse, N.C. Gen. Stat. § 30-15 (1992); and numerous rights arising from the dissolution of the marital relationship that

are not available to a cohabiting partner when his or her relationship comes to an end. *See generally* N.C. Gen. Stat. Chapter 50 (1987, Supp. 1992). Quite simply, the rules are different for married couples. *See Ritchie v. White*, 225 N.C. 450, 453, 35 S.E.2d 414, 416 (1945) (the moment the marriage relation comes into existence certain rights and duties spring into being). The dissent chooses to focus on one aspect of the law which does not grant a married person the same privilege as an otherwise similarly situated unmarried cohabitant in an effort to illustrate that the married couple is unduly restrained by our laws. The fact that the law does not allow a married couple to contract regarding spousal support, however, is not indicative of a general trend in the law to deprive married individuals of otherwise valid legal rights.

Second, having found, as the majority has, that an oral agreement existed between the parties in the present case pursuant to which the plaintiff wife agreed to support the defendant husband while he was in school, and having further found that there exists a personal duty of each spouse to support the other which duty cannot be modified by the parties to a marriage, the issue of unjust enrichment is easily resolved.

The doctrine of unjust enrichment is an equitable doctrine intended to require a recipient to pay for benefits received under circumstances in which it would be unfair for him or her to retain those benefits without compensating the benefactor. *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984). This principle, however, is inapplicable when the benefit is bestowed gratuitously or is in discharge of some obligation. *Atlantic Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966) (railroad company not allowed to recover for widening railroad tracks under a theory of unjust enrichment where it was required to so act pursuant to statute). Each spouse has a duty to support the other during the course of the marriage, and, therefore, the wife in the instant case cannot now seek to be reimbursed for such support under a theory of unjust enrichment.

I note that the law has not abandoned spouses who find themselves in the situation of the plaintiff. The legislature has enacted the equitable distribution statute, pursuant to which support such as the plaintiff has rendered in the present case is a distributional factor supporting an unequal distribution of the marital

property. N.C. Gen. Stat. § 50-20(7). It is unfortunate that the circumstances of the present case are such that the marital estate consists of little property. To make up for this by reaching the result that the dissenting opinion urges, however, would result in unwarranted litigation in those situations where a supporting spouse claims recovery under a theory of unjust enrichment in an amount in excess of the value of the marital property. The ramifications of the dissent's view cannot be ignored, as they would clearly result in an alteration of the laws relating to divorce, alimony, and property division that is best left to the legislature.

STATE OF NORTH CAROLINA v. WILLIAM ANDREW McKINNEY

No. 9219SC131

(Filed 1 June 1993)

1. **Indictment, Information, and Criminal Proceedings § 29 (NCI4th)— rape—allegations as to dates not specific—not grounds for dismissal**

Indictments for first-degree rape which alleged that the date of the offenses was July, 1985 through July, 1987 were not fatally defective because time is not of the essence of the offense and does not constitute an element of the offense. N.C.G.S. § 15A-924(a)(4).

Am Jur 2d, Indictments and Informations §§ 115-121.

2. **Indictment, Information, and Criminal Proceedings § 52 (NCI4th)— first-degree rape and indecent liberties—time of offense—variance between indictment and evidence—not fatal**

Charges of first-degree rape and indecent liberties were not required to be dismissed where the indictments alleged that the offenses occurred on 15 March 1988 and the evidence at trial was that the offenses occurred in the summer of 1987. Time was not of the essence for either of the felony offenses and there is no statute of limitations.

Am Jur 2d, Indictments and Informations § 268.

3. Evidence and Witnesses § 374 (NCI4th)— rape and indecent liberties—prior instances of sexual misconduct—common plan or scheme—admissible

There was no error in a prosecution for first-degree rape and indecent liberties in the admission of evidence that defendant had made young girls watch films and that he slept overnight in his locked bedroom with a child under the age of 13 where the State offered the testimony as evidence of a common plan or scheme on the part of defendant to win the trust of young girls in order to molest them. The testimony established that defendant brought little girls to his residence to watch adult films and to spend the night in his bed at least as early as 1983 or 1984, and other evidence established that he continued to associate with young girls in order to molest them until 1989. Contrary to defendant's contention, "prior bad act" evidence necessarily will encompass crimes, wrongs, or acts which occurred prior to the date or time period listed in the indictment. Defendant's contention that evidence of prior instances of misconduct is inadmissible under N.C.G.S. § 8C-1, Rule 608 is without merit because evidence of wrongful acts admissible under N.C.G.S. § 8C-1, Rule 404(b) is not within the scope of Rule 608.

Am Jur 2d, Rape § 73.

4. Appeal and Error § 155 (NCI4th)— rape and indecent liberties—motion to dismiss not made—may not raise on appeal

A defendant in a prosecution for first-degree rape and indecent liberties could not challenge on appeal the sufficiency of the evidence where he made no reference to the pages in the record which would reflect that defendant made such a motion and an exhaustive review of the record reveals that defendant did not move to dismiss the charges at the close of the evidence.

Am Jur 2d, Appeal and Error §§ 562 et seq.

5. Criminal Law § 481 (NCI4th)— jurors conferring prior to deliberations—motion for appropriate relief denied—no error

The trial court did not err in a prosecution for rape and indecent liberties by denying defendant's motion for appropriate relief based on alleged juror misconduct where the trial court made detailed findings and concluded that defendant was not

prejudiced by the alleged discussions among some members of the jury prior to deliberations.

Am Jur 2d, Trial §§ 999 et seq.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.

Judge McCRODDEN concurring.

Appeal by defendant from judgments entered 10 September 1991 in Randolph County Superior Court by Judge W. Douglas Albright. Heard in the Court of Appeals 9 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Crumley & Biggs, by Bobby J. Crumley and T.C. McCahan, for defendant-appellant.

GREENE, Judge.

Defendant appeals from judgments entered 10 September 1991, which judgments are based on jury verdicts convicting defendant of two counts of taking indecent liberties with a child, N.C.G.S. § 14-202.1, a Class H felony with a maximum term of ten years and a presumptive term of three years, and three counts of first-degree rape, N.C.G.S. § 14-27.2, a Class B felony with a maximum term of life in prison.

On 16 July 1990, defendant was indicted in Randolph County for one count of first-degree rape of T.B., a child under the age of thirteen, and for one count of taking indecent liberties with T.B. The indictments allege that the offenses occurred on 15 March 1988. On 20 August 1990, defendant was indicted in Guilford County for another count of first-degree rape of T.B. Defendant was also indicted on 20 August 1990 in Guilford County for one count of first-degree rape of S.J., a child under the age of thirteen. Both of the indictments allege that the date of the offenses was "July, 1985 thru July, 1987." Defendant filed a motion for a bill of particulars in these cases. The State responded in relevant part that, because of the young age of the children involved, it "[could] not give a time of any occurrence," but that S.J. stated that it happened when she was six or seven years old and continued until she was

nine, and T.B. stated that defendant "began messing with me when I was four and continued until I was nine." Defendant made a pre-trial motion to dismiss the two Guilford County rape indictments on the ground that they fail to allege the date of the offenses with sufficient particularity to enable defendant to prepare an adequate defense in violation of N.C.G.S. § 15A-924(a)(4) and his constitutional rights. The trial court denied the motion.

On 26 November 1990, defendant was indicted in Randolph County for one count of taking indecent liberties with D.C., a child under the age of sixteen, which, according to the indictment, occurred on 15 July 1989. On 31 July 1991, defendant waived venue in the two Guilford County rape cases alleged to have occurred between July 1985 thru July 1987. These cases were moved to Randolph County and were consolidated for trial with the three Randolph County indictments. Defendant filed a written motion in limine in all the cases seeking an order instructing the district attorney and all witnesses for the State to refrain from mentioning in the presence of the jury any alleged prior acts of sexual misconduct on the part of defendant. The trial court denied defendant's motion in limine and instead decided to rule on the admissibility of the evidence as needed at trial.

At trial, the State presented the testimony of complainant S.J., who was fourteen years old at the time of trial. S.J. testified that when she was six or seven years old, she would visit defendant at his home and sometimes would spend the night. On one occasion when she spent the night at defendant's home in High Point along with her cousin, defendant played a "dirty" movie which S.J., her cousin, and defendant watched. They later went to sleep in defendant's room. S.J. woke up and found defendant unclothed and lying on top of her. According to S.J., defendant had his "private" inside of her, and that this had happened before.

The State also presented the testimony of complainant T.B., who was eleven years old at the time of trial. T.B. testified that when she was five or six years old, defendant took her and her cousin skating and then to his apartment in High Point to spend the night. T.B. awoke to find defendant's "hands on my private." T.B. also testified that defendant later moved to a house in Hillsville, where he built a swimming pool in the back yard during the second summer after he moved in. On one occasion during the first summer after defendant moved into the house in Hillsville, while visiting

defendant, T.B. recalled defendant taking off his clothes and "sticking his penis inside" her. T.B. testified that defendant had done the same thing "a lot" at his High Point residence.

Complainant D.C., who was nine years old at trial, testified that one night when she was six or seven years old, she and a friend spent the night on a couch at defendant's house in Hillsville, and that it was after defendant built his swimming pool. D.C. testified that defendant woke her up in the middle of the night, took her hand, and placed it "on his private."

In addition to testimony of the complainants, the State presented, over defendant's objection, as evidence of a common plan or scheme on the part of defendant to molest young girls the testimony of Cindy Kendrick and Lori Kuplin, both of whom were twenty years old at the time of trial. Kendrick testified that on one occasion when she was twelve or thirteen years old (prior to July, 1985), she, Lori Kuplin, and S.J. were at defendant's home. According to Kendrick, defendant made the girls watch adult films and later took S.J. to his bedroom where the two spent the night with the door locked. Lori Kuplin's testimony was essentially the same as that of Kendrick.

At the close of the State's evidence, defendant made a motion to dismiss the Randolph County charge of indecent liberties involving D.C. on the ground that the State failed to present sufficient evidence of the essential elements of the offense. Defendant also made a motion to dismiss the Randolph County indecent liberties and first-degree rape indictments involving T.B., on the ground that the evidence presented by the State in support of these indictments shows that the offenses occurred in the summer of 1987, and not on the dates alleged in the indictments—15 March 1988. Defendant's motions were denied by the trial court.

Defendant presented evidence, including the testimony of a clinical psychologist who had administered a penile plethysmograph test to defendant. The psychologist testified that, based on the results of the test, in his opinion defendant did not have the mental condition known as pedophilia. At the close of all the evidence and after arguments of counsel and instructions, the jury convicted defendant on all charges. After sentencing, defendant filed a motion for appropriate relief pursuant to N.C.G.S. § 15A-1414, alleging, among other things, that members of the jury, including the alternate juror, were improperly discussing the case during breaks and

prior to the submission of the case to the jury for deliberation. The trial court, after making detailed findings and conclusions, denied the motion. Defendant appeals.

The issues presented are whether the trial court committed reversible error in (I) refusing to dismiss for lack of specificity the rape indictments which allege that defendant committed one count of first-degree rape each against S.J. and T.B. in "July, 1985 thru July, 1987"; (II) refusing to dismiss the indecent liberties and first-degree rape indictments involving T.B. on the ground that the evidence presented at trial regarding the date of the offenses varied from the 15 March 1988 date alleged in the indictments; and (III) admitting pursuant to Rule 404(b) evidence of defendant's prior sexual misconduct involving young girls.

I

[1] Defendant argues that the two first-degree rape indictments alleging the date of the offenses as "July, 1985 thru July, 1987" are fatally defective in that they fail to allege with specificity the date of the offenses in violation of N.C.G.S. § 15A-924(a)(4) and the United States Constitution.

North Carolina Gen. Stat. § 15A-924 provides that a criminal pleading must contain

> [a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time.

N.C.G.S. § 15A-924(a)(4) (1988). However, the failure to include in the indictment a designated date or period of time within which the offense occurred does not in every event require dismissal of the indictment. *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). If time is of the essence of the crime charged, the indictment must be dismissed under Section 924(a)(4) only if (1) there is an error in the date or period of time listed on the indictment, or the omission thereof, *and* (2) the error or omission misled the defendant to his prejudice. *See State v. Oliver*, 85 N.C. App. 1, 7, 354 S.E.2d 527, 531, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987) (because there was no error in the dates alleged in the indictment, even if time were of the essence in defendants' cases, the charges would not be subject to dismissal under Section 924(a)(4)); *Everett*, 328 N.C. at 75, 399 S.E.2d at 306. If time is

not of the essence of the offense charged, the failure to state the time at which the offense was committed, or stating the time imperfectly, is not grounds for dismissal of the indictment. N.C.G.S. § 15-155 (1983). Our construction of the statutes at issue incorporates the rights afforded a criminal defendant under the United States Constitution. *See* 1 Charles Alan Wright, *Federal Practice and Procedure: Federal Rules of Criminal Procedure* § 125 at 381-83 (2d ed. 1982); 2 Charles E. Torcia, *Wharton's Criminal Procedure* § 249 (13th ed. 1990); Joseph G. Cook, *Constitutional Rights of the Accused: Pre-trial Rights* § 88 (1972).

Thus, the indictments in the instant case must be evaluated in the context of whether time is of the essence of the offense of first-degree rape. Because time does not constitute an element of first-degree rape, *see* N.C.G.S. § 14-27.2 (1986), time is not of the essence of the crime. *See State v. Wise*, 66 N.C. 120, 122 (1872) (time is not of the essence of the offense unless time constitutes a part of the crime, e.g., time is of the essence of first-degree burglary because an essential element of first-degree burglary is the commission of the crime in the nighttime); *State v. Baxley*, 223 N.C. 210, 211, 25 S.E.2d 621, 622 (1943) (time is not of the essence of the offense of rape of a female under the age of sixteen). Accordingly, because in the instant case the failure of the indictments to allege *any* date on which the offenses occurred would not be grounds for dismissal of the charges, the designation of a two-year period is not grounds for dismissal.

II

[2] Defendant argues that the trial court committed reversible error in refusing to grant defendant's motion at the close of the State's evidence to dismiss the indecent liberties and first-degree rape charges involving T.B. Specifically, defendant contends that T.B.'s testimony at trial established that the offenses occurred during the summer before defendant built his swimming pool, which would have been the summer of 1987, not on 15 March 1988 as alleged in the indictments. Defendant contends that the variance in the proof at trial and the date alleged in the indictments requires dismissal of the charges.

When time is not of the essence of the offense charged, a variance between the date alleged in the indictment and proof of the date at trial is not grounds for dismissal of the charges, provided that no statute of limitations is involved. N.C.G.S.

§ 15A-924(a)(4) (1988); *Baxley*, 223 N.C. at 211, 25 S.E.2d at 622. Because, based on our previous discussion, time is not of the essence of either of the felony offenses challenged by defendant, for which there is no statute of limitations, we reject this assignment of error.

III

[3] Defendant contends that the trial court committed prejudicial error by admitting pursuant to North Carolina Rule of Evidence 404(b) testimony regarding prior instances of defendant's sexual misconduct. Specifically, defendant contends that he was unfairly prejudiced by testimony that he made young girls watch adult films and that he slept overnight in his locked bedroom with S.J.

Evidence of a defendant's prior crimes, wrongs, or acts is admissible pursuant to Rule 404(b) if it is offered for a proper purpose, is relevant, has probative value which is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, is coupled with a limiting instruction. *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). It is well established that, to be admissible, evidence of a defendant's prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time. *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988). However,

> [w]hile a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (citation omitted).

The State offered and the trial court admitted the testimony of which defendant complains pursuant to Rule 404(b) as evidence of a common plan or scheme on the part of defendant to win the trust of young girls in order to molest them. The testimony established that defendant, at least as early as 1983 or 1984, brought little girls to his residence to watch adult films and to spend the night with defendant in his bed. Other evidence presented by the

State established that defendant continued to find opportunities to associate with young girls in order to molest them until 1989. We hold that the challenged testimony was properly admitted by the trial court as evidence of a common plan on defendant's part to molest young girls.

We note that defendant's repeated contention that the testimony was inadmissible under Rule 404(b) because the alleged misconduct "occurred outside of the indictment period" is illogical. "Prior bad act" evidence as a general rule encompasses evidence of a defendant's crimes, wrongs, or acts which are similar to and occurred prior to the crime with which defendant is charged. Thus, the evidence necessarily will encompass crimes, wrongs, or acts which occurred prior to the date or time period listed on the indictment. In addition, defendant's contention that evidence of prior instances of his alleged sexual misconduct is inadmissible under Rule 608 simply is without merit, as "[e]vidence of wrongful acts admissible under Rule 404(b) is not within [the scope of Rule 608] and is admissible by extrinsic evidence or by cross-examination of any witness." N.C.G.S. § 8C-1, Rule 608 commentary (1992).

IV

Defendant raises several contentions which we summarily address.

[4] Defendant argues that "the trial court committed reversible error by failing to grant defendant's motion for an acquittal at the close of all the evidence" because the evidence in each case was insufficient to justify submission of the case to the jury. Defendant makes no reference to the pages in the record which would reflect that he made such a motion, and an exhaustive review of the record reveals that defendant, in fact, did not move to dismiss the charges at the close of all the evidence. "[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C.R. App. P. 10(b)(3) (1993).

[5] Defendant argues that the trial court committed error by not granting defendant's motion for appropriate relief based on alleged jury misconduct. In his brief, defendant cites no authority to support his contentions in this regard, and we are not persuaded by his argument, in light of the trial court's detailed findings and

conclusion that defendant was not prejudiced by the alleged discussions among some members of the jury prior to deliberations.

We have carefully reviewed defendant's remaining assignments of error and have determined that they are without merit.

V

The State in its brief, although it did not, and could not, perfect an appeal in this case, raises the issue of whether the trial court erred when it allowed a licensed clinical psychologist to testify on defendant's behalf regarding the results of a penile plethysmograph which he administered to defendant. As described by the psychologist, a penile plethysmograph is a device which, when placed on the human male penis, measures blood flow into the penis as various photographs are shown to the male. Having denied the State's petition for writ of certiorari, this issue of first impression in North Carolina is not properly before us.

With regard to the judgments in these cases,

No error.

Chief Judge ARNOLD concurs.

Judge McCRODDEN concurs with separate opinion.

Judge McCRODDEN concurring.

I concur in the result reached by the majority, but I do not believe that that opinion fully explores the problems inherent in indictments, such as the one in Case No. 91 CRS 101, alleging first degree rape of T.B. during a period spanning two years. N.C. Gen. Stat. § 15A-924(a)(4) (1988) requires that a criminal pleading must contain a statement that "the offense charged was committed on, or on or about, a designated date, or during a designated period of time." Our courts have recognized and allowed the leniency afforded young witnesses whose concept of time is not precise, *see, e.g., State v. Everett,* 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991), and periods of time stated in indictments have increased to reflect the unfortunate fact that many cases involving sexual abuse of children continue undetected for months and years.

Those facts, however, should not give prosecutors a false sense about their pleadings. In this case, for example, as counsel for defendant argued, evidence at trial showed that another first degree rape of T.B., the one charged in 90 CRS 6084 as occurring on 15 March 1988, actually occurred sometime in 1987, possibly within the two-year period of the first degree rape alleged by 91 CRS 101. This scenario raises the constitutional issue of double jeopardy, an issue the majority glosses over, in parts I and II of its opinion, by relying on that time-honored phrase that, where time is not of the essence of a particular crime, (I) the designation of a two-year period in the indictment is not fatal, and (II) a variance between the date alleged in the indictment and the date proved at trial is not grounds for dismissal. The case of *State v. Wise*, 66 N.C. 120 (1872), cited by the majority, stands for more than the majority indicated. In that case, while the Supreme Court acknowledged that time was not of the essence of the crime (arson) for which Wise had been indicted, it noted that "time has a most important effect upon the punishment," 66 N.C. at 124, because the date upon which Wise had committed his criminal deed would decide whether he received imprisonment under a law passed in 1869, or death under an 1871 act. The Court reversed the judgment based on the 1871 act, reserved for the future the question of whether the prosecutor could maintain a motion for judgment as upon a conviction under the 1869 act, and stated that, "it may be that judgment cannot be pronounced as upon conviction on either one of the statutes, by reason of the uncertainty." *Id.* at 125.

Absent other evidence that defendant in the instant case had committed first degree rape of T.B. on a number of occasions, this Court would not be able to determine whether the jury convicted defendant of the two first degree rape charges found in 90 CRS 6084 and 91 CRS 101 on the basis of the single 1987 incident. Indeed, absent such evidence, time would have a "most important effect upon the punishment," because defendant would have received two consecutive life sentences for identical offenses based upon the same act, in violation of defendant's Fifth Amendment right not to be twice tried for the same offense. Only because there is ample evidence that defendant had sexual intercourse with the child on a number of occasions within this period, including possibly the date in 1987 used to convict him of the rape charge in the 90 CRS 6084 indictment, will I stand with the majority in finding no error.

JOYCE M. DANIEL, PLAINTIFF v. CAROLINA SUNROCK CORPORATION, A NORTH CAROLINA CORPORATION, AND BRYAN PFOHL, INDIVIDUALLY, DEFENDANTS

No. 929SC479

(Filed 1 June 1993)

1. Labor and Employment § 77 (NCI4th)— wrongful discharge— public policy exception—sufficient forecast of evidence

Plaintiff's forecast of evidence was sufficient to support her claim for wrongful discharge under the public policy exception to the employment-at-will doctrine where plaintiff presented evidence tending to show that her working conditions deteriorated after she was subpoenaed and expressed a willingness to testify honestly about her employer in a former co-employee's suit against the employer, although she never testified because the lawsuit for which she was subpoenaed was settled out of court; the employer's president told plaintiff not to say any more than she had to when testifying and to "remember that you work for me and represent me and my company"; after plaintiff told the employer's attorney that she intended to testify that her former co-employee was a good worker, the employer took away many of plaintiff's employment responsibilities and moved her to a smaller office with no phone, no typewriter, and no heat; the employer's president told another employee that plaintiff knew too much and stated an intention to get rid of all of the former co-employee's "people"; other employees took notes on plaintiff's activities, counted and screened her personal phone calls, had a key made and inspected the contents of plaintiff's desk while she attended her father's funeral, and made harassing phone calls to the homes of plaintiff, her mother and her sister-in-law; and plaintiff was discharged thirteen months after the former co-employee's case was settled. A reasonable finder of fact could infer from plaintiff's forecast of evidence that the employer's president engineered plaintiff's discharge because he believed she was prepared to testify truthfully as a witness in the former co-employee's lawsuit.

Am Jur 2d, Master and Servant §§ 49-59.

2. Trespass § 2 (NCI3d)— intentional infliction of emotional distress—insufficient forecast of evidence

Alleged actions by defendant employer and its president did not rise to the level of extreme and outrageous conduct so as to support plaintiff's claim for the intentional infliction of emotional distress where plaintiff's forecast of evidence tended to show that, after plaintiff was subpoenaed by a former co-worker to testify against defendant employer, defendant's employees took away many of plaintiff's employment responsibilities, took notes on plaintiff's activities, counted and screened plaintiff's personal phone calls, had a key made and inspected the contents of plaintiff's desk while she attended her father's funeral, moved plaintiff into a smaller office with no phone and no heat, and made harassing phone calls to the homes of plaintiff, her mother, and her sister-in-law.

Am Jur 2d, Trial § 770.

Judge LEWIS dissenting.

Appeal by plaintiff from judgment entered 30 January 1992 in Granville County Superior Court by Judge Robert H. Hobgood. Heard in the Court of Appeals 15 April 1993.

On 17 July 1990, plaintiff filed a complaint in which she asserted claims against defendants for wrongful discharge, breach of employment contract, and tortious interference with contract. On 21 February 1991, plaintiff filed an amendment to the complaint, adding a claim for the intentional infliction of emotional distress. On 1 October 1990, defendants filed an answer to plaintiff's original complaint, and on 12 April 1991, defendants filed an answer to plaintiff's amended complaint.

Following extensive discovery proceedings, on 16 January 1992, defendants filed a motion for summary judgment as to each of plaintiff's claims. On 11 February 1992, plaintiff took a voluntary dismissal of her breach of employment contract claim. On that same date, Judge Hobgood entered summary judgment for the defendants on plaintiff's claims of wrongful discharge, intentional infliction of emotional distress, and tortious interference with contract. Plaintiff filed notice of appeal on 24 February 1992.

Pulley, Watson & King, P.A., by Tracy Kenyon Lischer, for plaintiff-appellant.

Haynsworth, Baldwin, Johnson & Greaves, P.A., by Gregory P. McGuire, for defendant-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claims of wrongful discharge and intentional infliction of emotional distress. Plaintiff did not appeal the summary judgment order as to her tortious interference with contract claim.

"Summary judgment is properly granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' N.C.G.S. 1A-1, Rule 56(c) (1983)." *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992). All inferences of fact from the proofs offered must be drawn against the movant and in favor of the party opposing the motion for summary judgment. *Id.* Applying these guidelines, we shall consider plaintiff's claims for wrongful discharge and intentional infliction of emotional distress.

Wrongful Discharge

While employed at Sunrock, plaintiff was an employee-at-will. Generally, in North Carolina, an employee-at-will has no claim for relief for wrongful discharge. *Tompkins v. Allen*, 107 N.C. App. 620, 421 S.E.2d 176 (1992). Generally, either party to an employment-at-will contract can terminate the contract for no reason at all, or for an arbitrary or irrational reason. *Id.* However, a valid claim for wrongful discharge may exist in the employment-at-will context if the contract is terminated for an unlawful reason or a purpose that contravenes public policy. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989).

In *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), this Court recognized a public policy exception to the employment-at-will doctrine in a case where a nurse alleged that her employer pressured her not to testify honestly in a medical malpractice lawsuit and subsequently discharged her because she refused to commit perjury, but rather testified fully and honestly. This Court wrote:

> Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. . . . We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here.

In *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E.2d 423 (1988), following *Sides*, this Court expanded the same public policy exception to a case where the plaintiff did not allege that her employer pressured her to alter her testimony, but rather alleged that she was wrongfully discharged after honestly testifying in an unemployment compensation hearing. The defendants in *Williams* attempted to differentiate their case from *Sides* because they never harassed or threatened plaintiff before she testified, but rather allegedly harassed and fired her after she testified against them. The *Williams* Court disagreed and found that, because she was discharged for telling the truth, "plaintiff falls into the same narrow exception to the general rule . . . that *Sides* created."

[1] In the case at bar, plaintiff asks this Court to extend the public policy exception to the employment-at-will doctrine recognized in *Sides* and *Williams* to a situation where plaintiff alleges that she was wrongfully discharged after being subpoenaed and expressing a willingness to honestly testify about her employer, but never actually testified because the lawsuit for which she was subpoenaed was settled out of court.

At the summary judgment hearing, the trial court considered (in addition to the pleadings) the depositions of plaintiff, H. Braxton Davis, Jr., David A. Eckstine, Jessie Self, Donald Tilley, Ellen Wilkins, and defendant Pfohl, and various exhibits relating to the plaintiff's employment history. From these materials, the forecast of evidence, viewed in the light most favorable to plaintiff, may be summarized as follows:

Carolina Sunrock Corporation [Sunrock] operates a quarry in Butner, North Carolina, producing crushed stone and building materials. Defendant Bryan Pfohl is the owner and President of Carolina Sunrock Corporation. Plaintiff became an employee at Sunrock in September of 1985. Between September of 1985 and

January of 1988, plaintiff was an excellent employee and had received favorable reviews from her supervisors, one of whom stated that she was "very very effective" and "did a very good job." On 28 January 1988, plaintiff was subpoenaed to produce company personnel records and to testify on behalf of Bob Gentry, a former plant superintendent who was suing Sunrock on a breach of contract claim. After learning that she had been subpoenaed, plaintiff immediately informed defendant Pfohl, the company's president and owner, that she had been served with the subpoena.

Upon learning of the subpoena, Mr. Pfohl told plaintiff not to say anymore than she had to when testifying and to "remember that you work for me and represent me and my company." Plaintiff took Mr. Pfohl's comments as a threat, pressuring her to alter her testimony, if need be, to advance the company's best interests.

Mr. Pfohl told plaintiff to meet with the company's attorney. At the meeting with Sunrock's attorney, plaintiff informed the attorney that she believed that Bob Gentry was a good worker and intended to testify to that effect. After informing Mr. Pfohl of the subpoena and her intention to testify honestly, plaintiff's working conditions deteriorated significantly. Because she was subpoenaed, Mr. Pfohl became distrustful of plaintiff and believed that she had been leaking company information to Bob Gentry.

Mr. Tilley, a heavy equipment operator, testified in deposition that Mr. Pfohl stated that plaintiff knew too much. Mr. Pfohl also expressed an intention to get rid of all of "Gentry's people." Mr. Pfohl treated plaintiff in a noticeably different manner after she received the subpoena. He was markedly colder to plaintiff after she received the subpoena.

Within one week of plaintiff being served the Gentry subpoena, Ellen Wilkins was hired by Sunrock. Wilkins was assigned many of plaintiff's duties, for reasons unrelated to plaintiff's performance. In February of 1988, Ms. Wilkins began taking notes on plaintiff and reported directly to Mr. Pfohl. Plaintiff was the only employee Ms. Wilkins took notes on and the notes she took were shredded after plaintiff was fired. Mr. Pfohl repeatedly asked Mr. Davis, a supervisor, whether he had "anything on" the plaintiff.

In March of 1988, while plaintiff was away from work, attending her father's funeral, Ms. Wilkins had a key made to plaintiff's

desk on Mr. Pfohl's instructions. In plaintiff's absence, Ms. Wilkins went through plaintiff's desk.

In May of 1988, Bob Gentry's lawsuit against Sunrock was settled out of court; hence, plaintiff never testified.

On 6 June 1988, Jessie Self was hired as a receptionist. Ms. Wilkins told Ms. Self that there were problems with the plaintiff and instructed Ms. Self to keep a record of the number and source of plaintiff's personal phone calls. Plaintiff was the only employee whose phone calls were counted. Ms. Self was also instructed to eavesdrop on plaintiff's conversations with fellow employees and visitors and to keep notes on any violations of company policy by plaintiff. Ms. Self attended secret meetings which Ms. Wilkins called to discuss plaintiff.

In December of 1988, David Eckstine was hired by Sunrock. Mr. Eckstine began taking notes on plaintiff in February, and continued taking such notes until he fired her, at which time he shredded his notes. Plaintiff was the only employee which Mr. Eckstine took notes on.

After plaintiff was subpoenaed and many of her employment responsibilities were stripped, she was moved to a smaller office with no phone, no typewriter, and no heat. On 20 June 1989, Mr. Eckstine met with plaintiff and suggested that plaintiff resign. Plaintiff was told that if she did not resign, she would be terminated. On 20 June 1989, plaintiff was fired.

From this forecast of evidence, a reasonable finder of fact might draw the inference that defendant Pfohl engineered plaintiff's discharge because he believed she was prepared to testify truthfully as a witness in the Gentry lawsuit. If plaintiff was discharged for such reasons, notwithstanding the fact that she never actually testified, then plaintiff's discharge violated public policy and would fall under the public policy exception to the employment-at-will doctrine. Therefore, the trial court erred in granting defendants' motion for summary judgment on the claim of wrongful discharge.

Intentional Infliction of Emotional Distress

[2] Next, plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claim of intentional infliction of emotional distress. "The essential elements

of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.' " *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992). Extreme and outrageous conduct has been described as conduct which exceeds "all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979).

In the case at bar, plaintiff alleged that harassment by Sunrock's executives and employees constituted extreme and outrageous behavior which was intended to result, and in fact resulted, in her severe emotional distress.

Plaintiff's forecast in support of the "extreme and outrageous behavior" element of her intentional infliction of emotional distress claim included her deposition testimony in which she stated that, after plaintiff was subpoenaed to testify against Sunrock, Sunrock's employees took away many of plaintiff's employment responsibilities, took notes on plaintiff's activities, counted and screened plaintiff's personal phone calls, had a key made and inspected the contents of plaintiff's desk while she attended her father's funeral, moved plaintiff to a smaller office with no phone and no heat, and made harassing phone calls to the home of plaintiff and to the homes of plaintiff's sister-in-law and mother.

In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *cert. denied*, 317 N.C. 334, 346 S.E.2d 141 (1986), this Court considered three intentional infliction of emotional distress claims brought against defendant by three former employees. At trial, each plaintiff's emotional distress claim was dismissed by summary judgment. On appeal, each plaintiff argued that her forecast of evidence contained sufficient grounds to overcome a summary judgment motion and reach the jury on its merits. While the Court considering plaintiff Hogan's claim, this Court wrote:

> Hogan's evidence tends to show that Pfeiffer [defendant's agent] screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her. She also testified that she shouted back at Pfeiffer. This conduct lasted during the period from 22 June 1983 until her termination on 24 July 1983. The general manager, Clifford Smith, received complaints from both Hogan and Pfeiffer concerning the temper of the other. His

attempt to discuss the situation with both employees was unsuccessful because Pfeiffer walked out.

While we do not condone Pfeiffer's intemperate conduct, neither do we believe that his alleged acts "exceed all bounds usually tolerated by a decent society," *Stanback, supra,* so as to satisfy the first element of the tort, requiring a showing of "extreme and outrageous conduct." *Dickens, supra.*

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.
>
> The liability clearly does not extend to mere insults, indignities, threats, ... The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind.
>
> There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. . . .

Restatement (Second) of Torts, §46 comment (d) (1965). We hold Pfeiffer's conduct, as shown by Hogan's forecast of evidence, was not such as to be reasonably regarded as "extreme and outrageous" so as to permit Hogan to recover for intentional infliction of mental distress.

In the case at bar, plaintiff's forecast of evidence, taken in the light most favorable to plaintiff, fails to demonstrate that the defendants' alleged actions "exceed all bounds usually tolerated by a decent society." Guided by the *Hogan* standards, we hold that defendants' alleged acts do not rise to the level of extreme and outrageous conduct, so as to support plaintiff's claim for intentional infliction of emotional distress. Accordingly, we affirm the trial court's granting of defendants' motion for summary judgment as to plaintiff's claim of intentional infliction of emotional distress.

For the reasons stated above, the trial court's order granting defendants' motion for summary judgment on plaintiff's wrongful discharge claim is reversed. The trial court's granting of defendants' summary judgment on plaintiff's claim for intentional infliction of emotional distress is affirmed.

Affirmed in part, reversed in part, and remanded.

Judge GREENE concurs.

Judge LEWIS dissents in a separate opinion.

Judge LEWIS dissenting.

I must respectfully dissent from the majority's opinion regarding the issue of wrongful discharge and I would vote to affirm the trial court's entry of summary judgment. I believe that the majority's opinion takes the public policy exception to the employment at will doctrine substantially beyond the rationale proclaimed in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985) and *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E.2d 423 (1988). In *Sides*, this Court first recognized the public policy exception when a nurse was discharged when she refused to commit perjury to protect her employer from liability in a civil suit. In reaching its decision, this Court said that encouraging perjury or incomplete testimony was an affront to our legal system. *Sides*, 74 N.C. App. at 338, 328 S.E.2d at 823-24. In *Williams*, we extended the public policy exception to a situation where an individual was harassed and eventually discharged after she testified truthfully. The *Williams* Court characterized the public policy exception as a "narrow exception" and again reaffirmed the rationale in *Sides* by stating: "[t]he law must encourage and not discourage truthful testimony." *Williams*, 91 N.C. App. at 40, 370 S.E.2d at 426, quoting *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25, 27 (Cal. App. 1959). This Court now seeks to extend the public policy exception to a situation where an employee was discharged for expressing a willingness to testify honestly, even though she was not called upon to do so. Although I agree with the majority that it is immaterial as to whether the plaintiff actually testified, I would still be compelled to say that even in the light most favorable to the plaintiff the facts of this case do not raise a genuine issue of material fact.

The majority concludes that "a reasonable finder of fact might draw the inference that Pfohl engineered plaintiff's discharge because he believed she was prepared to testify truthfully in the Gentry lawsuit." It is this conclusion with which I disagree. All of the evidence shows that it was plaintiff who sought out Pfohl once she was subpoenaed, and not the other way around. Pfohl told plaintiff that she would need to obey the subpoena and that she should tell the truth. Pfohl also told plaintiff that she was free to meet with Gentry's attorney. Nowhere in the record does any evidence appear that Pfohl or any of his employees encouraged plaintiff to commit perjury or to testify in a manner other than truthfully. Thereafter Pfohl never called plaintiff in nor even mentioned her testimony. I can hardly see how encouraging truthful testimony is an affront to our legal system and contrary to the public policy of this State.

The majority seems to rely heavily on the statement Pfohl made to plaintiff that she needed to remember for whom she worked and that she should say as little as possible. Plaintiff says that from this statement she felt threatened, and to the majority this seems to be enough to avoid summary judgment. However, if such innocuous statements as this are sufficient to support a claim for wrongful discharge, then employers will have to stand mute when faced with a similar situation for fear that no matter what they say their employees may perceive it as a threat. Surely an eggshell sensitivity of perception should not override the rule of reasonable application. Such a result would take the public policy exception too far, and what was characterized as a "narrow exception" to the employment at will doctrine will virtually swallow the rule.

I would also vote to affirm the trial court's entry of summary judgment on the basis that plaintiff has failed to demonstrate a sufficient causal connection between the actions of Pfohl and her discharge. Plaintiff received the subpoena in January of 1988. The Gentry lawsuit was settled in May of 1988 and it was not until June of 1989 that plaintiff was finally discharged. Thus seventeen months elapsed from the time plaintiff was subpoenaed until she was finally discharged. A full thirteen months transpired from the date the Gentry case was settled until plaintiff's discharge. In both *Sides* and *Williams*, the lapse of time was much less, with no more than three months transpiring between the truthful testimony of the employee and their termination, leaving no doubt a direct causal relationship existed. However, on the facts of this

case, the lapse of at least thirteen months between the settlement of the Gentry case and plaintiff's discharge shows a complete lack of any causal connection, and precludes plaintiff's claim as a matter of law.

For the foregoing reasons I respectfully dissent and would vote to affirm the trial court on the issue of wrongful discharge.

DISTRICT BOARD OF THE METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA v. BLUE RIDGE PLATING COMPANY, INC. AND BILL JOE BENFIELD

No. 9228SC402

(Filed 1 June 1993)

1. **Sanitary Districts § 2 (NCI3d)— prohibiting discharge into district sewerage system—administrative order—just cause**

Just cause for the issuance of an ex parte administrative order prohibiting respondent metal plating business from further discharges into a district sewerage system was provided by samplings taken by the sewerage district indicating that respondent had discharged heavy metals into the system from 1985 through 1989; an F.B.I. investigation indicating that respondents were discharging industrial waste into the system; and a federal jury's finding that respondent willfully and intentionally discharged wastewaters containing excessively high levels of heavy metals into the district sewerage system.

Am Jur 2d, Pollution Control § 589.

2. **Sanitary Districts § 2 (NCI3d)— district sewerage system—permanent sealing of business's access—sufficiency of evidence and findings**

An order of the district board of a metropolitan sewerage district that respondent metal plating business's access to the sewerage system be permanently sealed was supported by the evidence and the board's findings that respondent agreed in 1984 to change its manufacturing process so that it would not discharge industrial waste into the sewerage system; monitoring of the system in 1989 and 1990 revealed that respondent was discharging cadmium, zinc, chromium and copper

into the system when it had no permit to discharge industrial wastes; respondent was convicted in federal court of discharging heavy metals into the sewerage system in violation of the federal Water Pollution Control Act; and respondent continues to perform metal plating work and has the potential to discharge harmful and hazardous chemicals into the sewerage system. Furthermore, the district board acted within its authority, and its order was not arbitrary and capricious although alternative regulatory measures were available to the board.

Am Jur 2d, Pollution Control § 589.

Appeal by defendant from judgment entered 22 January 1992 in Buncombe County Superior Court by Judge Robert D. Lewis. Heard in the Court of Appeals 11 March 1993.

Robert Stevens & Cogburn, P.A., by William Clarke, for petitioner-appellee.

Jack W. Stewart for respondents-appellants.

WYNN, Judge.

Petitioner-appellee, Metropolitan Sewerage District of Buncombe County ("MSD"), is a North Carolina municipal corporation created under the provisions of the Metropolitan Sewerage District Act of North Carolina General Statutes, Chapter 153, Article 25, Sections 153-295 to 153-324 (succeeded by Chapter 162A, Article 5, Sections 162A-64 through 81 (1991)). MSD owns and operates a wastewater treatment plant, collection lines and sewers in Buncombe County, North Carolina. Respondents-appellants, Blue Ridge Plating, Inc. ("Blue Ridge") and Bill Joe Benfield are "industrial users" of the municipal sewer service managed by the MSD. Blue Ridge is a local business engaged in the process of metal plating under the direction of Bill Joe Benfield, its manager and principal stockholder.

Pursuant to N.C.G.S. § 143-215.3(a)(14), MSD is delegated the authority by the Environmental Management Commission of North Carolina to implement, administer and enforce a pretreatment program for the regulation of Industrial Waste. MSD is further authorized by N.C.G.S. § 162A-69(13a) and (14) "to adopt ordinances to regulate and control the discharge of sewage in any sewerage system owned or operated by the district" and "[t]o do all acts and things

necessary or convenient to carry out the powers granted by this Article." Pursuant to that authority, MSD adopted a Sewer Use Ordinance effective 17 January 1989 which prohibits the discharge of waste without a "Permit to Discharge Industrial Waste." Sewer Use Ordinance, Section 4.

On or about 19 July 1991, MSD issued an ex parte restraining order and Notice of Hearing against respondents. The notice averred an enforcement action against respondents wherein they were directed to appear and show cause why MSD should not take steps to temporarily and permanently seal access to the sewer system from Blue Ridge. On 19 August 1991, both parties appeared with counsel at an administrative hearing conducted before three hearing officers appointed by the District Board of MSD. Both parties presented evidence and testimony at the hearing. Following deliberation, the hearing officers recommended to the District Board that respondents' access to the sewerage system be permanently sealed. The District Board, adopting that recommendation, issued an Order dated 17 September 1991 requiring a permanent seal pursuant to Section 15.07 of the MSD Sewer Use Ordinance. Pertinent findings of fact listed in the District Board's Order include:

> 7. A chronological summary of the District's portion of the history with Blue Ridge Plating and Bill Joe Benfield was introduced into evidence. The chronological summary showed in part that [respondents] were cited for violations of the Sewer Use Ordinance and Blue Ridge Plating's Permit to Discharge Industrial Waste in October and December of 1983, that the MSD instituted a civil action to prevent further discharges by [respondents] to the District's Sewerage System in 1984; that said action was resolved with an Agreement by Blue Ridge Plating to change its manufacturing process so that it would not discharge industrial waste to the District Sewerage System. In 1989 and 1990, MSD sampled the sewer line below the Blue Ridge Plating facility and found metals in the following concentrations on the following dates:

Date	Cadmium	Zinc	Chromium	Copper
02/14/89	10.96 mg/l	4.53 mg/l	13.36 mg/l	
02/16/89	10.68 mg/l	22.16 mg/l	6.84 mg/l	
03/01/89		1.66 mg/l	3.08 mg/l	
10/28/89	2.14 mg/l	25.20 mg/l	9.52 mg/l	1.33 mg/l
01/25/90	4.12 mg/l	6.32 mg/l	4.81 mg/l	

8. During the period of these discharges, [respondents] had no Permit to Discharge Industrial Waste from the MSD or the State.

9. The District notified the [FBI] regarding discharges into the District Sewerage System. The FBI proceeded with a criminal investigation of [respondents]. The FBI, in the course of its investigation, discovered evidence tending to show that [respondents] were discharging industrial waste to the District Sewerage System without a Permit to Discharge. That as a result of the FBI investigation, [respondents] were tried . . . [and] the jury found that [respondents] willfully, knowingly, and intentionally discharged wastewater containing excessively high levels of heavy metals to the District Sewerage System in violation of the Federal Water Pollution Control Act and regulations promulgated thereunder.

10. That [respondents] discharged industrial waste without a Permit . . .; that the District has a need to protect its Treatment Plant and its users . . .; that [respondents] have the potential for future discharges into the system; that while the District does not have evidence of discharges . . . since January of 1990, [respondents] have the potential to discharge harmful and hazardous chemicals into the District Sewerage System.

11. That according to the testimony of [Benfield], Blue Ridge Plating continues to do plating work.

12. That the plating process requires the use of substantial amounts of water including some 77 tanks which hold 10,000 gallons of water; that Benfield testified that not all of this water is evaporated and cannot be under the system of fans and evaporation . . . on the premises of the plant.

13. That [respondents] have taken substantial actions to comply with the Order of no further discharge into the District Sewerage System, such as sawing in half, cutting and capping the discharge pipe, placing port-a-johns on the premises, and using hot tanks and fans for evaporation fluids.

14. That such actions indicate that [respondents] have no need for the District Sewerage System and that the permanent cementing by the District of any access to the System by

> [respondents] would not be harmful to either party nor make any difference in their operation.

Based upon these findings, the District Board ordered that the respondents' access to the Sewerage System be permanently sealed by cement or other means, extinguishing all access by respondents to the sewer system. Respondents filed notice of appeal from the Order to the Superior Court Division of Buncombe County on 27 September 1991 arguing that whereas there was no evidence of immediate harm and irreparable injury, the Board issued an arbitrary, excessive and drastic remedy without due cause and thereby exceeded its authority by ordering a permanent seal. The matter was heard on 17 January 1992 and Judge Robert D. Lewis entered judgment affirming the decision of the District Board. Respondents appeal. We affirm.

Other facts necessary to the decision of this case will be discussed in the opinion.

The standard for both the superior court, sitting as an appellate court, and this Court, when reviewing the decision of a municipal board was set out by the North Carolina Supreme Court in *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379 (1980). Review of a decision entails:

> 1) Reviewing the record for errors in law,
>
> 2) Insuring that procedures specified by the law in 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.

Id. at 626, 265 S.E.2d at 383.

In determining the sufficiency of the evidence to support the District Board's decision we apply the whole record test. The whole record test requires the examination of all competent evidence to determine if the Board's decision is based upon substantial

evidence. *In re Application of City of Raleigh*, 107 N.C. App. 505, 508, 421 S.E.2d 179, 180 (1992). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). In ascertaining the substantiality of the evidence supporting the Board's decision, the court must consider "contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

We note initially that the transcript of the proceedings is not included in the record. Instead, appellants included what appears to be the verbatim transcript of the administrative hearing in its entirety as part of the appendix to their brief. Rule 9(a) of the North Carolina Rules of Appellate Procedure provides that our review of an appeal from the trial division is based "solely upon the record on appeal and the verbatim transcript of the proceedings, *if one is designated.*" Specifically, in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, the record must contain, among other things, "copies of all items properly before the superior court as are necessary for an understanding of all errors assigned." N.C.R. App. P. 9(a)(2)e. This includes "notice of approval or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3)." Pursuant to Rule 9(c), the appellant is responsible for presenting the transcript for review by the appellate court by either including it in the record on appeal in "narrative" form, or by "designating" in the record that the verbatim transcript is settled and filing it contemporaneously with the record on appeal. Appellants in this case failed to include in the record an approval or order settling the verbatim transcript of the administrative hearing proceedings, and none was filed by appellants pursuant to Rule 9(c)(2) or (3). Although included in the appellant's brief, a party's appendix is not deemed part of the record. However, because the parties are not in dispute as to what evidence was produced at the hearing, and because conducting a "whole record" test is impossible without the "whole record," we have elected, pursuant to Rule 2, to suspend the requirement that the transcript be included or designated in the record and have reviewed the transcript so that we may conduct a proper judicial review of this case. *See*, N.C.R. App. P. 2.

Respondents-appellants' sole assignment of error contends that the trial court erred in sustaining the decision of the District Board to permanently seal all access to the District's sewer system. Respondents make three specific arguments to support their contention: 1) that the ex parte administrative order of 18 July 1991 was issued without just cause; 2) that the 17 September 1991 Order of the District Board was issued upon an erroneous application of the law; and 3) that the decision of the District Board was unnecessarily excessive, capricious and arbitrary in its application.

I.

[1] Respondents' first contention alleges that the petitioners issued the ex parte administrative order of 18 July 1991 without just cause. The order, issued by W.H. Mull, Engineer-Manager of MSD, outlined eleven specific findings of fact and based on those findings ordered that "pursuant to Section 15.02.05 of the Sewer Use Ordinance, any discharge from Blue Ridge Plating to the District Sewerage System is hereby prohibited." The engineer-manager is authorized to issue such an order pursuant to Section 15.02 of the Sewer Use Ordinance, entitled "Actions by Engineer-Manager," which reads:

> If a User of the MSD Sewerage System proposes to discharge, discharges or accidentally discharges Wastewater or any substance in a manner that is in violation of any Section of this ordinance, any condition of a Permit . . . or applicable State or Federal laws and regulations; the Engineer-Manager may take any one or a combination of the Actions listed:
>
> .01 *Prohibit the discharge of such Wastewater or substance.*

The ordinance clearly gives the engineer-manager the power to issue an ex parte order such as the one at issue here where a user is operating in violation of the Sewer Use Ordinance. Evidence tending to support a finding that respondents acted in violation of ordinance requirements includes: samplings taken by MSD which indicated that respondents had discharged heavy metals over the period from 1985 through 1989; an FBI-conducted investigation which indicated that respondents were discharging industrial waste into the sewerage system; and a jury finding that respondents willfully, knowingly and intentionally discharged wastewaters containing excessively high levels of heavy metals to the District

Sewerage System. This evidence was clearly sufficient to provide just cause to support the administrative order prohibiting further discharges to the sewerage system.

II.

[2] Respondents also argue that the superior court erred in sustaining the decision of the District Board to permanently seal respondents' access to the sewer system because the order of the District Board was based upon an erroneous application of law. Specifically, respondents contend that because alternative regulatory measures were available and because Blue Ridge had not been cited for a violation since January 1990, the action of the District Board was "tantamount to an unlawful deprivation of a protected property right that smacks of both unequal protection of the laws and a biased administration of the regulatory scheme(s) of the [MSD]."

Statutory and ordinance provisions provide the authority for enforcement actions by MSD against users for ordinance violations. N.C.G.S. § 162A-81 provides that with respect to the adoption and enforcement of ordinances:

> (a) A district shall have the same power as a city under G.S. 160A-175 to assess civil fines and penalties for violation of its ordinances, and may secure injunctions to further insure compliance with its ordinances as provided by this section.
>
> (e) An ordinance may provide, when appropriate, that each day's continuing violation shall be a separate and distinct offense.

Section 15.03 of the ordinance enacted by MSD provides for permissible enforcement actions by the District Board as follows:

> Action may be taken by the District Board upon receiving a report from the Engineer-Manager outlining details of the User's failure to comply with Actions of the Engineer-Manager taken pursuant to Section 15.02. The District Board may order a User violating this Ordinance to show cause before the District Board why proposed Enforcement Action should not be taken.

Moreover, Section 15.02.05 permits the Engineer-Manager to "[t]ake such other remedial Action as may be deemed to be desirable or necessary to achieve the purposes of this Ordinance including the revocation of the User's Permit to Discharge Industrial Waste."

Respondents do not dispute that based upon these statutory provisions and the Sewer Use Ordinance the MSD has the *authority* to permanently seal a user's access to the District Sewer System. Rather, respondents contend that because alternative penalties were available, the decision to impose such a penalty in this case was not supported by substantial evidence and therefore not warranted by law.

The evidence indicates that between February of 1989 and 25 January 1990, the industrial monitoring staff of MSD conducted samplings of the sewer line connection below the Blue Ridge facility and on five occasions reported finding concentrations of cadmium, zinc, chromium and copper in excess of the limits established by the MSD Sewer Use Ordinance as well as certain State and Federal regulations. Based on the discharge violations of 28 October 1989 and 25 January 1990, the MSD contacted the Federal Bureau of Investigation and requested a criminal investigation which in turn resulted in the indictment, trial and conviction of respondents for violation of the Clean Water Act of Title 33, United States Code, section 1317 and 1319, and Title 40, Code of Federal Regulations, section 413. *United States of America v. Blue Ridge Plating Company, Inc.*, a corporation, and Bill Joe Benfield, A-CR-90-143, United States Dist. Court, Western District of North Carolina.

Following the July 1991 conviction, MSD issued the ex parte order prohibiting further discharges and issued a Notice of Hearing, requiring respondents to appear and show cause why the District should not permanently seal all access to the sewerage system. Pursuant to the ex parte order, respondents discontinued all sewer line use.

Both parties were represented by counsel at the hearing on 19 August 1991. Monty Payne, Industrial Waste Coordinator for MSD, testified at the hearing. Payne testified that an Order of Enforcement was issued against respondents in August of 1983 and again in November of 1983 for the discharge of heavy metals in violation of permit limits and sewer use ordinance limits. Respondents were subsequently assessed a civil penalty for both violations. Payne further testified that court action was brought against respondents in 1984 for the discharge of heavy metals. That action was settled based upon an agreement by respondents to discontinue all heavy metal industrial waste discharges. Payne then outlined the monitoring history compiled by MSD which

showed periodic high levels of metal concentrations and industrial waste discharges from 1985 through 1990.

Bill Joe Benfield testified for the respondents, denying the discharge of metals to the sewerage system. Mr. Benfield also testified that he had seen a truck "dump stuff" in the sewer line near the location of Blue Ridge Plating on eighteen different occasions but presented no evidence supporting this statement. He explained the operating processes of Blue Ridge Plating and stated that Blue Ridge continues to do plating work. Mr. Benfield stated that respondents had cut and capped the sewage discharge pipe in the plant. As a result, port-a-johns were installed on the premises. At the time of the hearing, respondents had discontinued all sewerage system use.

Based upon the evidence presented, the Board found that respondents have the potential to discharge harmful and hazardous chemicals into the District Sewerage System if permitted to continue using the system. Our review of the whole record in this case reveals that the findings of fact of the Board have adequate support and further that the Board acted within its statutory authority in imposing a regulatory penalty for the discharge of harmful industrial waste which was warranted by law. The findings were based on data that is beyond serious dispute or evidence that is manifestly credible. Respondents have not attempted to demonstrate, except in the most general sense, how the challenged action lacked sufficient evidence. In addition, respondents failed to support any of their arguments with legal authority. The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 6, 341 S.E.2d 588, 591, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Based upon our review, we hold that the District Board's findings were based on substantial evidence. Moreover, those findings support the Board's action to permanently seal respondents' access to the Sewerage System.

III.

Respondents lastly argue that the decision of the District Board was excessive, arbitrary and capricious in its application. After outlining the findings of fact stated above, the Board concluded that:

1. This action was properly brought pursuant to Section 15.06 of the MSD Sewer Use Ordinance and properly noticed to all parties.

2. That the Hearing Officers have jurisdiction to hear the testimony and review the evidence of the parties in this matter.

3. That Blue Ridge Plating and Bill J. Benfield failed to show cause why the District should not proceed to permanently seal off access to the District Sewerage System.

Based upon the findings and conclusions, the Board ordered the permanent seal of respondents' access to the District Sewerage System. The judgment entered by the trial judge affirming the decision of the MSD states:

[T]he Court having considered the whole record in accordance with article 4 of G.S. 150B together with briefs and arguments of counsel, enters the following judgment:

1. MSD violated no constitutional provisions;

2. MSD did not exceed its statutory authority or jurisdiction;

3. the decision was made upon lawful procedures unaffected by any error of law; and

4. in view of the entire record, the decision was supported by substantial evidence and was not arbitrary or capricious.

As a reviewing court, we should not second guess the wisdom of local municipal officials in selecting between a number of alternative remedies or penalties. *See Dize Awning & Tent Co. v. City of Winston-Salem*, 29 N.C. App. 297, 224 S.E.2d 257, *disc. rev. denied*, 290 N.C. 667, 228 S.E.2d 451 (1976). Having conducted our own review of the whole record, we also hold that the District Board acted within its authority; imposed a penalty supported by substantial evidence; and in light of the evidence, imposed a penalty that was not arbitrary and capricious.

As a result, the judgment of the trial court is

Affirmed.

Judges Eagles and Cozort concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. DAVID R. WINGLER AND TERESA HAM WINGLER

No. 9223SC376

(Filed 1 June 1993)

1. Appeal and Error § 95 (NCI4th)— denial of discovery of documents—no right of immediate appeal

An order denying discovery of documents was not immediately appealable where the record failed to disclose what evidence was being sought and defendants thus failed to show that the information being sought was so crucial to the outcome of the case that denial of the motion would deprive defendants of a substantial right.

Am Jur 2d, Appeal and Error § 80.

2. Insurance § 728 (NCI4th)— installment purchase of home—joint homeowner's insurance—home destroyed by fire—amount of recovery by purchaser

Where defendant purchaser entered into an installment contract for the purchase of a home from the sellers with the transfer of the deed reserved for later, the agreement provided that homeowner's insurance would be carried jointly on the property but failed to provide how insurance proceeds would be divided, the home was destroyed by fire after defendant had made eight payments and before legal title had passed, and the insurance policy provided that the insurer would not be liable to the purchaser for more than his insurable interest in the property, the purchaser's recovery under the policy was limited to his insurable interest in the home, which was the amount of equity he had paid toward the purchase price.

Am Jur 2d, Insurance §§ 938 et seq.

3. Appeal and Error § 99 (NCI4th)— denial of motion to amend—compulsory counterclaim—right of immediate appeal

The denial of a motion to amend is generally an interlocutory order; however, when the trial court's ruling involves an amendment to an answer to add a compulsory counterclaim, the denial of the motion to amend affects a substantial right and is immediately appealable.

Am Jur 2d, Appeal and Error § 99.

4. Rules of Civil Procedure § 15.1 (NCI3d)— compulsory counterclaim—denial of motion to amend—no abuse of discretion

The trial court did not abuse its discretion in the denial of defendants' motion to amend their answer to add a compulsory counterclaim for deceptive and unfair trade practices, a claim that would greatly change the nature of the defense and add a possibility of treble damages, where substantial discovery had already taken place and several months had passed since defendants filed their answer. N.C.G.S. § 1A-1, Rule 13(f).

Am Jur 2d, Pleading §§ 310, 312, 315, 322, 324.

Timeliness of amendments to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 ALR Fed 123.

5. Appeal and Error § 118 (NCI4th)— denial of summary judgment—unappealable interlocutory order

The denial of a motion for summary judgment is an interlocutory and unappealable order.

Am Jur 2d, Appeal and Error § 104.

Appeal by defendants from judgments entered 17 January 1992 and 31 January 1992 by Judge Julius A. Rousseau, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 11 March 1993.

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

Franklin Smith for defendants-appellants.

LEWIS, Judge.

The issues presented by this appeal arise out of a homeowner's insurance policy and an unfortunate fire. On 11 April 1990, David Wingler entered into a handwritten "Installment/Purchase Agreement" (hereafter "Agreement") to purchase a home in Wilkes County from Grace Wilson Prevette and Worth Prevette (hereafter "Prevette"). The terms of the Agreement were that David Wingler would pay at least $500 a month for twelve months towards the purchase price of $62,000, with the remaining balance due within 30 days of the final monthly payment. It was further agreed that homeowner's insurance would be carried jointly with the pre-

miums being split equally between David Wingler and Prevette. In the event of a major loss, it was agreed that David Wingler would have the option to repair the home or pay the remaining cash balance to Prevette. Regardless of the actual status of the Agreement, it was agreed that the property would be considered sold to David Wingler unless he failed to pay the full purchase price in the time allotted.

On 19 June 1990 a coinsurance policy was issued on the Prevette home to David Wingler by North Carolina Farm Bureau Mutual Insurance Company (hereafter "Farm Bureau"), with Prevette listed as mortgagee. The policy provided for coverage in the amounts of: $50,000 for loss to the dwelling, $25,000 for loss to personal property, $5,000 for loss to other structures, and $10,000 for loss of use.

After entering into the Agreement, David Wingler married Teresa Wingler (hereafter "the Winglers") and the couple resided in the home until 4 February 1991, when a fire destroyed much of the house. According to the Winglers, they were awakened at approximately 5:00 a.m. by flames in the doorway of their basement bedroom. The Winglers immediately exited the house with their children and then called the fire department from a neighbor's house. The Winglers did not have time to remove any of their personal belongings and most were lost in the fire.

On 11 February 1991, the Winglers submitted a proof of loss statement to Farm Bureau in the amount of $76,071.27. This amount represented the value of the home plus loss and damage to personal property. Farm Bureau's investigation of the fire revealed traces of gasoline leading from the basement stairwell up to the first floor. Farm Bureau also learned that the Winglers had been trying to sell the house for several months. On the basis of this information, the Winglers' claim was denied.

On 15 May 1991, Farm Bureau initiated the present Declaratory Judgment action against the Winglers asserting that the Winglers were barred from recovering anything under the policy for having participated in the burning of insured property, making material misrepresentations and failing to produce requested documents. Farm Bureau also requested that the trial court determine the respective interests of the Winglers and Prevette.

After suit was filed, the Winglers submitted their First Set of Interrogatories and First Request for Production of Documents seeking the names of all persons having any knowledge of the allegations in Farm Bureau's complaint. Thereafter, the Winglers filed a Second Request for Production of Documents requesting all documentation in the possession of Farm Bureau or any of its agents that related to Farm Bureau's allegations. The Winglers were particularly interested in the reports of Farm Bureau's Special Investigator, Jimmy Ledbetter. Farm Bureau objected to most of the information sought claiming that it had been prepared in anticipation of litigation and was protected by work product immunity. The Winglers filed a Motion to Compel Discovery which was heard on 16 December 1991. The trial court ordered Farm Bureau to produce most of the information requested with the exception of any reports prepared by Jimmy Ledbetter which the court determined to be work product and not discoverable.

Thereafter, in December of 1991, Farm Bureau moved for summary judgment as to Prevette and the amount payable to her under the policy. The trial court determined that David Wingler had an insurable interest in the home of $4000 presumably based upon having paid eight installment payments under the Agreement. The trial court then concluded that Prevette was entitled to the remaining $46,000 under the policy as mortgagee. Farm Bureau also sought but was denied summary judgment against David Wingler on the basis that he had failed to provide his 1989 and 1990 income tax returns as required by the policy.

Two days after Farm Bureau's Motion for Summary Judgment was heard, the Winglers filed a Motion to File Amended Answer, Counterclaim and Third-Party Complaint. The Winglers failed to attach their proposed amendments nor did they assert any specific reasons as to why their motion should be allowed. As a result, the trial court in its discretion denied the motion to amend.

The Winglers gave Notice of Appeal to this Court on 19 February 1992, excepting to the trial court's entry of summary judgment in favor of Prevette, as well as the trial court's denial of their motion to amend. Farm Bureau has also given Notice of Appeal, assigning as error the denial of its motion for summary judgment as to David Wingler.

[1] The essence of the Winglers' first assignment of error is that the trial court erred in not ordering complete disclosure of all

the documents requested. Before reaching the merits of this issue, we must first determine whether this issue is properly before this Court. Ordinarily orders denying or granting discovery are interlocutory and not appealable unless they affect a substantial right which would be lost if the ruling was not reviewed prior to final judgment. *Dworsky v. The Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980). However, an order denying discovery is immediately appealable if the discovery sought would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly relevant to a determination of the critical question to be resolved in the case. *Id.*

In *Travelers*, plaintiffs sought the entire contents of an insurance claim file, but the record in that case failed to disclose what material and relevant evidence was being sought. As a result, this Court held that plaintiffs had failed to show that the information sought was so important to the outcome of the matter as to amount to a substantial right, and dismissed plaintiffs' appeal. We find the facts of this case to be indistinguishable from *Travelers*. In this matter, the Winglers have failed to include in the record the documents which they sought and which the trial court viewed in camera. Without the ability to view these documents for ourselves, it is impossible to determine this issue.

The Winglers have cited *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 353 S.E.2d 425 (1987), in support of their argument that they will be deprived of a substantial right unless they are allowed to appeal. The Winglers' reliance on *Walker* is unfounded. In *Walker* this Court addressed the issue of whether or not an order granting discovery presents an appealable issue. As part of its opinion this Court reasoned that when a discovery order is enforceable by sanctions pursuant to Rule 37(b) then it is considered a final judgment and immediately appealable. *Id.* However, in cases denying discovery, sanctions are not needed and they are only appealable if they affect a substantial right. In the present case there were no sanctions involved and the Winglers have failed to demonstrate a substantial right that will be lost. Therefore, *Walker* is inapplicable.

It is undeniable that the Winglers have met the first part of the *Travelers*' test that the desired discovery would not have delayed trial or caused any undue burden, delay, annoyance or

oppression to Farm Bureau. However the *Travelers'* test for appeal from a discovery order includes a second part, and this is where the Winglers have fallen short. We therefore dismiss the Winglers' first assignment of error as interlocutory.

II.

[2] For their second assignment of error, the Winglers claim the trial court erred when it granted summary judgment in favor of Prevette. More particularly, the Winglers seem to be upset by the division of the insurance proceeds that has resulted.

The Agreement used by the Winglers and Prevette is essentially a long term contract for the sale of land where the vendee buys property on the installment method with the transfer of the deed reserved for later. *Webster's Real Estate Law in North Carolina*, § 138 (3d ed. 1988). *Webster's* states that these long term contracts are often analogous to mortgages and for this reason it is easy to understand why Prevette was listed on the insurance policy as a mortgagee instead of as the owner. Under the installment method of financing, title to the property remains with the vendor, in this case Prevette, until payment is made in full. *Id.*

We have reviewed the language in the Agreement and do not feel that it in any way alters the normal property interests of the parties. Prevette and David Wingler stated in the Agreement that insurance would be carried jointly. They also provided that in the event of a fire or similar loss David Wingler would have the sole decision of whether or not to repair the property or to pay the remaining balance on the property to Prevette. However, the Agreement made no mention of how any insurance proceeds would be divided. Therefore, we are guided by general principles of insurance, as well as the specific terms of the policy.

It is well established in North Carolina that an insurable interest is essential to the validity of an insurance contract, *United States Fidelity & Guaranty Co. v. Reagan*, 256 N.C. 1, 122 S.E.2d 774 (1962), and the extent of a claimant's recovery is typically limited by the policy itself to the claimant's insurable interest. *See Harris v. North Carolina Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 370 S.E.2d 700 (1988). The express terms of the policy here, provided that Farm Bureau would not be liable to David Wingler for more than his insurable interest at the time of the fire. Our courts have defined an insurable interest as one which

"furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of the insurance." *Collins v. Quincy Mut. Fire Ins. Co.*, 39 N.C. App. 38, 42, 249 S.E.2d 461, 463 (1978), *aff'd*, 297 N.C. 680, 256 S.E.2d 718 (1979); *see also Jerome v. Great American Ins. Co.*, 52 N.C. App. 573, 279 S.E.2d 42 (1981).

In determining the extent of the Winglers' insurable interest for this appeal, the only portion of the policy which is applicable is the $50,000 coverage on the dwelling, because this is the only portion of the policy to which the trial court granted summary judgment. The Winglers claim that they have an insurable interest in the dwelling by virtue of their possession and claim that the trial court's grant of summary judgment deprives them of that interest. We agree that the Winglers have an insurable interest in the dwelling but we do not agree that the trial court's ruling has deprived them of that interest. Although the Agreement stated that the parties would consider the home to be sold to David Wingler, legal title had not yet passed at the time of the fire. Therefore, if the Winglers acquired any insurable interest in the dwelling structure, it was limited to the amount of equity which they had paid towards the $62,000 purchase price. This is supported by language in C.J.S. which provides:

> [A] vendee in possession of real property under a contract for its purchase, although he has not paid the whole of the consideration or performed all the conditions of the sale, has an insurable interest therein, at least to the extent of the amount paid . . . .

44 C.J.S. *Insurance* § 229(b) (1993). At $500 a month for a period of eight months the only equity the Winglers had accumulated in the dwelling was $4000. Based on this calculation the trial court subtracted the $4000 from the total dwelling coverage of $50,000 and granted summary judgment in favor of Prevette for $46,000. Although we feel the proper calculation would have been to determine the percentage $4000 was of $62,000 and then apply this percentage to the policy amount of $50,000, this was an issue for Prevette to appeal and since she is not a party to this appeal we affirm the trial court's grant of summary judgment. The Winglers may still proceed against the remaining $4000 of coverage on the dwelling, the $25,000 coverage on personal property, and the $10,000 of coverage for loss of use if they are not barred for other reasons.

III.

[3] The Winglers' third assignment of error addresses the propriety of the trial court's denial of their motion to amend. The denial of a motion to amend is generally an interlocutory order. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119, *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978). However when the trial court's ruling involves an amendment to an answer to add a compulsory counterclaim, then the denial is immediately appealable because it affects a substantial right. *Id.* A counterclaim is considered compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." N.C.G.S. § 1A-1, Rule 13(a) (1990). We have reviewed the record and find the Winglers' counterclaims to be compulsory because they arise out of the fire and Farm Bureau's subsequent conduct. When a counterclaim is omitted then leave of court is necessary to add the counterclaim to the answer by way of an amendment. N.C.S.G. § 1A-1, Rule 13(f). The granting or denial of a motion to amend is directed to the sound discretion of the trial court and is not reviewable absent a clear showing of abuse of discretion. *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 408 S.E.2d 885 (1991). However, the fact that the Winglers' counterclaims were compulsory does not effect the discretion of the trial court in granting or denying the motion to amend. See *Grant & Hastings, P.A. v. Arlin*, 77 N.C. App. 813, 336 S.E.2d 111 (1985), *disc. rev. denied*, 316 N.C. 376, 342 S.E.2d 894 (1986).

When the Winglers filed their motion to amend, they failed to file their proposed amended pleadings. At least one prominent commentator in North Carolina has stated: "A motion to amend should be accompanied by the proposed new pleading and should set forth the grounds on which it is based with particularity." 1 Wilson, *North Carolina Civil Procedure* § 15-4 (1989). We find this to be the preferred practice in this State because without the proposed pleading the trial court is placed in the difficult position of deciding whether leave of court is required, and the reviewing court is unable to determine whether the trial court abused its discretion.

Since we do not have the benefit of the Winglers' proposed amendments our review of the trial court's decision is quite limited. In addition the trial court did not state the reasons for its denial of the Winglers' amendments. We have therefore, in our discretion,

undertaken an examination of the record for apparent reasons upon which the trial court may have denied the Winglers' motion. *See United Leasing Corp. v. Miller*, 60 N.C. App. 40, 298 S.E.2d 409 (1982), *disc. rev. denied*, 308 N.C. 194, 302 S.E.2d 248 (1983).

[4] We have reviewed all the facts surrounding the Winglers' motion to amend and find ample reasons to support the trial court's denial of their motion. The Winglers sought to add a claim for deceptive and unfair trade practices, but as stated in *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 266 S.E.2d 14, *aff'd*, 301 N.C. 522, 271 S.E.2d 909 (1980), such a claim greatly changes the nature of the defense and increases the stakes of the lawsuit with the possibility of treble damages. Therefore, given that substantial discovery had already taken place and several months had transpired since the Winglers filed their answer, we cannot say that the trial court abused its discretion in denying the Winglers' motion to amend. The Winglers' third assignment of error is overruled.

IV.

[5] Farm Bureau filed its own appeal assigning as error the trial court's denial of its motion for summary judgment on the basis that David Wingler had not complied with all policy requirements when he failed to supply copies of his tax returns. We note at the outset that the denial of a motion for summary judgment is an interlocutory and nonappealable order. *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). Farm Bureau has obviously recognized the interlocutory nature of its appeal because it also filed a Petition for a Writ of Certiorari urging that it should not be put to the expense of trying this case. We see no difference between Farm Bureau's case and any other case where summary judgment has been denied. We deny Farm Bureau's petition and dismiss its appeal as interlocutory.

The decision of the trial court is hereby,

Affirmed.

Judges JOHNSON and JOHN concur.

REBECCA ANN WILLIAMS v. SHAWN LEE WILLIAMS, RALPH WILLIAMS AND WIFE, MAGGIE WILLIAMS

No. 9225DC390

(Filed 1 June 1993)

1. **Divorce and Separation § 562 (NCI4th)— foreign child custody order—child in foreign state—failure to comply with UCCJA**

The North Carolina courts were not required to give full faith and credit to an Indiana child custody order for a child taken to Indiana by her mother because the Indiana court did not exercise jurisdiction in conformity with the UCCJA where there were no findings in the Indiana order that Indiana was the child's home state or had been her home state within six months before the action was commenced, or that it was in the child's best interest for Indiana to assume jurisdiction because she had significant connections with that state. Accordingly, the cause is remanded for a determination as to whether North Carolina has the authority to exercise jurisdiction to decide custody pursuant to N.C.G.S. § 50A-3.

Am Jur 2d, Divorce and Separation §§ 1143-1145.

2. **Divorce and Separation §§ 494, 562 (NCI4th)— foreign child custody order—child in this state—absence of foreign jurisdiction—authority to determine custody**

The North Carolina courts were not required to give full faith and credit to an Indiana child custody order finding that the Indiana court had jurisdiction because the child has significant connections with that state where the child was born in North Carolina, has lived here all of her life, and has never been to Indiana. Furthermore, the North Carolina courts had authority to exercise jurisdiction to determine custody of the child where the court found that the child has lived in North Carolina her entire life, that North Carolina is the child's home state, and that it is in the child's best interest that North Carolina assume jurisdiction over the custody determination.

Am Jur 2d, Divorce and Separation §§ 964, 965, 1143-1145.

Appeal by plaintiff and defendants from order entered 17 February 1992 by Judge Robert M. Brady in Caldwell County District Court. Heard in the Court of Appeals 11 March 1993.

Steve B. Potter, P.A., by Steve B. Potter, for plaintiff appellant-appellee.

Wilson, Palmer & Lackey, P.A., by Wesley E. Starnes, for defendant appellants-appellees.

COZORT, Judge.

The issue here is whether North Carolina or Indiana has jurisdiction to determine custody issues for two minor children born in North Carolina. One child was taken to Indiana by her mother; the other remained in North Carolina with paternal grandparents. The Indiana trial court exercised jurisdiction over both children. The North Carolina trial court granted full faith and credit to the Indiana order as to the child in Indiana and exercised jurisdiction over the child in North Carolina. We affirm the North Carolina trial court's exercise of jurisdiction over the child in North Carolina; as to the child in Indiana, we remand for a determination of whether North Carolina should exercise jurisdiction. The facts follow.

Plaintiff Rebecca Ann Williams and defendant Shawn Lee Williams were married on 2 April 1988 and lived in North Carolina until the date of their separation, 16 February 1990. The parties had two children, Amanda Williams born 2 July 1987, and Amber Williams, born 7 November 1989. After the separation, plaintiff-mother moved to Indiana. The first week of January 1991, Amber began residing with her mother in Indiana. Amanda resided with her paternal grandparents, defendants Ralph and Maggie Williams, in North Carolina after the separation.

On 18 June 1991, plaintiff filed petitions in the Superior Court of Delaware County, Indiana, seeking an absolute divorce, alimony, custody of the children, and child support. On the same date, the superior court granted plaintiff's petition for immediate custody of the two minor children and entered a restraining order prohibiting both Rebecca Ann Williams and Shawn Lee Williams from removing any child of the marriage then residing in Indiana from the state.

On 20 June 1991, plaintiff filed a complaint and motion in North Carolina seeking to gain immediate physical custody of Amanda, who had been residing in North Carolina with her grandparents. That same day, defendant filed a motion to dismiss plaintiff's North Carolina petition for custody of Amanda, with defendant

contending that the prior Indiana action should abate the North Carolina action. On 21 June 1991, Caldwell County District Court Judge Robert M. Brady awarded plaintiff temporary custody of Amanda, staying the order pending further hearing. On 10 July 1991, defendant Shawn Williams filed an answer seeking custody, child support, and equitable distribution. Defendants Ralph and Maggie Williams also filed an answer and counterclaim seeking joint custody with defendant-father.

On 14 November 1991, the Indiana superior court entered an order, holding (1) that the court's prior temporary custody order as to Amber should remain in effect; (2) pursuant to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), the court had authority to exercise jurisdiction over the custody of Amanda; and (3) the court could not order child support because it lacked personal jurisdiction over defendant Shawn Williams. The court then vacated the previous support order and affirmed the previous custody order as to Amanda.

On 17 February 1992, Judge Brady entered an order addressing two issues: (1) whether North Carolina must give full faith and credit to the Indiana orders of 18 June 1991 and 14 November 1991, and (2) whether North Carolina has jurisdiction to decide the custody issue. Judge Brady found in pertinent part: both children were born in North Carolina; Amanda had resided in North Carolina all her life; Amber resided in North Carolina until the first week of January 1991 when plaintiff unilaterally and without the consent of defendant removed her to Indiana; since February 1990 Amanda had resided with grandparents Ralph and Maggie Williams; plaintiff has substantial family in North Carolina, most of whom have had contact with Amanda; plaintiff has family in Indiana, including an uncle, a great-uncle, several cousins, a father, and a sister; of the relatives in Indiana only plaintiff's uncle in Indiana has seen Amanda; defendants have substantial family in North Carolina; plaintiff and defendant resided in North Carolina during their marriage; defendants have never been to Indiana; and Amanda has never been to Indiana.

Based upon the findings of facts, Judge Brady concluded that: (1) North Carolina must grant full faith and credit to the Indiana orders as to Amber pursuant to N.C. Gen. Stat. § 50A-3(a)(1) (1989); (2) the Indiana orders as to Amanda are not in substantial compliance with the UCCJA in that Amanda does not have substantial

connections with Indiana as required by § 50A-3(a)(2); (3) North Carolina has subject matter jurisdiction pursuant to the UCCJA to decide the custody of Amanda in that North Carolina is her home state; (4) North Carolina has personal jurisdiction over all the parties; and (5) it is in the best interest of the minor child Amanda that North Carolina exercise jurisdiction. Judge Brady then ordered that (1) North Carolina grant full faith and credit to the Indiana orders as to Amber, but not Amanda; and (2) North Carolina would exercise jurisdiction to determine the custody and child support issues for Amanda. All parties appeal.

Specifically, defendant-father and paternal grandparents argue on appeal that the trial court erred in concluding that North Carolina must grant full faith and credit to the Indiana orders as to Amber. Plaintiff-mother argues on appeal that the trial court erred in exercising jurisdiction over the custody determination as to Amanda and not enforcing the Indiana orders as to Amanda. We reverse in part and affirm in part.

To determine jurisdiction of child custody issues, the trial court must follow the mandates of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (1989), and North Carolina's Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1—50A-25 (1989). *See Gasser v. Sperry*, 93 N.C. App. 72, 376 S.E.2d 478 (1989). Although differing in some respects, the provisions of the PKPA and UCCJA are substantially similar. *In the Matter of Custody of Bhatti*, 98 N.C. App. 493, 494-95, 391 S.E.2d 201, 202 (1990). The PKPA provides in pertinent part:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

28 U.S.C.A. § 1738A(g).

N.C. Gen. Stat. § 50A-6(a) (1989) provides:

> If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state *exercising jurisdiction substantially in conformity with this Chapter*, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by

the court of the other state because this State is a more appropriate forum or for other reasons.

(Emphasis added.) Under both statutes, if there is an action pending in another state, the threshold issue is whether the other state has exercised jurisdiction in substantial conformity with the UCCJA. *Davis v. Davis*, 53 N.C. App. 531, 539-40, 281 S.E.2d 411, 416 (1981). N.C. Gen. Stat. § 50A-3 (1989), sets forth four alternative bases for jurisdiction:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

N.C. Gen. Stat. § 50A-2(5) (1989) defines "home state" as "the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months . . . ." Courts of other states

must also comply with the notice provisions of N.C. Gen. Stat. § 50A-4 and § 50A-5 (1989). *Copeland v. Copeland*, 68 N.C. App. 276, 279-80, 314 S.E.2d 297, 299-300 (1984).

In exercising jurisdiction over child custody matters, North Carolina requires the trial court to make specific findings of fact supporting its actions. *Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985). "[C]onclusory recitations by courts of other states [are] insufficient, and fairness and uniform application of the UCCJA demand the same specificity of our courts." *Jerson v. Jerson*, 68 N.C. App. 738, 740-41, 315 S.E.2d 522, 524 (1984).

[1] We first address defendant's argument that the trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders as to Amber. We must determine if the Indiana superior court exercised jurisdiction in conformity with North Carolina's UCCJA. In the 18 November 1991 order, the Indiana superior court found that "[t]he court's jurisdiction over Amber Williams, born November 7, 1989, is not at issue, and the court's prior provisional order regarding the custody of Amber Williams should remain in full force and effect." The Indiana court made no findings to support the exercise of jurisdiction as to Amber. The 18 June 1991 Indiana ex parte order contained no findings concerning jurisdiction or justifying placement with plaintiff. In the 17 February 1992 order, Judge Brady found that Amber resided in North Carolina until the first week of January 1991 when plaintiff took her to live in Indiana. Judge Brady then concluded that North Carolina must grant full faith and credit to the Indiana orders because Indiana was Amber's home state.

In the Indiana order, there were no findings of fact that Indiana was Amber's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state. *See Brewington*, 77 N.C. App. at 730, 336 S.E.2d at 447. We find that the North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders. The Indiana court had not assumed jurisdiction over the custody determination of Amber in substantial conformity with the UCCJA. Since the Indiana court did not properly assume jurisdiction, North Carolina courts are not bound to enforce the Indiana orders. *See id.* Accordingly, we must reverse the trial court's order insofar as it applies to Amber and remand

the cause for determination of whether North Carolina has the authority to exercise jurisdiction, pursuant to N.C. Gen. Stat. § 50A-3, over the custody determination as to Amber.

[2] Next, we address plaintiff's argument that the North Carolina trial court erred in exercising jurisdiction of the child custody determination as to Amanda. Plaintiff contends the Indiana court acted in substantial conformity with the UCCJA. Plaintiff argues that the North Carolina trial court was required to decline jurisdiction under § 50A-6(a). The Indiana court assumed jurisdiction based upon a finding that Amanda had significant connections with Indiana because her mother, her sister, and her half-brother had resided there since November 1990; until November 1990, the three children resided together in the same household; the petitioner's relatives reside in Indiana; and the most substantial evidence concerning the child's present or future care, protection, training, and personal relationships is available in Indiana.

During the pendency of this appeal, the Indiana Court of Appeals held that the Indiana superior court erred in finding that Amanda had substantial connections with Indiana. *In re the Marriage of Shawn L. Williams v. Rebecca A. Williams*, 609 N.E.2d 1111 (1993). The Indiana Court of Appeals held that use of the "significant connection" test is appropriate only if the "home state" rule is not applicable. *Id.* at 1113. The court noted that the facts "plainly fit the 'home state' test" because Amanda was born in North Carolina and she had spent all her life there. *Id.* The court further stated that even if the substantial connections test were applicable, Indiana did not have jurisdiction because there was no evidence that Amanda had ever been to Indiana. Her most significant connection is that her mother, step-brother and infant sister reside there. *Id.*

As noted above, the North Carolina trial court was required to determine if the Indiana court had exercised jurisdiction in substantial conformity with North Carolina's UCCJA. The North Carolina trial court found that Amanda has seen various physicians in North Carolina; plaintiff has substantial family in North Carolina, most of whom have had contact with Amanda; only one of plaintiff's relatives in Indiana had seen Amanda; Amanda has attended church in North Carolina since before her first birthday; and Amanda has never been to Indiana. The North Carolina trial court concluded that the Indiana orders did not substantially comply with the UCCJA because Amanda did not have substantial connections with Indiana.

We find no error in the trial court's conclusion that the Indiana orders as to Amanda did not substantially conform with the mandates of the UCCJA.

We further find that the trial court did not err in concluding that North Carolina had authority to exercise jurisdiction as to Amanda. The trial court found that Amanda had lived in North Carolina her entire life and concluded that North Carolina was Amanda's home state. Pursuant to N.C. Gen. Stat. § 50A-3(a)(1), a North Carolina court could assume jurisdiction if Amanda lived in North Carolina for six months prior to the commencement of the proceeding. The trial court also made the requisite finding that it is in Amanda's best interest that North Carolina assume jurisdiction over the child custody determination.

In summary, the trial court's order is affirmed as to Amanda. As to Amber, the trial court's order is reversed, and the cause is remanded for a determination as to jurisdiction.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and WYNN concur.

STATE OF NORTH CAROLINA v. CHARLES NATHAN WITHERSPOON, JR.

No. 9226SC279

(Filed 1 June 1993)

1. Searches and Seizures § 21 (NCI3d)— marijuana grown in crawl space of house—informant—probable cause for search warrant

Information from a concerned citizen that defendant was growing marijuana in the crawl space of his house was sufficiently reliable to provide probable cause for a search warrant where the magistrate was presented a sworn affidavit signed by two officers which stated that a third officer had been told by a concerned citizen who wished to remain confidential that 100 marijuana plants were growing under a lighting system with automatic timers in the crawl space of defendant's home; the information was based on the informant's personal observa-

tions and on the informant's numerous conversations with defendant concerning the cultivation of the marijuana plants; the informant told the third officer that he had used marijuana and had seen the cultivation of marijuana plants in the past; and the informant correctly told the third officer that defendant had been arrested on a prior occasion.

Am Jur 2d, Searches and Seizures §§ 120-123.

2. **Searches and Seizures § 21 (NCI3d)— search warrant—marijuana plants growing under house—plants seen within 30 days—information not stale**

Information from a concerned citizen that 100 marijuana plants had been seen growing in the crawl space of defendant's house "within the last 30 days" was not stale at the time the search warrant was issued because it is unlikely that defendant would personally consume such a large quantity within 30 days; if the marijuana was being grown for purposes of sale, then the informant's statements indicate that defendant was engaged in an ongoing activity; the magistrate could reasonably infer that the evidence would likely remain in defendant's home thirty days after being seen from the presence of a lighting system and timers, objects requiring installation and not subject to ready mobility; and the information concerned the cultivation of marijuana plants, the growth of which lasts approximately 3 to 4 months.

Am Jur 2d, Searches and Seizures §§ 120-124.

3. **Evidence and Witnesses § 1560 (NCI4th)— search warrant—exclusionary rule—good faith exception**

Assuming that information which served as the basis for a search warrant was insufficient, officers reasonably relied on a search warrant that was issued by a detached and neutral magistrate and took every reasonable step to comport with the fourth amendment requirements. The good faith exception to the exclusionary rule is applicable.

Am Jur 2d, Evidence § 416.7.

Appeal by defendant from order entered 31 October 1991 by Judge Peter W. Hairston in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 March 1993.

Defendant pled guilty to manufacture of a controlled substance (91-CRS-38448), possession with intent to sell and deliver a controlled substance (91-CRS-38450), and possession of drug paraphernalia (91-CRS-38451). Defendant was sentenced to three years, suspended, with supervised probation for three years. Prior to the entry of his guilty plea, defendant made a motion pursuant to G.S. 15A-974 to suppress the evidence seized from his home on the ground that the search warrant was not supported by probable cause. Defendant contended *inter alia* that the informant's tips which formed the basis of the application for the search warrant were either stale or unreliable. The trial court denied defendant's motion. Having pled guilty, defendant now appeals.

On 30 May 1991, Officers James M. Kolbay and G. W. Hester of the Charlotte Police Vice Narcotics Bureau applied for a warrant to search defendant's home for marijuana, a controlled substance. As part of the application affidavit, Officers Kolbay and Hester swore to the following facts:

> We . . . have received information from Officer D. M. Sikes who has received information from a concerned citizen that Charles Nathan Witherspoon, Jr. is growing marijuana at 3602 Carlyle Drive. This citizen has been inside this address within the last 30 days and have [sic] observed approximately one hundred marijuana plants growing under the crawl-space of this house at 3602 Carlyle Drive using a light system with automatic timers. This concerned citizen advised they [sic] have known Charles Nathan Witherspoon, Jr. for more than 30 days and during this time period has spoken with Charles Nathan Witherspoon, Jr. on numerous occasions about his growing these marijuana plants. This concerned citizen has used marijuana and has observed it growing in the past. This concerned citizen lives and works in the Charlotte area and has nothing to gain by giving this information. Officer D. M. Sikes has known this concerned citizen for more than one year and knows them [sic] to be truthful. This concerned citizen wishes to remain confidential and is in fear of reprisals and bodily harm.
>
> The concerned citizen also stated that Charles Nathan Witherspoon, Jr., has been arrested for DWI, drives a light blue Ford LTD and parks it at his residence at 3602 Carlyle Drive. Through independent investigation, a criminal history shows a prior arrest for DWI. The affiants have observed

> a light blue Ford LTD, North Carolina registration CSA-8167 parked in the driveway of 3602 Carlyle Drive. The vehicle is registered to BMW Realty. Prior arrest shows this is Charles Nathan Witherspoon, Jr.'s place of employment. Duke Power records show that Charles Nathan Witherspoon, Jr. has been paying the power bill for 3602 Carlyle Drive continuously for the last 6 months.
>
> Based on these affiants[']' training and experience as Charlotte Police Officers and Vice Investigators, the information given by the concerned citizen shows a continuous growing and cultivation process of marijuana plants. This is consistent with these affiants[']' experience involving growing and cultivation of marijuana plants . . . .

Neither of the officers who submitted the sworn affidavit had met the concerned citizen. Officer Sikes, to whom the concerned citizen gave the information, did not appear before the magistrate nor did he submit a sworn affidavit. The magistrate issued the search warrant on 30 May 1991.

Officer Kolbay testified at the 31 October 1991 suppression hearing that as a result of the search of defendant's home pursuant to the 30 May 1991 warrant, 14 "full and bushy" marijuana plants that "took up all the [crawl] space underneath the [defendant's] house" were discovered, along with an "extensive lighting system, on a track lighting going back and forth" and an "automatic watering system." Additionally, 20 "smaller" marijuana plants were found "underneath a florescent light in the closet in the [defendant's] house." Officer Kolbay also testified that based on his eight years of experience as a police officer (including three years in the Vice Narcotics Bureau), his training, and his research, it takes "three to four months" for a marijuana plant to grow "from a small plant to maturity."

Attorney General Lacy H. Thornburg, by Associate Attorney General Ronnie E. Rowell, for the State.

Goodman, Carr, Nixon & Laughrun, by Theo X. Nixon, for the defendant-appellant.

EAGLES, Judge.

Defendant brings forward three assignments of error. In his first two assignments of error, defendant contends that there was

a lack of probable cause to support the magistrate's issuance of the search warrant because of the "insufficiency of reliable information provided by a 'concerned citizen' " and because of the "staleness of [the] information." In his last assignment of error, defendant argues that the trial court erred by failing to suppress the evidence "after applying a 'totality of circumstances' test to the information provided to the magistrate." After a careful review of the record, briefs, and transcript, we affirm.

[1] In determining under the federal and state constitutions whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527 (1983) is to be applied. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

> The totality of the circumstances test may be described as follows:
>
> > The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.
>
> *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L.Ed. 2d 527, 548 [1983]). Under this test the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.

State v. Beam, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989). *See State v. Riggs*, 328 N.C. 213, 218-19, 400 S.E.2d 429, 432-33 (1991).

Our inquiry commences with an examination of the reliability of the information presented in the 30 May 1991 affidavit.

> In showing that information is reliable for purposes of obtaining a search warrant, the State is not limited to certain narrowly defined categories or quantities of information. What is popularly termed a "track record" is only one method by which

> a confidential source of information can be shown to be reliable for purposes of establishing probable cause.

Riggs, 328 N.C. at 219, 400 S.E.2d at 433.

Here, the magistrate was presented a sworn affidavit signed by Officer Kolbay and Officer Hester. Their affidavit stated that Officer Sikes had been told by a concerned citizen that 100 marijuana plants were growing under a lighting system with automatic timers in the crawl space of defendant's home. "The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971) (citation omitted). The officers' affidavit reflected that the informant's information was based on the informant's personal observations and on the informant's "numerous" conversations with defendant concerning the cultivation of these marijuana plants. "Concerning the reliability of the informant's information *Gates* teaches that 'even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.' *Gates* at 234, 103 S.Ct. at 2330, 76 L.Ed.2d at 545." *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 463, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988).

Furthermore, the reliability of the informant is shown by the officers' sworn affidavit, which reflects that the informant told Officer Sikes that he (the informant) had used marijuana, thus admitting his (the informant's) possession and use of a controlled substance in the past. "Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search." *Beam*, 325 N.C. at 221, 381 S.E.2d at 330 (citing *Arrington*, 311 N.C. at 642, 319 S.E.2d at 260). In addition to his prior use of marijuana, the informant also stated that he had seen the cultivation of marijuana plants in the past. *Barnhardt*, 92 N.C. App. at 98, 373 S.E.2d at 463. Finally, the officers' investigation revealed that the informant correctly told Officer Sikes that defendant had been arrested on a prior occasion. Based upon our review of the information, *supra*, provided to the magistrate, we conclude that this information was sufficiently reliable.

[2] Next, our inquiry turns to defendant's contention that the evidence was "stale" because the affidavit stated that the reliable

informant had observed the marijuana plants growing "within the last 30 days." In *State v. Lindsey*, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982), this Court stated that

> [t]he test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E.2d 919 (1979). Common sense must be used in determining the degree of evaporation of probable cause. *State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630 (1979), *cert. denied*, 444 U.S. 836 (1980). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . ." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A.2d 78, 106, *cert. denied*, 274 Md. 725 (1975), aff'd, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

Our Supreme Court has stated that a number of variables are to be considered in determining whether probable cause still exists at the time a search warrant is issued, including *inter alia* the items to be seized and the character of the crime. *Louchheim*, 296 N.C. at 323, 250 S.E.2d at 636. If the marijuana was being grown for defendant's personal consumption, it is unlikely that he would consume such a large quantity within 30 days. Accordingly, at least a portion of it would likely remain in his home 30 days later when this search warrant was issued. Likewise, if the marijuana was being grown in defendant's home for purposes of sale, then the informant's statements indicate that defendant was engaged in the ongoing criminal activity of selling marijuana. *Beam*, 325 N.C. at 222, 381 S.E.2d at 330. *Compare State v. Newcomb*, 84 N.C. App. 92, 95, 351 S.E.2d 565, 567 (1987) (suppressing evidence arising from warrant where the officer's "affidavit contain[ed] a mere naked assertion that the informant at *some time* saw a 'room full of marijuana' growing in defendant's house" [emphasis added]). *See Barnhardt*, 92 N.C. App. at 98, 373 S.E.2d at 463 (discussing *Newcomb*). Furthermore, the officers' affidavit stated that defendant was suspected of *growing* marijuana using a "light system with automatic timers." Hence, from the presence of a lighting system and timers, objects requiring installation and not subject to ready mobility, the magistrate could reasonably infer that the evidence would likely remain in defendant's home 30 days later.

> One may properly infer that equipment acquired to accomplish the crime and records of the criminal activity will be kept for some period of time. When the evidence sought is of an ongoing criminal business of a necessarily long-term nature, such as marijuana growing, rather than that of a completed act, greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time.

U.S. v. Greany, 929 F.2d 523, 525 (9th Cir. 1989) (citations omitted). *See State v. Louchheim*, 296 N.C. at 322-23, 250 S.E.2d at 635-36 (discussing probable cause in context of an ongoing business). We note that we find the information here not to be stale because the information concerned the informant's observation (within 30 days) of the *cultivation* of marijuana plants, the growth cycle of which lasts approximately 3 to 4 months according to the testimony presented at the suppression hearing. We further note that this factual situation differs substantially from an informant's observation of harvested or processed marijuana in a non-cultivation factual situation. *Compare Lindsey*, 58 N.C. App. at 567, 293 S.E.2d at 835 (non-cultivation case holding information stale where the police seized four ounces of marijuana stored in "plastic bags" from defendant's residence based upon "information concerning residential possession" received by the officer one year prior to the issuance of the warrant). We conclude that "there was a substantial basis for the magistrate to conclude that there was a fair probability that marijuana would be found at defendant's residence on the date the warrant was issued." *Beam*, 325 N.C. at 222, 381 S.E.2d at 330.

Accordingly, after having examined the reliability and timeliness of the information, we conclude that the evidence as a whole provided the magistrate a substantial basis for concluding that probable cause existed at the time the search warrant was issued. *Beam*, 325 N.C. at 221, 381 S.E.2d at 329.

> "No more is required." *Rugendorf v. United States*, 376 U.S. 528, 533, 11 L.Ed.2d 887, 891, 84 S.Ct. 825, 828 (1964). *See also Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976). Moreover, reviewing courts are to pay deference to judicial determinations of probable cause, *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), and "the resolution of doubtful or marginal cases in this area

should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca, supra* at 109, 13 L.Ed.2d at 689, 85 S.Ct. at 746.

Louchheim, 296 N.C. at 324, 250 S.E.2d at 636-37.

[3] Finally, we conclude that, even assuming *arguendo* the information which served as the basis for the warrant was insufficient, the good faith exception to the exclusionary rule is applicable here. In *State v. Welch*, 316 N.C. 578, 588, 342 S.E.2d 789, 794-95 (1986), our Supreme Court stated:

> In *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984), the Supreme Court carved out a good faith exception to the exclusionary rule stating that it should not apply when officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate but subsequently found invalid. In *Leon* a search was conducted pursuant to a search warrant that was later determined to lack probable cause. In upholding the search, the Supreme Court stated that the exclusionary rule "operates as a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.' " 468 U.S. at 906, 82 L.Ed.2d at 687. The exclusionary rule was designed to deter police misconduct, not a judge's errors. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U.S. at 921, 82 L.Ed.2d at 697. The Supreme Court concluded in *Leon* that the "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." 468 U.S. at 918, 82 L.Ed.2d at 695. Since the officer in *Leon* reasonably relied on a warrant issued by a detached and neutral magistrate, the Supreme Court concluded that the exclusionary rule should not be applied and that the evidence obtained pursuant to that warrant should be admissible.

Here, the officers reasonably relied on the search warrant that was issued by a "detached and neutral magistrate" and took every reasonable step to comport with the fourth amendment requirements. *Welch*, 316 N.C. at 589, 342 S.E.2d at 795. Accordingly, we find no error.

No error.

Judges MARTIN and JOHN concur.

FRED LEVETTE SLADE AND WIFE, BARBARA J. SLADE, PLAINTIFFS v. C. D. VERNON, SHERIFF OF ROCKINGHAM COUNTY; JACK KENNETH BRYANT, CHIEF JAILER OF THE ROCKINGHAM COUNTY JAIL; BEING SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. 9217SC449

(Filed 1 June 1993)

1. **Appeal and Error § 118 (NCI4th)— action against sheriff and jailer—immunity—summary judgment for defendants denied—appealable**

The denial of defendants' motion for summary judgment was immediately appealable where plaintiffs brought an action against the sheriff and the jailer in their official and individual capacities after plaintiff Fred Slade suffered injuries while incarcerated. While the denial of a summary judgment motion usually would not affect a substantial right, an immediate appeal lies where the summary judgment motion is based on a substantial claim of immunity because a valid claim of immunity is in essence immunity from suit and not just a defense in a lawsuit. The immunity would be effectively lost if the case erroneously proceeded to trial.

Am Jur 2d, Appeal and Error § 104.

2. **Sheriffs and Constables § 4 (NCI3d)— sheriff and jailer—action by injured prisoner—immunity**

The trial court correctly denied defendants' motion for summary judgment as to plaintiffs' statutorily based negligence cause of action where plaintiffs allege that defendant prison officials observed plaintiff's bizarre behavior often, that one of the jailers informed them of plaintiff's need for medical attention and additional supervision, and that defendants knew or should have known plaintiff was likely to injure himself but failed to take the necessary steps to ensure plaintiff's safety. Although defendants argue that summary judgment should have been granted as to plaintiffs' negligence claims

because defendants are immune from suit based on sovereign immunity, the General Assembly specifically provided for a cause of action against a sheriff or other officer and their surety with the enactment of N.C.G.S. § 58-76-5. By expressly providing for this cause of action, the General Assembly has abrogated common law immunity where a public official causes injury through "neglect, misconduct, or misbehavior" in the performance of his official duties or under color of his office. N.C.G.S. § 153A-224.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90, 159.

3. Sheriffs and Constables § 4 (NCI3d)— injured prisoner—individual liability of sheriff and jailer—immunity—summary judgment erroneously denied

The trial court improperly denied defendants' motion for summary judgment as to their individual liability for injuries received by plaintiff Fred Slade as a prisoner. A public official is immune from personal liability for mere negligence in the performance of his duties but is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties. Plaintiffs alleged that defendants were negligent in the course of their duties, then asserted that defendants' actions amounted to malice; however, mere allegations of malice without more are insufficient to overcome a motion for summary judgment.

Am Jur 2d, Sheriffs, Police and Constables § 159.

4. Constitutional Law § 86 (NCI4th)— injured prisoner—1983 claim—immunity of officials—summary judgment for defendants

The trial court erred by not granting summary judgment for defendant sheriff and jailer on claims against defendants in their individual capacities under 42 U.S.C. § 1983 where plaintiffs did not allege a violation of any specific constitutional law or right. Qualified immunity protects public officials from personal liability for performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A general allegation of conduct in violation of 42 U.S.C. § 1983 is not sufficient to abrogate qualified immunity. Moreover, plaintiffs may not maintain a suit against defendants in their official capacities for violation of section 1983

under these circumstances because the only remedy sought is monetary damages.

Am Jur 2d, Constitutional Law §§ 391-401.

Judge GREENE concurring.

Judge WYNN concurs in the result only.

Appeal by defendants from judgment entered 6 February 1992 in Rockingham County Superior Court by Judge W. Steven Allen, Sr. Heard in the Court of Appeals 27 April 1993.

Plaintiffs brought this action against defendants seeking damages for injuries plaintiff Fred L. Slade sustained while incarcerated in the Rockingham County Jail. The forecast of evidence reveals that on 27 January 1988, Mr. Slade was taken to the Rockingham County Jail pursuant to a contempt order. At the time of his incarceration, Mr. Slade was suffering from delirium tremens and was exhibiting bizarre behavior, such that defendants knew or should have known Mr. Slade was likely to harm himself. Specifically, Mr. Slade was talking to non-existent persons, screaming and hollering, warning others to watch out for falling rocks, and climbing the cell bars while screaming that he was trying to protect a child from being hit by a truck.

A deputy and several other jail personnel of the Rockingham County Jail observed Mr. Slade exhibit such abnormal behavior. Based upon his observations, Deputy Foster believed that Mr. Slade would fall from the cell bars and injure himself if he was not given medical treatment and placed in a safe environment. No action was taken by any jail or medical personnel. Mr. Slade did in fact injure himself while incarcerated by falling off the cell bars, fracturing both feet.

Plaintiffs filed suit against defendants, the Sheriff of Rockingham County and the Rockingham County Jailer, both individually and in their official capacities, for various acts of negligence and "malicious actions" resulting in Mr. Slade's injury. Defendants answered plaintiffs' complaint asserting qualified immunity, governmental immunity and public officers' immunity as affirmative defenses.

On 12 April 1991, defendants filed a motion for summary judgment based on the immunity defenses. On 23 January 1992, plain-

tiffs filed a motion to amend their complaint which was granted. On 6 February 1992, after reviewing all matters of record before it, the trial court denied defendants' motion for summary judgment. Defendants appeal the trial court's order denying summary judgment.

Moses & Moses, by Pinkney J. Moses, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr. and Allan R. Gitter, for defendants-appellants.

WELLS, Judge.

The sole question upon review is whether the trial court erred in denying defendants' summary judgment motion based upon public officers' immunity, governmental immunity and qualified immunity.

[1] We first address the threshold issue of the reviewability of an order denying appellants' summary judgment motion. Generally, the denial of a motion for summary judgment is not appealable as an interlocutory order unless such order would deprive the appellant of a substantial right which would be lost if not reviewed prior to final judgment. *See* N.C. Gen. Stat. § 1-277; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975). Usually the denial of a summary judgment motion would not affect a substantial right; however, where the summary judgment motion is based on a substantial claim of immunity, an immediate appeal shall lie. *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991). The justification for such an exception stems from the nature of the immunity defense. A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost. *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 on other grounds*, 330 N.C. 761, 413 S.E.2d 276 (1992) (*citing Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). In the case *sub judice*, defendants do assert a claim of immunity, and therefore their appeal is properly before this Court.

Plaintiffs have brought suit against defendants in both their official capacity and individually, and defendants assert that immunity bars each of plaintiffs' claims. We therefore shall address each of plaintiffs' claims separately.

I. State Law Claims

A. Official Capacity

[2] Defendants first argue summary judgment should have been granted as to plaintiffs' negligence claims because defendants, acting in their official capacities as public officers, are immune from suit based on sovereign immunity. It is well established that the State is immune from suit under the doctrine of sovereign immunity, until and unless it consents to be sued. *Jones v. Pitt County Memorial Hospital*, 104 N.C. App. 613, 410 S.E.2d 513 (1991). Sovereign immunity also precludes suit against a county, a governmental agency exercising the police power of the State. Likewise, county employees and county officials engaged in governmental functions are also immune from suit. *Baucom's Nursery Co. v. Mecklenburg Co.*, 89 N.C. App. 542, 366 S.E.2d 558, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). It is uncontroverted that defendants are public officials of Rockingham County, and, as such, are entitled to sovereign immunity.

Sovereign immunity is a "common law theory or defense established by [the] Court," to protect the sovereign or the State and its agents from suit. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). Our courts, however, have deferred to the General Assembly to determine those circumstances in which a state or its agents may be sued. For example, under G.S. § 153A-435(a), a county waives its defense of immunity for negligence in the performance of governmental functions to the extent it has purchased liability insurance. *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231, *rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). The General Assembly, in enacting the Tort Claims Act, G.S. § 143-291 *et seq.*, has also partially waived sovereign immunity of the State for tort claims falling within its purview.

With the enactment of G.S. § 58-76-5 (formerly G.S. § 109-34), the General Assembly specifically provided for a cause of action against a sheriff or other officer and their surety. Pertinent portions of that statute are as follows:

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the

> State, without any assignment thereof; . . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

See Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975). This statute allows a plaintiff to maintain suit against a public officer and the surety on his official bond for acts of negligence in performing his official duties. In addition, our appellate courts have traditionally recognized this statutory claim without reaching the question of sovereign immunity. *See Williams, supra; Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954); *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 563 (1940).

Here, plaintiffs allege a statutory-based negligence cause of action against defendants in performing their official duties under G.S. § 153A-224(a). This statute creates an affirmative duty owed by prison officials to inmates in supervising local confinement facilities. G.S. § 153A-224(a) provides as follows:

> **Supervision of local confinement facilities.**
>
> (a) No person may be confined in a local confinement facility unless custodial personnel are present and available to provide continuous supervision in order that custody will be secure and that, in event of emergency, such as fire, illness, assaults by other prisoners, or otherwise, the prisoners can be protected. These personnel shall supervise prisoners closely enough to maintain safe custody and control and to be at all times informed of the prisoners' general health and emergency medical needs.

Plaintiffs allege that defendant prison officials observed plaintiff's bizarre behavior often and that one of the jailers informed them of plaintiff's need for medical attention and additional supervision. Plaintiffs also allege that after observing plaintiff's behavior and being informed of his condition, defendants knew or should have known plaintiff was likely to injure himself but failed to take the necessary steps to ensure plaintiff's safety. Plaintiffs' forecast of evidence is sufficient to maintain an action in negligence based on the violation of G.S. § 153A-224(a). The General Assembly specifically allows such a claim based on the negligence of public officers acting in their official capacity under G.S. § 58-76-5. By expressly providing for this cause of action, the General Assembly

has abrogated common law immunity where a public official causes injury through "neglect, misconduct, or misbehavior" in the performance of his official duties or under color of his office. We therefore hold that the trial court's denial of summary judgment as to this issue was proper.

We note that plaintiffs' action in this case was brought against the sheriff and the jailer individually, and their official sureties were not joined as parties. Although courts in our State have held the sureties to be necessary parties in an action under G.S. § 58-76-5, *see Cain v. Corbett*, 235 N.C. 33, 69 S.E.2d 20 (1952), defendants did not raise this argument in their assignments of error and this issue is therefore not before our Court.

B. Individual Capacity

[3] Defendants next contend that they are immune from suit because as public officers, they cannot be held individually liable for "mere negligence" in the performance of their duties. We agree.

The general rule is that a public official is immune from personal liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties. *Thompson Cadillac-Oldsmobile, Inc. v. Sink Hope Automobile, Inc.*, 87 N.C. App. 467, 361 S.E.2d 418 (1987), *disc. rev. denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

Here, plaintiffs have alleged defendants were negligent in their failure to supervise plaintiff in the course of their duties, where defendants knew or should have known plaintiff was likely to injure himself. Plaintiffs also allege defendants breached their duty owed to plaintiff to maintain safe custody and control of him and give him adequate medical attention in violation of G.S. § 153A-224(a). Plaintiffs then assert that defendants' actions amounted to malice and therefore defendants are not shielded from personal liability by public official's immunity. Mere allegations of malice without more are insufficient to overcome a motion for summary judgment. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976). We find the trial court's denial of defendants' summary judgment motion as to this issue to be improper.

II. 42 U.S.C. § 1983 Claims

[4] As to plaintiffs' constitutional law claims against defendants in their individual capacities, "a [public] official will be personally answerable for damages under section 1983 only where qualified immunity is not available to shield the official from liability for deprivation of federal rights." *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). In general, qualified immunity protects public officials from personal liability for performing discretionary functions insofar as their conduct does not violate " 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Corum*, 330 N.C. 761, 413 S.E.2d 276 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The first inquiry is whether plaintiffs have alleged a violation of a clearly established law of which a reasonable official would have known. Summary judgment must be granted if they have not. *Lopez v. Robinson*, 914 F.2d 486 (4th Cir. 1990). Here, plaintiffs do not allege a violation of any specific constitutional law or right. A general allegation of conduct in violation of 42 U.S.C. § 1983 is not sufficient to abrogate qualified immunity. *Id.* We find that defendants are entitled to summary judgment on this issue. Furthermore, our courts have held that plaintiffs may not maintain a suit against defendants in their official capacities for violation of section 1983 under these circumstances, because the only remedy plaintiffs sought is monetary damages. *Lenzer, supra.* We therefore reverse the denial of summary judgment as to this issue as well.

Affirmed in part, reversed in part.

Judge GREENE concurs in a separate opinion.

Judge WYNN concurs in the result only.

Judge GREENE concurring.

I write separately to emphasize that, except to the extent that defendant Vernon has furnished a bond pursuant to N.C.G.S. § 162-8 (1987), and except to the extent that defendant's conduct violates the provisions of the bond, defendants have full immunity from plaintiffs' claim. *See State ex rel. Williams v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975) (N.C.G.S. § 58-76-5 held to enlarge

conditions of bond furnished under N.C.G.S. § 162-8 to include liability for wrongful death of prisoner). Furthermore, because we are treating this action as one on the sheriff's bond, unless the surety on the bond is joined as a party within a reasonable time after remand, the action must be dismissed. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 17, 362 S.E.2d 812, 822 (1987).

STATE OF NORTH CAROLINA v. GEORGE EDWARD PHARR

No. 9221SC445

(Filed 1 June 1993)

1. **Criminal Law § 933 (NCI4th)— requested instruction of defendant's decision not to testify not given—motion by the court for appropriate relief—court not required to grant**

Defendant was not entitled to appropriate relief *per se* in an assault prosecution where defendant presented no evidence and requested at the charge conference an instruction concerning the effect of defendant's decision not to testify; the court agreed to give the instruction but failed to do so; the court reconvened after defendant was found guilty upon the court's motion for appropriate relief; and the court denied its own motion after hearing the arguments of counsel. Although defendant argues that the motion in and of itself establishes that defendant is entitled to relief, the trial court upon its own motion should have the same opportunity to hear the arguments of counsel and conduct a review as to whether there has been prejudicial error as when the motion is made by a party.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 44 et seq.

2. **Criminal Law § 809 (NCI4th)— instruction on defendant's decision not to testify not given—motion for appropriate relief denied—error not prejudicial**

The court's error was not prejudicial in an assault prosecution where defendant presented no evidence and requested at the charge conference an instruction concerning the effect of defendant's decision not to testify; the court agreed to give the instruction but failed to do so; the court reconvened after

defendant was found guilty upon the court's motion for appropriate relief; and the court denied its own motion after hearing the arguments of counsel. The evidence of guilt was overwhelming, the defendant's theory of the case did not create an unmet expectation that defendant would testify, and the jury was told in the judge's opening statement as well as in the defense attorney's closing statement that the defendant was not required to testify.

Am Jur 2d, Criminal Law § 940.

3. **Evidence and Witnesses § 2874 (NCI4th)— assault—cross-examination—limited by court—no error**

The trial court did not err in an assault prosecution by limiting defendant's cross-examination of a prosecution witness. Although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court. The scope of defendant's cross-examination of this witness was properly limited by the trial court to protect the witness from harassment or undue embarrassment while making the interrogation effective for the ascertainment of the truth.

Am Jur 2d, Witnesses § 472.

Appeal by defendant from judgment entered 15 January 1992 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for the State.

Lawrence J. Fine for the defendant-appellant.

WYNN, Judge.

Defendant was indicted on 9 September 1991 pursuant to N.C.G.S. § 14-32(a) for assault with a deadly weapon with intent to kill inflicting serious injury. The case was tried by a jury and the jury returned a verdict of guilty. The trial judge sentenced defendant to twenty years imprisonment.

The State's evidence tends to show the following. On 10 July 1991 between 10:00 and 11:00 p.m., a group of ten to twelve people

were standing at the corner of Blade and Birch Streets in the Cherryview housing development in Winston-Salem, North Carolina. Among those were Steven Sims, Curtis Coleman, Curtis Scott and Melvin Glover. A silver Honda Accord with two individuals inside, drove by and stopped at the corner. Curtis Coleman walked over to the car on the passenger's side and had a conversation with its occupants. The passenger in the car asked Coleman whether anyone in the group had any drugs. Coleman stated that they did not have drugs. He saw that the passenger had a handgun and returned to his friends across the street. Conversation between the group of people standing on the street and those in the vehicle continued for approximately ten minutes. Coleman again approached the vehicle, this time at the driver's side. Steve Sims followed Coleman. Others walked toward the passenger's side of the vehicle. The passenger of the vehicle leaned across the driver and fired five to six shots out of the driver's side window and the back window. Sims was struck in his left chest area.

The Honda was seen later that evening at the Bridgewood apartment building and the owner was determined to be Melvin Nivens. Nivens testified that he had loaned the car to defendant and Trina Johnson earlier that day. Coleman, Glover and Scott identified the defendant as the passenger in the car and as the person who fired the weapon injuring Sims.

Defendant presented no evidence. At the charge conference, counsel for defendant requested an instruction concerning the effect of defendant's decision not to testify. The court agreed to give the instruction but subsequently failed to do so. Defendant was found guilty of the charged offense. The following day, the trial court upon its own motion for appropriate relief reconvened pursuant to N.C.G.S. § 15A-1420(d), for a hearing to determine whether relief should be granted in the form of a new trial due to the court's failure to instruct the jury regarding the defendant's failure to testify. After hearing arguments of counsel, the court denied its own motion. From entry of judgment and sentencing as well as the denial of the court's motion for appropriate relief, defendant appeals.

I.

[1] By defendant's first assignment of error he contends that the trial court erred in denying its own motion for appropriate relief pursuant to N.C.G.S. § 15A-1420(d) based on the court's failure

to give a requested instruction regarding the defendant's decision not to testify.

Pursuant to N.C.G.S. § 15A-1420(d), "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." Defendant argues that the court's motion for appropriate relief, in and of itself establishes that defendant is entitled to relief and that as a result, the court had no option but to grant the appropriate relief. We disagree.

Although the statute permits the court to grant relief to the defendant upon its own motion for appropriate relief when the defendant is entitled, it does not necessarily follow that the defendant is *per se* entitled to relief any time the motion is made by the court rather than by a party. Whether the motion for appropriate relief is made by a party or by the court itself, the standard of review for the failure to give a requested instruction which results in a violation of the defendant's constitutional rights remains the same under N.C.G.S. § 15A-1443(b). Such an error is deemed prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b). Appropriately, as in this case, a subsequent hearing may be held to make a determination as to whether the error was harmless or not. As a result, the trial court, upon its own motion should have the same opportunity to hear the arguments of counsel and conduct a review in making a determination as to whether there has been a prejudicial error for which appropriate relief should be granted, as when the motion is made by a party. Therefore the trial judge was not compelled *per se* to grant its own motion for appropriate relief, and defendant's assignment of error is without merit.

II.

[2] Defendant next argues that the trial court committed prejudicial error by failing to give the requested jury instruction regarding the defendant's decision not to testify and by denying its own motion for appropriate relief because the exclusion of the instruction was not harmless error beyond a reasonable doubt.

We note initially that notwithstanding the fact that defendant's counsel failed to object to the jury charge when it was given, defendant's request for the instruction at the charge conference

was sufficient under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure to warrant this Court's full review on appeal. *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988); *State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987).

Although it was clearly error for the trial judge to fail to give the requested instruction concerning defendant's decision not to testify in his own defense, the issue is whether the omission was "sufficiently prejudicial to defendant's cause to warrant our order of a new trial?" *Ross*, 322 N.C. at 266, 367 S.E.2d at 892. The standard for determining whether the omission was prejudicial is provided in N.C.G.S. § 15A-1443(b) as follows:

> A violation of defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the state to demonstrate, beyond a reasonable doubt, that the error was harmless.

Thus the burden is on the State in this case to prove that the trial judge's error was harmless beyond a reasonable doubt.

The State contends that the error was harmless beyond a reasonable doubt because the evidence of defendant's guilt was overwhelming and it is extremely unlikely that the trial court's error affected the outcome of the case. Evidence of defendant's guilt included the testimony of three witnesses to the shooting who all identified defendant as the person who fired the shots. One of those witnesses, Curtis Coleman, had approached the passenger's side of the vehicle and spoke directly with the defendant a few minutes prior to the shooting. In addition, the owner of the Honda Accord testified that he loaned the car to defendant earlier on the day of the shooting.

Defendant points to the North Carolina Supreme Court's holding in *State v. Ross* for support. In *Ross*, where the defendant asked for an instruction concerning his decision not to testify and the trial judge promised to give the requested instruction but inadvertently failed to do so, the Court held that the State failed to meet its burden of proving that the omission was harmless error despite a finding of substantial evidence of the defendant's guilt. In reaching its decision, the Court noted the importance of the defendant's Fifth Amendment right against self-incrimination and pointed out that "crucial to [its] determination as to prejudice"

was the fact that defendant's attorney forecast self-defense as defendant's theory of the case. 322 N.C. at 267, 367 S.E.2d at 892. As a result of that forecast, the jury had an expectation that the defendant would present evidence as to why he killed the victims and that expectation was never met. The State points out, as did the trial judge, the distinctions between the defendant Ross's theory of his case and the theory presented by defendant in this case. Indeed, in its order denying appropriate relief, the trial court focused on the fact that the defendant's counsel never forecast that the defendant would testify and that the jury therefore had no expectation that defendant would testify. The trial judge found as fact that the "defendant's trial tactics were to rely solely on the weaknesses of the State's case and the presumption of innocence" and further that "[t]he jury at no time, was informed that the defense would present any evidence regarding any defense." The trial court concluded as a matter of law that the error in failing to give the requested instruction

> was not prejudicial as a matter of law but was harmless beyond a reasonable doubt in view of the defense trial tactics of relying upon the weakness of the State's evidence in that the jury at no time was promised and had no reason to expect the defendant to produce any evidence and the jury fully being aware that the State did have the burden and that the defendant had no burden, but was to be presumed innocent.

Moreover, it should be noted that the trial judge stated in his opening statement to the jury that

> [a] defendant does not have to prove anything in this country. Defendants do not have to put on evidence. Defendants do not have to take the stand, and they don't have to prove anything for one reason. That is the State, the government, has the burden of proof. All defendants are presumed to be innocent. They have no burden to prove anything whatsoever.

In addition, counsel for the defendant pointed out in her closing argument that the defendant had the right not to take the stand and testify.

We recognize the importance of the defendant's Fifth Amendment right to be free from compelled self-incrimination, as well as the importance of jury instructions concerning this right. However, whereas in this case, the evidence of guilt was overwhelming, the

defendant's theory of the case did not create an unmet expectation that the defendant would testify, and the jury was told in the judge's opening statement, as well as in the defense attorney's closing statement, that the defendant was not required to testify, we conclude that the trial judge's error was harmless beyond a reasonable doubt.

III.

[3] By defendant's next assignment of error he contends that the trial court erred by prejudicially limiting defense counsel's absolute right to cross-examine a prosecution eyewitness in violation of both the federal and state constitutions.

Melvin Glover, when testifying for the State, identified the defendant as the passenger in the vehicle from which the gun was fired. On cross-examination, he was asked about whether he noticed any damage to the Honda Accord when he first saw it. The pertinent questioning and answers are as follows:

Cross-examination by defense counsel:

A: The back window was shot out and the back side window. I know that.

Q: That was when you first saw it?

A: Yeah. I heard the glass shooting out. Then I looked back and when I looked back the window was like busted.

Q: Are you saying when you heard these same shots you also heard glass breaking at the same time?

A: Uh-huh. Well, I ain't really— I heard glass hitting the ground and stuff like that.

Q: Did you observe the windows broken out before all this shooting or after?

A: Yes. Well, both of them. Before and after.

Redirect Examination by prosecution:

Q: Now, one other time did— The holes that are in this vehicle, did you observe any of those before Steven was shot?

A: Yes. They weren't busted out or nothing like that.

Q: They were not busted out? Okay. So you didn't see the holes before he was shot?

A: No.

Recross-examination:

Q: Mr. Glover, are you changing your testimony?

COURT: Objection sustained.

A: No.

Q: You indicated the windows in that car were shot out before you heard the shots as well as afterwards?

A: I said—

COURT: Ladies and gentlemen of the jury, you'll recall what the witness said. All right. Go ahead.

A: I said they wasn't shot before he got shot.

Defendant contends that the trial court improperly limited his right to cross-examine a witness against him. We disagree.

Although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court. *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986); *see also* N.C.G.S. § 8C-1, Rule 611 (1992). We conclude that the scope of the defendant's cross-examination of Melvin Glover was appropriately limited by the trial court to "protect the witness from harassment or undue embarrassment" while making the interrogation effective for the ascertainment of the truth. *See Id.* This assignment of error is without merit.

For the reasons outlined above, we hold that the defendant received a fair trial free from prejudicial error.

No Error.

Judges WELLS and GREENE concur.

ANGELA BROWN GABRIEL FLANDERS, PLAINTIFF v. JOEL PARKS GABRIEL, DEFENDANT

No. 9219DC473

(Filed 1 June 1993)

Divorce and Separation § 354 (NCI4th)— child custody—evidence of abuse by stepfather—award to mother

The trial court did not err in granting custody of a child to plaintiff mother rather than to defendant father, although there was some evidence that the child had been sexually abused by the stepfather, where the Department of Social Services had investigated and found that the child had not been neglected or abused, and where the trial court's finding that plaintiff mother offered a stable and continuous environment for the child supported the court's conclusion that it was in the best interest of the child for plaintiff mother to be granted custody.

Am Jur 2d, Divorce and Separation §§ 974 et seq.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 31 December 1991 in Cabarrus County District Court by Judge Clarence E. Horton, Jr. Heard in the Court of Appeals 15 April 1993.

Plaintiff Angela Brown Gabriel Flanders and defendant Joel Parks Gabriel were married in August of 1980 and were divorced in January of 1991. On 28 February 1986, plaintiff gave birth to the couple's only child, Jacob Parks Gabriel. When the parties separated in July of 1989, Jacob resided with plaintiff, and defendant visited Jacob on a weekly basis. While visiting the child in April of 1990, defendant noticed that Jacob was experiencing pain in his midsection. Defendant brought Jacob to an emergency room in Forsyth County. The emergency room physician noticed that the child had bruises in his genital area and reported his findings to the Forsyth County Department of Social Services. The Forsyth County Department of Social Services conducted an investigation in an attempt to determine who, if anyone, was abusing Jacob. The investigation was closed with inconclusive findings. In August of 1990, plaintiff moved to Charlotte, N.C. and later to Harrisburg, N.C., in Cabarrus County.

In the summer of 1991, defendant remarried and moved to Pennsylvania. During Labor Day weekend of 1991, Jacob was visiting defendant at defendant's home in Pennsylvania. Alleging that Steve Flanders, plaintiff's husband, was abusing Jacob, the defendant refused to return Jacob to plaintiff. On 11 September 1991, plaintiff filed an action in North Carolina seeking custody of Jacob, child support, and attorney fees. On that same date, an emergency custody order was entered by Judge Clarence E. Horton, Jr., awarding temporary custody of Jacob to plaintiff and ordering defendant to return Jacob to plaintiff in North Carolina. On 12 September 1991, defendant filed for emergency custody in Pennsylvania, and on 16 September 1991, a Pennsylvania court awarded defendant temporary custody of Jacob.

In North Carolina, on 18 September 1991, defendant filed an answer and counterclaim seeking custody of Jacob, child support from plaintiff, and attorney fees. Defendant also filed a motion seeking to dissolve the temporary custody order filed by Judge Horton in North Carolina. On 16 October 1991, Judge Horton entered an order denying defendant's motion and awarding temporary custody of Jacob to plaintiff, on the condition that the minor child not have any contact with Steve Flanders.

After plaintiff was granted emergency custody, the Cabarrus County Department of Social Services conducted an investigation based on defendant's allegations and reported that it found insufficient evidence to conclude that Jacob had been abused or neglected. On 3 October 1991, Steve Flanders, plaintiff's husband, entered into an agreement with the Cabarrus County Department of Social Services in which he agreed to refrain from physically assisting Jacob in his toileting, to refrain from touching Jacob's private parts for any reason, and to limit his wrestling playtime holds with Jacob to non-choking holds.

The plaintiff's complaint for custody and the defendant's counterclaim for custody were heard on 18 December 1991. On 9 January 1992, Judge Horton entered an order awarding custody of Jacob to plaintiff and granting visitation rights to defendant. Defendant gave notice of appeal on 17 January 1992.

Susan V. Thomas for plaintiff-appellee.

Helms, Cannon, Hamel & Henderson, P.A., by Thomas R. Cannon and William B. Hamel, for defendant-appellant.

WELLS, Judge.

On appeal, defendant contends that the trial court erred when it awarded custody of Jacob to plaintiff, the child's mother. In *Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627, *affirmed*, 328 N.C. 324, 401 S.E.2d 362 (1991), this Court addressed the appropriate standard of appellate review to be implemented when reviewing a trial court's custody order. The *Witherow* court wrote:

> The "welfare of the child is the paramount consideration which must guide the Court . . ." in its decision. *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). Findings of fact regarding the competing parties must be made to support the necessary legal conclusions. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E.2d 466 (1978). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Id.* at 604, 244 S.E.2d at 468. However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute. *Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981). This is a discretionary matter with the court which can only be disturbed upon " 'a clear showing of abuse of discretion.' " *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 672 (1984). (Citation omitted.)

In the case at bar, defendant first contends that the trial court erred by finding facts that were not supported by the evidence. "Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991). Specifically, defendant objects to the trial court's following findings of fact:

> 9. That the Defendant has made allegations of sexual abuse of the minor child of the parties against the present husband of the Plaintiff, Steve Flanders; that said allegations have not been substantiated by evidence at this hearing.
>
> . . .
>
> 11. That the best interests of the minor child require that he be allowed to remain in a stable, continuous environment;

the home he has with the Plaintiff and her present husband appears to be such a stable environment.

12. That the Plaintiff is a fit and proper person to have custody of the said minor child and it would be in the best interests of the said minor child that the Plaintiff be granted such custody.

13. That the Defendant is a fit and proper person to have visitation rights with his minor child.

As Judge Wynn's dissent aptly emphasizes, there was substantial evidence from which the trial court could have found that Jacob had been mistreated by his stepfather. The evidence as to whether he had been sexually abused was conflicting. Those conflicts were for the trial court to resolve. In support of the trial court's finding that the plaintiff and her present husband offer a stable and continuous environment, there was evidence that the child had resided with his mother since the parties separated and that the child had developed a routine and would be best served by not disrupting that routine or uprooting the child from his present home. In support of the trial court's finding that the plaintiff is a fit and proper person to have custody is plaintiff's history of providing care for the child and the Department of Social Services' investigation reports, finding that the child has not been neglected or abused. While defendant assigned error to the trial court's finding that defendant is fit to have visitation rights with the child, defendant's history of successful visitation in the past supports the trial court's finding that defendant is a fit and proper person to enjoy visitation in the future. In the case at bar, as in most custody hearings, evidence was presented to the trial court which could have supported contrary findings. Nonetheless, there was sufficient competent evidence to support the trial court's findings of fact.

Next, defendant contends that the trial court failed to make sufficient findings of fact concerning the best interest of the child. While there may well have been other evidence which helped the trial court determine that the best interest of the child was served by granting plaintiff custody, the trial court's finding of fact that plaintiff offered a stable and continuous environment for the child constitutes sufficient findings of fact to tip the scales in plaintiff's favor and support the trial court's conclusion that it is in the best interest of the child for plaintiff to be granted custody.

After carefully reviewing defendant's remaining arguments, we find them to be without merit.

Affirmed.

Judge GREENE concurs.

Judge WYNN dissents in a separate opinion.

Judge WYNN dissenting.

The guiding light in child custody proceedings is the best interest of the child. Our General Assembly codified this principle in Section 50-13.2(a) of the North Carolina General Statutes which provides:

> An order for custody of a minor child entered into pursuant to this section shall award custody of such child to such a person, agency, organization, or institution as will, in the opinion of the Judge, best promote the interests and welfare of the child. An order awarding custody must contain findings of fact which support the determination by the Judge of the best interests of the child.

N.C. Gen. Stat. § 50-13.2(a) (Cum. Supp. 1984).

In the subject case, the trial court apparently relied upon the two determinations by the Department of Social Services in making the finding of fact that allegations of the step-father's sexual abuse of the minor child had not been substantiated. However, the trial judge further found that the step-father had agreed to refrain from helping the child with his toileting, touching the child's private parts and using choke holds on the child. Additionally, the record contains an interview summary with the five-year-old child in which the child states that the step-father "thumps me on my penis" and pulls on his penis "real hard". The child stated that this conduct happens "a lot," usually after he goes to the bathroom.

The record further contains the testimony summary of Dr. Sara H. Sinal, an associate professor of pediatrics at Bowman Gray School of Medicine at Baptist Hospital in Winston-Salem. Her specialty is child abuse cases. She testified that the minor child was brought to her attention by an emergency room physician who

had seen the minor and was concerned about bruises and injuries that he discovered. She examined the child, reviewed the medical records and concluded that "the child had sustained too many unexplained or poorly explained injuries, and it was my opinion that it was highly suspicious that he had been a victim of child abuse".

The child's statements, Dr. Sinal's testimony, and the physical evidence, when coupled with the agreement of the step-parent not to commit inappropriate acts with the child, is evidence of child abuse which must not be ignored by the trial court even when the Department of Social Services makes its own determination that the allegations are unsubstantiated. The trial court's order, in my opinion, fails to reflect a consideration of this evidence. I, therefore, would remand this case to the trial court for a consideration of the evidence which tends to indicate that the minor child was abused.

ROANOKE PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP v. SPRUILL OIL COMPANY, INC.

No. 9210SC411

(Filed 1 June 1993)

1. Venue § 7 (NCI3d)— motion for change of venue—title to land not directly affected—change as matter of right properly denied

The trial court did not err by denying defendant's motion for a change of venue as of right where plaintiff and defendant entered into an agreement by which defendant provided tanks, pumps, and fuel inventory for a marina in Dare County, plaintiff agreed to purchase its fuel from defendant exclusively at least until the equipment was paid for, defendant recorded the agreement in the Dare County Register of Deeds, plaintiff subsequently brought an action in Wake County seeking a declaratory judgment that the exclusive fuel purchase provision was binding only until the equipment was paid in full, and defendant moved for a change of venue to Dare County. The complaint, viewed in its entirety, reveals that the action does not directly affect title to land or a right or interest therein. N.C.G.S. § 1-83.

Am Jur 2d, Venue §§ 58, 63, 65.

Construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and the ends of justice. 74 ALR2d 16.

2. Venue § 8 (NCI3d)— motion for change of venue—convenience—denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion for a change of venue from Wake to Dare County for the convenience of witnesses and the ends of justice in an action arising from a contract to supply equipment and fuel to a marina in Dare County where the record reflects that several of defendant's affiants reside in Wake County and that plaintiff's principal place of business is in Bertie County. Although defendant contended that all of its records concerning the property are recorded in Dare County, defendant does not contend that either the property or its records must be viewed to resolve the action.

Am Jur 2d, Venue § 84.

3. Unfair Competition § 1 (NCI3d)— fuel purchase agreement—not a valid requirements contract—not a valid exclusive dealing contract—void

The trial court properly voided the fuel purchase provisions of an agreement by which defendant furnished plaintiff equipment and fuel for a marina and plaintiff agreed to pay defendant 5 cents per gallon on fuel sold and to buy fuel exclusively from defendant until the equipment was paid in full. Although valid requirements contracts and valid exclusive dealing contracts are not within the province of N.C.G.S. § 75-5(b)(2) and are recognized by the courts and the legislature, this was not a requirements contract because it authorized defendant unilaterally to refuse to supply fuel without cause, and not an exclusive dealing contract because it did not require defendant to sell its product in the Manteo area exclusively to plaintiff. The entire contract is void and unenforceable under N.C.G.S. § 75-5(b)(2); however, plaintiff did not dispute the validity of the portion of the agreement requiring payment for the equipment and that portion of the agreement remains in effect.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 595, 597.

Appeal by defendant from order entered 10 February 1992 and order entered 12 February 1992 in Wake County Superior Court by Judge Donald W. Stephens. Heard in the Court of Appeals 30 March 1993.

Kirby, Wallace, Creech, Sarda & Zaytoun, by Paul P. Creech and Richard P. Nordan, for plaintiff-appellee.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr., David J. Irvine, Jr., and Lars P. Simonsen, for defendant-appellant.

GREENE, Judge.

Defendant appeals from orders entered 10 February 1992 and 12 February 1992, denying defendant's motion for change of venue, N.C.G.S. § 1-83, and granting plaintiff's motion for summary judgment, N.C.G.S. § 1A-1, Rule 56.

Plaintiff Roanoke Properties (Roanoke), as part of its development of a marina at Pirate's Cove subdivision in Manteo, North Carolina, sought to purchase fuel tanks, pumps, and related equipment from defendant Spruill Oil Company, Inc. (Spruill). Roanoke and Spruill entered into an agreement dated 28 August 1987 (the Agreement), which Spruill recorded in the Dare County Register of Deeds. The Agreement provides in pertinent part that Spruill will install and maintain "all the tanks and pumps necessary for the sale of gasoline and diesel fuel" at Pirate's Cove. In exchange, Roanoke agreed to pay Spruill "for its overhead costs and profit five (.05) cents per gallon for all gasoline and diesel fuel sold" at Pirate's Cove. Roanoke also agreed to pay Spruill an additional five cents per gallon "until a total of $95,957.54 principal, plus interest at 0% on the unpaid balance" has been paid to purchase the equipment installed by Spruill. The Agreement further provides at paragraph four that "[o]nly gas and diesel fuel supplied by Spruill may be sold on Pirate's Cove's premises." Paragraph nine of the Agreement, entitled "Inventory," states that

> Spruill will endeavor to keep enough inventory on hand at all times to meet [Roanoke's] service requirements. In the event Spruill cannot or *will not* supply gas and/or diesel fuel as provided in this agreement, [Roanoke] may . . . purchas[e] the product from another source and may continue to . . . *until Spruill offers to resume delivery* of petroleum products and the provisions of Paragraph 4 herein are waived by Spruill.

[Emphases added.] The term of the Agreement is for a five-year period ending on 31 September 1992, "with Spruill having the option of renewing the agreement on the same terms and conditions for two consecutive additional five (5) year periods."

On 4 October 1991, Roanoke filed an action in Wake County Superior Court seeking a judgment declaring that the provision of the Agreement regarding the purchase of fuel exclusively from Spruill is binding on Roanoke only until such time as the equipment is paid in full. According to Roanoke's complaint, at no time did Roanoke agree to bind itself to an exclusive fuel supply contract with Spruill for a period beyond the date that the equipment was paid in full. Roanoke also alleges that Spruill's recording of the "Memorandum of Agreement" created "a cloud upon the title of the property which has interfered with and restricted [Roanoke] from selling the property to . . . potential buyers."

On 24 October 1991, Spruill filed its answer and a motion for change of venue seeking removal of the action to Dare County on the grounds that plaintiff's complaint alleges that title to real property is involved, and that "the convenience of the witnesses and the ends of justice would be promoted" thereby. Subsequently, Roanoke and Spruill filed cross-motions for summary judgment. Wake County Superior Court Judge Donald Stephens denied Spruill's motion for a change of venue, both as a matter of law and in the court's discretion, and granted Roanoke's motion for summary judgment. In his order granting summary judgment, Judge Stephens declared void and unenforceable the provisions in the Agreement "which seek to require [Roanoke] to purchase gasoline and diesel fuel exclusively from [Spruill]." From this order, and from the order denying its motion for change of venue, Spruill appeals.

The issues presented are whether (I) the trial court erred as a matter of law and/or abused its discretion by denying Spruill's motion for change of venue; and (II) the provision in the Agreement stating that Roanoke may sell only fuel supplied by Spruill renders the Agreement invalid pursuant to N.C.G.S. § 75-5(b)(2).

I

Change Of Venue As Of Right

[1] Spruill argues that the trial court erred as a matter of law in denying Spruill's motion for change of venue pursuant to N.C.G.S. § 1-83. We disagree.

The trial court must, pursuant to N.C.G.S. § 1-83, upon timely motion of defendant, change the place of trial when the action is not brought in the proper county. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55 (1952). Actions for the determination of a right or interest in real property, *i.e.*, "local" actions, must be tried in the county in which the subject of the action, or some part thereof, is situated. N.C.G.S. § 1-76(1) (1983); *Snow v. Yates*, 99 N.C. App. 317, 320, 392 S.E.2d 767, 769 (1990). " 'Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein.' " *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 798, 336 S.E.2d 103, 104-05, *disc. rev. denied*, 315 N.C. 588, 341 S.E.2d 26 (1986) (citation omitted). The court is limited to a consideration of the allegations of the complaint in determining whether the judgment sought by the plaintiff would affect title to land. *Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 212, 368 S.E.2d 41, 42 (1988).

In the instant case, Roanoke alleges in its complaint that Spruill's recording of the Agreement in Dare County "created a cloud upon the title of the property." However, the complaint, when viewed in its entirety, reveals that the action brought by Roanoke does not *directly* affect title to land, or a right or interest therein. The judgment sought by Roanoke in this action is a declaration that the Agreement, properly interpreted, relieves Roanoke of its obligation to purchase its fuel exclusively from Spruill once Roanoke pays in full for the equipment installed by Spruill. The trial court did not err by denying Spruill's motion for change of venue on this basis.

Change Of Venue For Convenience

[2] Spruill argues that the trial court abused its discretion by denying Spruill's motion for change of venue to Dare County pursuant to N.C.G.S. § 1-83(2). We disagree.

"The trial court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2) (1983). It is well established, however, that the court's refusal to do so will not be disturbed absent a showing that the court abused its discretion. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 361 (1979).

In the instant case, the record reflects that several of Roanoke's affiants in support of its motion for summary judgment (*i.e.*, potential trial witnesses), including its financial officer, reside in Wake County, North Carolina, and that Spruill's principal place of business is in Bertie County, North Carolina. Although, according to Spruill, "all of the records concerning the subject property are recorded in Dare County," Spruill does not contend that either the property itself or its records must be viewed in order to resolve this declaratory judgment action. A review of the record does not persuade us that the trial court abused its discretion by failing to transfer the matter to Dare County.

II

[3] Spruill argues that the trial court, relying on N.C.G.S. § 75-5(b)(2), erroneously invalidated the fuel purchase provisions of the Agreement. According to Spruill, the Agreement is either a valid requirements contract or a valid exclusive dealing contract, negotiated at arms-length by sophisticated parties, and outside the provisions of Section 75-5(b)(2). Roanoke, on the other hand, argues that the fuel purchase provisions of the Agreement violate N.C.G.S. § 75-5(b)(2) and, for this reason, were properly voided by the trial court.

Section 75-5(b)(2) provides that,

> [i]n addition to the other acts declared unlawful by [Chapter 75 of the North Carolina General Statutes], it is unlawful for any person directly or indirectly to . . . , or to have any contract express or knowingly implied to . . . sell any goods in this State upon the condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.

N.C.G.S. § 75-5(b)(2) (1988). Although contracts which violate Section 75-5(b)(2) have long been deemed unenforceable in this State, *see, e.g., Standard Fashion Co. v. Grant*, 165 N.C. 453, 81 S.E. 606 (1914); *Florsheim Shoe Co. v. Leader Dep't Store, Inc.*, 212 N.C. 75, 193 S.E. 9 (1937), valid requirements contracts and valid exclusive dealing contracts are not within the province of Section 75-5(b)(2) and are recognized by our Courts and our Legislature. *See, e.g., Indian Mountain Jellico Coal Co. v. Asheville Ice and Coal Co.*, 134 N.C. 574, 47 S.E. 116 (1904) (enforcing contract pursuant to which plaintiff agreed to sell defendant "all the coal that may be required" by defendant during a specified time period);

Mar-Hof Co. v. Rosenbacher, 176 N.C. 330, 97 S.E. 169 (1918) (upholding exclusive dealing contract in which defendant manufacturer agreed to sell its suits exclusively in Winston-Salem to plaintiff retailer); N.C.G.S. § 25-2-306(1), (2) (1986); *see also* William B. Aycock, *North Carolina Law On Antitrust and Consumer Protection*, 60 N.C. L. Rev. 205, 242 (1982).

The Agreement at issue in the instant case, contrary to Spruill's contention, is neither a requirements contract nor an exclusive dealing contract. It is not a requirements contract because it authorizes Spruill unilaterally to refuse to supply fuel to Roanoke without cause, and hence does not obligate Spruill to supply the fuel requirements of Roanoke. It is not an exclusive dealing contract because by its terms it does not require Spruill to sell its product in the Manteo area exclusively to Roanoke. Rather, the Agreement is simply an equipment purchase contract which contains a provision requiring Roanoke to sell only fuel supplied by Spruill. This provision violates Section 75-5(b)(2), and under established law in this State deems the entire Agreement illegal and unenforceable. *See Florsheim*, 212 N.C. at 79, 193 S.E. at 11. However, because Roanoke does not dispute the validity of the portion of the Agreement requiring Roanoke to pay Spruill for the fuel tanks and equipment, that portion of the Agreement, as the trial court determined, remains in effect.

Affirmed.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA v. THOMAS GERALD BASDEN

No. 928SC612

(Filed 1 June 1993)

Perjury § 12 (NCI4th)— grand jury testimony—hedging of false statements—materiality

Defendant's answers of "No sir" to questions concerning a conversation about cocaine during testimony before the grand jury constituted "false statements" within the definition of perjury even though he hedged his answers when given second

opportunities to give truthful answers by stating "I don't think so" or "I don't recall saying that." Furthermore, defendant's answers met the materiality element of perjury where the grand jury was investigating the proliferation of drugs and drug offenses in the county and defendant's answers were capable of misleading or deceiving the grand jury as to whether a substance shown to defendant by another person was in fact cocaine and, if so, the amount thereof.

Am Jur 2d, Perjury §§ 98-100.

Appeal by defendant from judgment entered 26 February 1992 by Judge Henry L. Stevens, III, in Lenoir County Superior Court. Heard in the Court of Appeals 11 May 1993.

Defendant, Thomas Gerald Basden, was convicted of two counts of perjury and received a three year sentence at the 24 February 1992 Criminal Session of the Lenoir County Superior Court. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Dal F. Wooten for defendant-appellant.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: On 4 May 1987, Billy Ray Smith received 10 ounces of cocaine from Sidney Turnage and Vernon Rogers. Smith took the cocaine to his home, showed it to defendant and Darrel Rouse and proceeded to "cut one ounce." Billy Ray Smith was subsequently convicted of trafficking in cocaine and sentenced to 21 years in prison.

On 27 July 1988, Rita Smith, wife of Billy Ray Smith, was wired by detectives of the Kinston Police Department and went to see the defendant. During the course of the wired conversation, the following colloquy occurred:

Rita: Yeah, but like I said, if Billy Ray just hadn't got himself in this mess. He couldn't mess with just a little bit, he had to go big time.

Thomas: Well, he's been okay, I think.

Rita: Which I didn't even know nothing about that time that he had those ten ounces, and he told me, he said, "Yeah, Thomas and Darrel were there." I said, "Well, where was I at?" "I don't know; you must have been gone to your mama's or somewhere," he said, you know, but—

Thomas: I wish I had 10 ounces like that right there cause they were bricks, little old bricks, prettiest I ever seen.

On 24 October 1988, defendant appeared before a special investigative grand jury convened in Lenoir County to conduct a broad based investigation of the proliferation of drugs and drug offenses in Lenoir County. Before testifying under oath, defendant was advised of his constitutional rights and of the scope of the investigation. Defendant was also informed that if he lied to the grand jury about a material fact, he would be subjecting himself to a possible charge of perjury. Defendant, after stating that he understood his rights, freely, knowingly, understandingly and voluntarily waived immunity from prosecution and waived any right to prevent the use of his testimony in any criminal proceeding.

The questioning of the defendant before the grand jury centered on his drug activities and those of Billy Ray Smith. Before the grand jury, the defendant testified, *inter alia*, that on a Saturday in May 1987 while he and Darrel Rouse were at Billy Ray Smith's home, Smith showed them a large quantity of cocaine, some 200 or 300 ounces.[1] Later in his testimony, however, defendant recanted this testimony by denying that the substance he observed was cocaine and by refuting and qualifying the quantity of cocaine he had allegedly seen in Smith's possession. Defendant was then questioned about the July 1988 conversation he had with Rita Smith regarding[2] the May 1987 events he had earlier testified about. Defendant's answers to the questions regarding the conversation with Rita Smith form the bases for the perjury charges:

INDICTMENT

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 24th day of October, 1988 in Lenoir County Thomas Gerald Basden did unlawfully, wilfully, and feloniously commit per-

1. It appears defendant was confusing ounces with grams.

2. Rita Smith was wired with a recording device which picked up and recorded the soliloquy referred to in the indictment.

jury before Investigative Grand Jury 88IGJ1, Lenoir County, convened pursuant to N.C.G.S. 15A-623(b), where upon oath or solemn affirmation properly administered, he did falsely assert upon said oath a solemn affirmation that:

[FIRST COUNT]

Question: Did she tell you how much there was at the house that night?[3]

Answer: No sir.

Question: This time she came to talk to you, she didn't tell you how much there was?

Answer: I don't think so, I don't think so.

. . .

[SECOND COUNT]

Question: Did you not say to her that I wish I had ten ounces like that night because they are little old bricks, prettiest I ever seen?

Answer: No, sir.

Question: You never said that to her?

Answer: I don't recall saying that.

. . .

In the case *sub judice*, Rita Smith testified that she did in fact have a conversation with the defendant. She testified as to the substance of the conversation and that the conversation was recorded. The tape recording of the conversation was received into evidence, corroborating her testimony. Also, at defendant's trial in January 1990, on charges of trafficking in cocaine and possession of cocaine, defendant testified under oath that he gave false testimony to the investigative grand jury on 24 October 1988. Defendant offered no evidence at his trial for perjury. Defendant was convicted of the above two counts of felonious perjury and sentenced to three years.

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3. This is a paraphrasing of a question asked as a statement, "Well, she was there at the house—telling you how much there was at the house that night."

Defendant contends that the trial court erred in denying his motion for dismissal made at the close of all the evidence for insufficiency of the evidence to sustain a conviction.

The question for the trial court upon defendant's motion to dismiss made at the close of all of the evidence, was whether there was substantial evidence of each element of the offense charged and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). In determining the sufficiency of the evidence, the trial court is to view all of the evidence in the light most favorable to the State and give the State all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *Id.*

The essential elements of perjury are 1) a false statement under oath, 2) made knowingly, wilfully and designedly, 3) made in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, and 4) made as to some matter material to the issue or point in question. *State v. Smith*, 230 N.C. 198, 52 S.E.2d 348 (1949). It is defendant's contention that the statements he made to the grand jury as set out in the indictment against him were 1) not "false statements" within the definition of perjury; and 2) not material to the grand jury inquiry. We disagree.

To sustain a conviction for perjury, it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

As to the first count of the indictment, when defendant was asked whether Rita Smith was there at the house telling him how much (cocaine) there was at the house that night, the defendant answered, "No, sir." When given the opportunity by a second question to give a truthful answer, defendant continued to deny the conversation by saying, "I don't think so, I don't think so." As to the second count, when defendant was asked if he told Rita Smith that he wished he had ten ounces (of cocaine) like that night because they are little old bricks, prettiest he had ever seen, defendant answered, "No, sir." When given an opportunity by a second question to give a truthful answer, defendant continued to deny the conversation by stating, "I don't recall saying that."

At defendant's trial, proof of the perjured grand jury testimony was made by the testimony of Rita Smith about the substance of her conversation with defendant, a tape recording of the conversation, and evidence that defendant testified under oath at a trial in January 1990 that he had given false testimony to the investigative grand jury on 24 October 1988.

Defendant argues that by using terms such as "I don't think so," or "I don't recall saying that," he qualified his responses, thereby removing the previous false statements from the realm of perjury. In our research, we find no North Carolina cases addressing this point. However, there is federal case law that we find instructive: *U.S. v. Nickles*, 502 F.2d 1173 (7th Cir. 1974), *cert. denied*, 426 U.S. 911, 48 L.Ed.2d 837 (1976) (holding that "hedging" after a direct answer does not prevent testimony from being considered perjurious); *U.S. v. Ponticelli*, 622 F.2d 985 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016, 66 L.Ed.2d 476, *overruled on other grounds*, 730 F.2d 1255 (9th Cir. 1984) (holding that deception by the use of such precatory terms as "I believe" will not defeat a perjury charge); *U.S. v. Abrams*, 568 F.2d 411 (5th Cir.), *cert. denied*, 437 U.S. 903, 57 L.Ed.2d 1133 (1978) (demonstrating that an "I don't recall" answer may be held perjurious). We hold in the instant case, that defendant's equivocating statements of "I don't think so," and "I don't recall saying that," do not remove his false answers of "No, sir" from the realm of perjury.

An essential element of perjury is that the false statement under oath must be material to an issue or point in question. The false statement must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. *Smith*, 230 N.C. at 198, 52 S.E.2d at 348; *State v. Chaney*, 256 N.C. 255, 123 S.E.2d 498 (1962). The question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury. *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

In *U.S. v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1978), *citing U.S. v. Stone*, 429 F.2d 138, 140 (2nd Cir. 1970), the Court stated:

> [M]ateriality of statements made in a grand jury investigation may more readily appear than that of similar evidence offered on an issue of civil or criminal litigation, since the purpose of the investigation is to get at facts which will enable the grand jury to determine whether formal charges should be

made against someone rather than prove matters directly at issue.

Given the wide-ranging investigative function of the grand jury, the materiality of any line of inquiry pursued by a grand jury must be broadly construed. In attempting to define materiality of testimony in grand jury proceedings, the Court in *U.S. v. Friedhaber*, 826 F.2d 284, 286 (4th Cir. 1987), *on reconsideration*, 856 F.2d 640 (4th Cir. 1988) held that testimony is material if it has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation. The scope of the grand jury investigation in the case *sub judice* was broad. Defendant's doubtful responses were an attempt to influence the grand jury's investigation into the extent of the drug problem within the county, and including but not limited to the rendering of indictments. Defendant's answers were capable of misleading or deceiving the grand jury relative to whether the substance Billy Ray Smith showed to defendant and Darrel Rouse on 4 May 1987 was in fact cocaine, and if so, in what amount. It is not necessary that defendant's false statements actually impeded the grand jury investigation, only that the answers were capable of influencing the grand jury on an issue before it, including collateral matters. Accordingly, the trial court correctly denied defendant's motion to dismiss.

In the trial of defendant's case, we find no error and affirm the trial court's decision.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. JOHN ANTHONY HUTCHENS

No. 9221SC298

(Filed 1 June 1993)

1. Evidence and Witnesses § 2332 (NCI4th)— rape and indecent liberties—lay testimony regarding victim's emotional state—not admissible

The trial court erred in a prosecution for rape and indecent liberties by allowing a counselor who was neither tendered

nor received as an expert to describe the victim's "emotional state." This testimony went well beyond an opinion on emotions displayed on a given occasion permissible under N.C.G.S. § 8C-1, Rule 701 to describe behavioral patterns and symptoms which are outside the perception of a lay witness. An explanation of the symptoms and characteristics of sexually abused children is admissible (1) only through the testimony of an expert in the field and (2) only for the limited purpose of assisting the jury in understanding the behavior patterns of sexually abused children, and evidence that a particular child's symptoms are consistent with those of children who have been sexually abused is admissible only through the testimony of an expert in the field and only for the limited purpose of aiding the jury in assessing the complainant's credibility. The introduction of the lay testimony here, followed by the testimony of an expert who had not examined the victim, was a back-door attempt to introduce lay testimony that the victim exhibited symptoms consistent with those exhibited by sexual abuse victims.

Am Jur 2d, Expert and Opinion Evidence §§ 217 et seq.

2. **Evidence and Witnesses § 2332 (NCI4th)— rape and indecent liberties—symptoms and characteristics of sexually abused children—admitted as substantive evidence—error**

The trial court erred in a rape and indecent liberties prosecution by admitting expert testimony regarding the characteristics of sexually abused children as substantive evidence. Such testimony is admissible only to assist the jury in understanding the behavior patterns of sexually abused children and must be so limited by the trial court.

Am Jur 2d, Expert and Opinion Evidence § 244.

Appeal by defendant from judgments entered 1 November 1991 in Forsyth County Superior Court by Judge F. Fetzer Mills. Heard in the Court of Appeals 1 April 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

GREENE, Judge.

Defendant appeals from judgments entered 1 November 1991, which judgments are based on jury verdicts convicting defendant of two counts of first-degree rape, N.C.G.S. § 14-27.2, and one count of taking indecent liberties with a child, N.C.G.S. § 14-202.1.

The evidence presented by the State at defendant's trial established that the complaining witness is defendant's daughter, D., who was fourteen years old at the time of trial. D. testified that defendant separated from D.'s mother when D. was four years old. Defendant was awarded custody of D. According to D., defendant began touching her vagina with his penis or his hand when D. was six years old. When D. was eight years old and in the third grade, defendant began forcing, with threats of spanking, D. to perform oral sex on him. Defendant had sexual intercourse with D. on two occasions: once when D. was eight years old and again when she was eleven years old. When D. was twelve years old, defendant rubbed his penis between D.'s buttocks, asked her to "play with him," and fondled her. According to D., defendant would act appropriately when other people were present, but when she and defendant were alone, he would tease and fondle her. D. testified that when she was twelve years old she promised herself that she would never let defendant touch her again. D. considered running away as well as suicide. In November, 1990, when she was thirteen years old, D. went to the home of her second cousin, Deborah Reece. While there, D. for the first time revealed that defendant had been sexually molesting her for most of her life.

The State also presented the testimony of Lisa Allred (Allred), a counselor at Family Services, Inc. in Winston-Salem, who was neither tendered nor received as an expert. Allred testified that she had "taken a history" from D. and that D. told her essentially the same things that D. testified to at trial regarding sexual molestation by defendant. Allred was asked by the State to describe D.'s "emotional state." Allred replied that "[m]y observations of [D.'s] emotional state were that she had a lot of self-esteem problems." Allred continued:

> She was having difficulty concentrating. She described sleep disturbances and nightmares. She was feeling guilt and responsibility. She was withdrawn. She was experiencing bewilderment and confusion, frustration, abandonment and isolation,

> fear and anxiety, distrust, hopelessness, depression and suicidal feelings. On more than one occasion she described suicidal feelings. And overall she was feeling crazy. Those were the emotions that I had noted.

The trial court instructed the jury that Allred's testimony "is being received into evidence for the purpose of corroborating the witness that testified, if it does, and for no other purpose."

The State then presented over defendant's objection the testimony of Elaine Whitman (Whitman), also a counselor at Family Services, Inc., who the State tendered and the court received as an expert in the characteristics of sexually abused children. Whitman testified that children who have been sexually abused exhibit fear, anxiety, nightmares, sleep disturbances, feelings of responsibility, guilt, helplessness, distrust, depression, suicidal thoughts, anger, hostility, and isolation. Whitman testified that she had not evaluated D. and had never met D. The trial court admitted Whitman's testimony as substantive evidence.

Dr. Tad Lowdermilk testified that he examined D. in April, 1990, when D. was thirteen years old, and determined that D. was suffering from pelvic inflammatory disease, an illness seen in women that involves pain and tenderness in the lower abdomen and the organs of the pelvis. D. told Dr. Lowdermilk that she had had sexual intercourse in the past.

Defendant testified in his own behalf, and denied sexually molesting D. He also presented two other witnesses. Wanda Slate testified that D., when visiting Slate, did not abide by Slate's "ground rules." Ellen Jeffers testified that D. told her that D. would "hurt her Daddy" for not letting D. go with a certain boy.

The jury convicted defendant on all charges, and the court sentenced defendant to two consecutive life terms for the first-degree rape convictions and a concurrent three-year term for the indecent liberties conviction. Defendant appeals.

The issues presented are whether the trial court committed reversible error in (I) allowing counselor Allred to testify to D.'s "emotional state"; and (II) admitting as substantive evidence the expert testimony of counselor Whitman regarding the characteristics of sexually abused children.

I

[1] Defendant argues that the testimony of lay witness Lisa Allred describing D.'s "emotional state" constitutes inadmissible non-expert testimony that D. exhibited symptoms consistent with those exhibited by children who have been sexually abused. The State disagrees, arguing instead that Allred's testimony simply described the mental or emotional state of an alleged sexual abuse victim, and therefore was properly admitted by the trial court.

Opinion testimony on the emotional state of another is admissible in North Carolina pursuant to the following principles. First, North Carolina Rule of Evidence 701 authorizes the admission of lay opinion evidence if the opinion is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue. N.C.G.S. § 8C-1, Rule 701 (1992). Second, expert testimony regarding the mental and emotional state of an alleged sexual abuse victim has been determined to be relevant and admissible in North Carolina. *See State v. Kennedy*, 320 N.C. 20, 30-31, 357 S.E.2d 359, 366 (1987); *State v. Wise*, 326 N.C. 421, 425, 390 S.E.2d 142, 145, *cert denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990); N.C.G.S. § 8C-1, Rule 702 (1992).

In *Kennedy*, a psychologist, testifying as an expert, stated that the victim had responded to his personality and IQ test questions in an " 'honest fashion . . . admitting that she was in a fair amount of emotional distress.' " *Kennedy*, 320 N.C. at 30, 357 S.E.2d at 365. In *Wise*, the expert witness, a counselor, described the victim's emotional state as " '[g]enuine . . . not extremely emotional as far as crying, not furious, anger, related the story, there were tears, there was sadness, but not extreme.' " *Wise*, 326 N.C. at 425, 390 S.E.2d at 145. In both *Kennedy* and *Wise*, the defendants argued that the aforementioned testimony amounted to an impermissible comment by an expert witness on the credibility of the complainant. *See State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 65 (1987). The Court determined in each case that it did not, deeming proper a "statement of opinion by a trained professional based upon personal knowledge and professional expertise," and an expert's description of "her personal observations concerning the emotions of the victim during the counseling sessions." *Kennedy*, 320 N.C. at 31, 357 S.E.2d at 366; *Wise*, 326 N.C. at 427, 390 S.E.2d at 146.

In the instant case, Lisa Allred was neither tendered nor received, explicitly or implicitly, as an expert in any field, nor does defendant contend that Allred's testimony amounted to an impermissible comment on D.'s credibility. Thus, *Kennedy* and *Wise* are, in this regard, inapposite. The State argues that Allred nonetheless, pursuant to Rule 701, could give her lay opinion as to the emotional state of another. However, Allred's testimony went well beyond constituting pursuant to Rule 701 a permissible lay opinion on the emotions D. displayed on a given occasion, specifically, during counseling sessions. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 129 n.14 (3d ed. 1988). Allred described behavioral patterns (*e.g.*, difficulty concentrating, sleep disturbances, nightmares) and symptoms (*e.g.*, abandonment, isolation, depression, hopelessness) exhibited by D. which, as recognized in *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), are outside the perception of a non-expert. The "emotions" Allred described are in essence the characteristics of sexually abused children recognized in this State and elsewhere and delineated by expert witness Whitman, who testified immediately after Allred. In fact, a reading of the transcript belies the State's contention that Allred simply described D.'s emotional state. The prosecutor, in his attempt to introduce Whitman's testimony regarding the characteristics of sexually abused children, argued to the court that evidence regarding "the type of *symptoms and characteristics that Ms. Allred has testified to*" is admissible in a sexual abuse trial (emphasis added).

Our Supreme Court enunciated the rules regarding the admissibility of testimony regarding the characteristics of sexually abused children in *Kennedy* and, more recently, in *Hall*. An explanation of the symptoms and characteristics of sexually abused children is admissible (1) only through the testimony of an expert in the field, and (2) only for the limited purpose of assisting the jury in understanding the behavior patterns of sexually abused children. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366; *Hall*, 330 N.C. at 818, 412 S.E.2d at 887. Evidence that a particular child's symptoms are consistent with those of children who have been sexually abused is admissible (1) only through the testimony of an expert in the field, and (2) only for the limited purpose of aiding the jury in assessing the complainant's credibility. *Id.* The trial court is required to explain to the jury the permissible uses of the aforementioned evidence. *Hall*, 330 N.C. at 817, 412 S.E.2d at 887.

For the foregoing reasons, we reject the State's contention that Allred simply related a lay opinion as to the emotions displayed by D. on a given occasion for the purpose of corroborating D.'s testimony. Rather, we agree with defendant that the introduction of Allred's testimony, followed by Whitman's testimony, was a back-door attempt to introduce non-expert testimony that D. exhibited symptoms consistent with those exhibited by sexual abuse victims. Under the principles previously discussed, only an expert in the field is permitted to so testify, and therefore the admission of Allred's testimony was error.

II

[2] Defendant argues that the trial court committed reversible error in failing to limit the permissible uses of the State's evidence regarding the characteristics of sexually abused children.

As previously discussed, expert testimony regarding the symptoms and characteristics of sexually abused children is admissible only to assist the jury in understanding the behavior patterns of sexually abused children, and must be so limited by the trial court. In the instant case, the trial court admitted Whitman's testimony as substantive evidence. To do so was error.

We have carefully reviewed the transcript, and in light of the conflicting evidence presented at trial, have determined that, had the trial court not committed the aforementioned errors, there is a reasonable possibility that the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a) (1988). For this reason, defendant is entitled to a

New trial.

Judges WELLS and WYNN concur.

DANIEL JAMES REECE AND WIFE, VICKIE WHITE REECE, PLAINTIFFS v. HOMETTE CORPORATION, DEFENDANT

No. 9217SC353

(Filed 1 June 1993)

1. **Limitations, Repose, and Laches § 27 (NCI4th); Products Liability § 1 (NCI4th)— failure to state products liability claim— statute of limitations**

Plaintiffs' complaint does not allege a claim under the Products Liability Act, N.C.G.S. Ch. 99B, where plaintiffs seek recovery for damages to a mobile home manufactured by defendant and the alleged defects in the mobile home caused neither personal injury nor damage to property other than to the manufactured product itself. Accordingly, the statute of limitations for products liability actions brought under Ch. 99B, N.C.G.S. § 1-50(6), is inapplicable.

Am Jur 2d, Products Liability §§ 1-4, 909-923.

Products liability: what statute of limitations governs actions based on strict liability in tort. 91 ALR3d 455.

2. **Limitations, Repose, and Laches § 27 (NCI4th)— negligent manufacture of mobile home—statute of limitations**

The proviso "[u]nless otherwise provided by statute" in N.C.G.S. § 1-52(16) rendered the statute of limitations set forth in that statute inapplicable to plaintiffs' claim for damages allegedly caused by defendant's negligent manufacture, design and inspection of a mobile home purchased by plaintiffs because the sale of a mobile home is a "transaction in goods" covered by the Uniform Commercial Code, and N.C.G.S. § 25-2-725 is more specifically applicable to plaintiffs' claim.

Am Jur 2d, Products Liability §§ 909-923.

Products liability: what statute of limitations governs actions based on strict liability in tort. 91 ALR3d 455.

3. **Limitations, Repose, and Laches § 27 (NCI4th); Uniform Commercial Code § 11 (NCI3d)— breach of warranty of mobile home—claim barred by statute of limitations**

Plaintiffs' claim for damages to their mobile home manufactured by defendant was barred by the statute of limitations

where defendant's express warranty covered one year as permitted by N.C.G.S. § 25-2-725, and plaintiffs' claim was filed after the express warranty had expired. Furthermore, the claim was also barred under the four-year limitation of § 25-2-725 where it was filed more than four years after defendant tendered delivery of the mobile home to plaintiffs.

Am Jur 2d, Products Liability §§ 909-923.

Products liability: what statute of limitations governs actions based on strict liability in tort. 91 ALR3d 455.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 ALR4th 791.

Appeal by plaintiffs from judgment signed 29 November 1991 by Judge Howard R. Greeson, Jr. in Surry County Superior Court. Heard in the Court of Appeals 10 March 1993.

On 29 March 1986, plaintiffs signed a contract to buy a mobile home manufactured by defendant. Defendant delivered the mobile home in April 1986. Defendant is a wholly owned subdivision of Skyline Corporation. The mobile home came with a "Full One Year Warranty" which stated that "Manufacturing defects reported to Skyline within one year and ten days after original delivery by an authorized dealer will be corrected on site, without charge and within reasonable times."

In September 1990 (over four years after defendant delivered the mobile home to plaintiffs) plaintiffs noticed "stain and water damage where the walls meet the ceiling" in their mobile home. On 9 April 1991, plaintiffs filed a complaint seeking relief for the damage to their mobile home, alleging *inter alia* defendant's negligent manufacture, negligent design, and negligent inspection of the mobile home. On 7 June 1991, defendant filed an answer pleading the affirmative defense of the expiration of the statute of limitations and alleging that "plaintiffs were contributorily negligent in that plaintiffs failed to properly vent the foundation of the manufactured/mobile home and, upon information and belief, had gutters incorrectly and improperly attached and installed." On 11 October 1991, defendant filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 29 November 1991, the trial court granted defendant's motion for summary judgment. Plaintiffs appeal.

Donnelly & DiRusso, by F. Christian DiRusso, for plaintiff-appellants.

Smith Helms Mullis & Moore, by Robert A. Wicker and Christine T. Nero, for defendant-appellee.

EAGLES, Judge.

Plaintiffs contend that the trial court erred by granting defendant's motion for summary judgment pursuant to G.S. 1A-1, Rule 56. We disagree.

To prevail on its motion for summary judgment, defendant must meet its burden of establishing the lack of a genuine issue as to any material fact and its entitlement to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). Defendant may meet its burden by showing that plaintiffs cannot surmount an affirmative defense, such as the expiration of the applicable statute of limitations, which would bar plaintiffs' claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Defendant contends that the statute of limitations set forth in the Uniform Commercial Code (U.C.C.), G.S 25-2-725, operates to bar plaintiffs' claim. Plaintiffs argue that their claim is not barred procedurally because they "have filed this action within the shorter of both periods" established in G.S. 1-50(6) and G.S. 1-52(16). We conclude that in this factual situation G.S. 25-2-725 is the applicable statute of limitations and that it operates to bar plaintiffs' claim.

Plaintiffs contend that their claim is not time barred because their claim is governed by G.S. 1-50(6), which provides that "[n]o action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." Plaintiffs argue that G.S. 1-50(6) is applicable because their claim for damage to their mobile home is based on the manufacturer's negligence. We disagree.

[1] G.S. 1-50(6) "was enacted in 1979 with Chapter 99B, the Products Liability statute. 1979 N.C. Sess. Laws, ch. 654 . . . . G.S. § 1-50(6) was enacted with Chapter 99B to cover those actions to which that chapter [99B] applies." *Bernick v. Jurden*, 306 N.C. 435, 446, 293 S.E.2d 405, 412-13 (1982) (footnote omitted). Here, plaintiffs seek recovery for damages to the mobile home, the prod-

uct manufactured by defendant. In *Cato Equipment Co. v. Matthews*, 91 N.C. App. 546, 549, 372 S.E.2d 872, 874 (1988), this Court held that the provisions of Chapter 99B were inapplicable where the alleged defects of the product manufactured by defendant caused neither personal injury nor damage to property other than to the manufactured product itself. Accordingly, plaintiffs' complaint does not allege a viable claim under Chapter 99B, and G.S. 1-50(6), the statute of limitations for product liability actions brought under Chapter 99B, is inapplicable.

[2] Alternatively, plaintiffs argue that the statute of limitations found in G.S. 1-52(16) is applicable. G.S. 1-52(16) provides:

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

In accordance with the proviso "[u]nless otherwise provided by statute," we conclude that G.S. 1-52(16) is rendered inapplicable by virtue of G.S. 25-2-725, which is more specifically applicable to plaintiffs' claim. Our Supreme Court has stated:

> Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability. *National Food Stores v. North Carolina Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966); *State ex rel. Utilities Comm. v. Union Electric Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968). "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell*, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979); *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E.2d 457 (1979).

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985).

Here, plaintiffs seek recovery solely for damage to their mobile home, which was manufactured by defendant. The sale of a mobile home is a "transaction in goods." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). Article 2 of Chapter 25, the Uniform Commercial Code (U.C.C.), applies to "transactions in goods." G.S. 25-2-102. Accordingly, the U.C.C. determines the rights of the parties here. *Alberti*, 329 N.C. at 732, 407 S.E.2d at 822.

[3] Here, plaintiffs' claim seeks recovery only for damage to the mobile home, the very product manufactured by defendant. This claim is substantially different from a claim arising from a factual situation where the manufactured product causes physical injury to a person or to property other than the manufactured product itself.

> The U.C.C. is generally regarded as the *exclusive* source for ascertaining when the seller is subject to liability for damages if the claim is based on an intangible economic loss and not attributable to physical injury to person or to a tangible thing other than the defective product itself. *Prosser and Keeton [on Torts], supra*, § 95A, at 680 [5th ed. 1984]. If intangible economic loss were actionable under a tort theory, the U.C.C. provisions permitting assignment of risk by means of warranties and disclaimers would be rendered meaningless. It would be virtually impossible for a seller to sell a product "as is" because if the product did not meet the economic expectations of the buyer, the buyer would have an action under tort law. The U.C.C. represents a comprehensive statutory scheme which satisfies the needs of the world of commerce, and courts have been reluctant to extend judicial doctrines that might dislocate the legislative structure. *Henry Heide, Inc. v. W R H Products Co.*, 766 F.2d 105, 109 (3d Cir. 1985).

2000 Watermark Association, Inc. v. Celotex Corporation, 784 F.2d 1183, 1186 (4th Cir. 1986); *see Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 432, 391 S.E.2d 211, 217, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 674, *reconsid. denied*, 327 N.C. 632, 397 S.E.2d 76 (1990) (adopting the rule set forth in *2000 Watermark Association*, 784 F.2d 1183). *Cf. Spillman v. American Homes*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly

perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation."); *Ports Authority v. Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."). Similarly, it would be anomalous to permit plaintiffs to circumvent the legislature's enactment of the U.C.C.'s shorter statute of limitations specifically designed for claims arising from the "transaction of goods" by virtue of a more general statute of limitations such as that found in G.S. 1-52(16).

In the U.C.C., G.S. 25-2-725 provides that:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Here, the manufacturer's express warranty covered a period of approximately one year. Defendant tendered delivery of the mobile home in April 1986. Plaintiffs noticed the water damage over four years later in September 1990 and did not file their complaint until 9 April 1991. Accordingly, plaintiff has no right to recovery under the manufacturer's express warranty due to its expiration. Having filed their complaint on 9 April 1991, plaintiffs also failed to commence this action within four years after defendant tendered delivery. G.S. 25-2-725.

In sum, we conclude that plaintiff's action is barred by the statute of limitations found in G.S. 25-2-725.

Affirmed.

Judges COZORT and WYNN concur.

WHIRLPOOL CORPORATION, PLAINTIFF v. DAILEY CONSTRUCTION, INC.; W. C. DAILEY AND DAILEY INVESTMENTS, INC., INDIVIDUALLY AND AS GENERAL PARTNERS FOR BRAEHILL WAY LIMITED PARTNERSHIP; BRAEHILL WAY LIMITED PARTNERSHIP; AND FIRST UNION NATIONAL BANK OF SOUTH CAROLINA, DEFENDANTS

No. 9221SC424

(Filed 1 June 1993)

Uniform Commercial Code § 43 (NCI3d)— appliances incorporated into apartment project—security agreement—authorization of sale—termination of security interest upon sale of project

Where plaintiff sold various kitchen appliances to defendant contractor for incorporation into an apartment project, and plaintiff retained a security interest in the appliances, language in the security agreement providing that the contractor represented "that the products sold hereunder that are designated for use in or delivery to a specified building site will be used only at that site, and will be resold only as a part of the building project or a unit thereof" constituted at least an implied authorization by plaintiff for the appliances to be sold as part of the apartment project, and plaintiff's security interest in the appliances was terminated under N.C.G.S. § 25-9-306(2) when the contractor sold the apartment complex, including the appliances, to the developer. The fact that the same individual served as president of defendant contractor and general manager of the developer does not permit the existence of separate business entities to be disregarded in this case.

Am Jur 2d, Secured Transactions § 269.

Appeal by plaintiff from order and judgment entered 27 January 1992 by Joseph R. John, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 31 March 1993.

Tuggle Duggins & Meschan, P.A., by Thomas S. Thornton and Jonathan S. Dills, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by D. Anderson Carmen, for defendant Braehill Way Limited Partnership.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant First Union National Bank of South Carolina.

LEWIS, Judge.

The issue presented by this appeal arises out of a security agreement between Dailey Construction, Inc. ("Dailey Construction") and Whirlpool Corporation ("Whirlpool"). On 11 January 1990, Whirlpool sold various kitchen appliances to Dailey Construction for incorporation into the Glen Eagles Apartment project in Winston-Salem. As part of the agreement, Whirlpool retained a security interest in the appliances, which it properly filed and perfected.

Prior to the execution of the security agreement between Dailey Construction and Whirlpool, Dailey Construction had entered into a construction contract with Braehill Way Limited Partnership ("Braehill") to construct the Glen Eagles Apartments. Dailey Construction was to be the general contractor for the project and obtained a construction loan from First Union National Bank of South Carolina ("First Union") in June of 1989. As security for the construction loan, First Union took a security interest in the property, improvements and all personal property relating to the project. As per the terms of the construction contract, Dailey Construction sold the Glen Eagles Apartments to Braehill when construction was completed and a portion of the money paid to Dailey Construction represented the cost of the appliances installed in the apartments. Braehill and First Union claim that Whirlpool lost its security interest in the appliances because Whirlpool authorized the sale as per N.C.G.S. § 25-9-306(2). This matter came before the trial court on 13 January 1992 on cross-motions for summary judgment. The trial court granted summary judgment in favor of Braehill and First Union, and Whirlpool has appealed.

The only significant issue presented by this appeal is whether Whirlpool's security interest in the appliances was terminated as a result of the sale of the appliances to Braehill. On the facts of this case we hold that Whirlpool's security interest was terminated, but we are troubled by the manner in which it was done. At all times pertinent to this appeal, W.C. Dailey was the president of Dailey Construction. In addition, the same W.C. Dailey was the only noncorporate general partner of Braehill. As a result the sale from Dailey Construction to Braehill, which ultimately terminated Whirlpool's security interest, was conducted by W.C. Dailey in his representative capacity on behalf of both Dailey Construction and Braehill.

As a general rule, a security interest is effective against subsequent purchasers. N.C.G.S. § 25-9-201 (1986). However this rule is not without exception. The two exceptions which are most applicable to the facts of this case are contained in N.C.G.S. § 25-9-306(2) and § 25-9-307(1). Braehill and First Union claim that § 25-9-306(2) is applicable because Whirlpool authorized the sale of the appliances. The specific language of § 25-9-306(2) provides:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, ...

Whirlpool denies ever authorizing the sale of the appliances and says that § 25-9-307(1) is the only other section that could apply to this case. Section 25-9-307(1) provides:

> A buyer in the ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

The definition of a buyer in the ordinary course of business is in turn provided by N.C.G.S. § 25-1-201(9) and states:

> "Buyer in the ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . .

The essence of Whirlpool's argument is that since W.C. Dailey represented both Dailey Construction and Braehill in the sale of the appliances, then it was impossible for Braehill to have taken in good faith and without knowledge of Whirlpool's security interest. Thus, according to Whirlpool's argument, neither § 25-9-306(2) nor § 25-9-307(1) are applicable and the general rule of § 25-9-201 applies. Although this is a compelling argument, we do not agree.

By definition, § 25-9-306 applies rather than § 25-9-307 when the sale of collateral is authorized. 9 Anderson, *Uniform Commercial Code*, § 9-306:42 (3d ed. 1985). Since the issue of whether Whirlpool authorized the sale to Braehill is so sharply disputed, we address this issue first, because if Whirlpool authorized the

sale of the appliances then Braehill acquired title free of Whirlpool's security interest regardless of Braehill's status as a buyer in the ordinary course as that term is defined in § 25-1-201(9). *See Finance America Commercial Corp. v. Econo Coach, Inc.*, 454 N.E.2d 1127 (Ill. App. 2d Dist. 1983). The answer to whether or not a creditor has authorized the transfer of collateral may be found either by express consent, by implication, or by a course of conduct expressing consent. 9 Anderson, *Uniform Commercial Code*, § 9-306:44 (3d ed. 1985). Both Braehill and First Union claim that Whirlpool expressly consented to the transfer of the appliances by the specific language used in the security agreement. The language upon which Braehill and First Union rely is contained in paragraph 10 of the security agreement and states:

> Buyer's Representation. The Buyer represents that the products sold hereunder that are designated for use in or delivery to a specified building site will be used only at that site, and will be resold only as a part of the building project or a unit thereof.

Given that a security agreement is essentially a contract between the creditor and the debtor, we believe that the issue in this case is one of contract interpretation as to whether the above quoted language amounts to an authorization of sale.

The rules of contract interpretation are well established. When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court. *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481, 333 S.E.2d 559 (1985), *aff'd*, 318 N.C. 259, 347 S.E.2d 425 (1986). However if the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury. *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 306 S.E.2d 587 (1983). Having reviewed the security agreement, we believe that the language of paragraph 10 is clear and unambiguous. A fair reading of paragraph 10 leaves no doubt that both Whirlpool and Dailey Construction knew that the appliances were to be incorporated into the Glen Eagles Apartment project and then resold as part of the project. It is clear that Whirlpool, if not expressly, then at least impliedly consented to the resale. Such a result is mandated not only by the terms of the security agreement, but also by logic because unless the appliances were resold as part of the apartment project,

Dailey Construction did not stand to profit from the project and would have been unable to repay Whirlpool.

In reaching our decision we are guided by an opinion of the Virginia Supreme Court in a similar case. In *Graves Constr. Co. v. Rockingham Nat'l Bank*, 263 S.E.2d 408 (Va. 1980), a local school board contracted to have a school built. The electrical subcontractor in the case was authorized by its secured creditor to sell its collateral in the ordinary course of business. After the electrical subcontractor defaulted on its obligation, the secured creditor attempted to take possession of the electrical subcontractor's wiring and materials stored on the job site, and the general contractor objected. The Virginia Supreme Court held that since the general contractor had paid the electrical subcontractor on a monthly basis that title to the materials had passed to the general contractor regardless of the secured creditor's security interest. Supplying the rationale for its decision, the Virginia Supreme Court stated that the incorporation of the electrical subcontractor's inventory into the school building was the type of sale authorized within the language of the security agreement. For the same reasons, we feel that Dailey Construction, in the course of its business, incorporated its materials into the Glen Eagles Apartments and this is exactly what Whirlpool authorized in the security agreement.

In conclusion, we must state that we are disturbed by the fact that W.C. Dailey played such an integral part in the transaction for both Dailey Construction and Braehill. However, just because W.C. Dailey was the president of Dailey Construction and the general manager of Braehill, does not allow us to disregard the existence of separate business entities. *See Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555 (1986). Had evidence of bad faith been presented as to this issue, or if other equitable factors had been produced which would have allowed us to disregard the separate business status of Dailey Construction and Braehill, then we may have reached a different result. However, on the facts of this case we must give due regard to the corporate formalities that are in place and without more we cannot say that bad faith existed. The order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

STATE OF NORTH CAROLINA v. RAYMOND LOUIS BARNES

No. 929SC367

(Filed 1 June 1993)

Kidnapping and Felonious Restraint § 21 (NCI4th)— kidnapping— purpose of terrorizing victim—evidence sufficient

There was sufficient evidence in a kidnapping prosecution that defendant confined or restrained the victim for the purpose of terrorizing him where the victim broke into the house of defendant's son and stole items which he sold to support a drug habit; defendant and his accomplices subsequently accosted the victim in the parking lot of a Golden Corral; they were all armed except the victim; defendant carried a pump shotgun; the victim was searched; defendant smashed the shotgun against the victim's head; the victim broke free and ran; he was subsequently accosted by defendant and his accomplices at the victim's apartment; as defendant and one accomplice were pushing on the front door, the victim opened it quickly, so that defendant and his accomplice fell into the apartment; the victim escaped with defendant's accomplices in pursuit and threatening to shoot him; he was caught, held at bay with a gun, and ordered to get into a limousine; defendant was waiting in the limousine with a pump shotgun and told the victim he was taking him to Durham to retrieve the items stolen from his son; the limousine was stopped at a roadblock by law enforcement officials; the victim emerged scared, shaking, nervous, and crying; and the victim told officers that defendant was trying to kill him, that defendant had forced him to go with defendant by using a pistol, and that he was still in fear of his life. There was sufficient evidence to show that defendant intended to and did put the victim in an intense state of fright or apprehension when the victim was placed in the limousine and confined there so that he would agree to retrieve the stolen items.

Am Jur 2d, Abduction and Kidnapping § 32.

Appeal by defendant from judgment entered 12 December 1991 by Judge George M. Fountain in Person County Superior Court. Heard in the Court of Appeals 1 April 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for State.

H. M. Michaux, Jr., for defendant.

JOHNSON, Judge.

The facts in this case are as follows: Rodney Burnette broke into the house of the defendant's son on Saturday morning, 1 December 1990, stole some items and then sold those items to support a drug habit. That night, while Rodney was in his car in the Golden Corral parking lot, defendant, armed with a shotgun, and his accomplices, who were also armed, stopped Rodney's car. They made Rodney exit the car and after searching him, defendant struck him in the head with a pump shotgun. Rodney escaped and ran to a friend's house. The friend's father, Joseph Bennett, transported Rodney to the hospital where he was treated for a head injury resulting from the blow to his head. Although the police were called, Rodney was afraid to press charges or to return immediately to his apartment. He eventually returned home at about 5:00 a.m. Sunday morning. Later that day, defendant and his accomplices arrived at Rodney's apartment in a white limousine. As they exited the limousine, Rodney saw that defendant had a pistol. Defendant and one accomplice came to the front door, another accomplice went to the back door, and one remained at the limousine. Defendant and the accomplice at the front door began pushing on the door to force it open. As they pushed against the door, Rodney snatched the door open, causing the two to fall to the floor inside the apartment. Rodney ran from the apartment with defendant's accomplices in pursuit. The accomplices were threatening to shoot as they chased him. They out ran Rodney and tackled him. While holding a gun on him, they ordered him to get into the limousine which had then driven up to where they were. Defendant was seated in the limousine with a pump shotgun on the floorboard. Defendant accused Rodney of breaking into his son's home and said that he was taking Rodney to Durham to make him find the stolen property. After riding for about twenty minutes, the limousine came upon a roadblock set up by the police. Rodney exited the limousine and related to Officer Poole, one of the law enforcement officials at the roadblock, the events that had transpired. Rodney's statement was later reduced to writing which he signed after reading it.

Donnell Bennett, Joseph Bennett and Danny Eastwood testified for the State and corroborated various aspects of Rodney's testimony.

The defendant contends that the trial court erred in failing to allow his motion to dismiss at the close of all of the evidence because the State failed to establish the crime of kidnapping with the intent to terrorize. We find this argument meritless.

In passing upon a motion to dismiss made pursuant to North Carolina General Statutes § 15A-1227 (1988), all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Contradictions and discrepancies do not warrant dismissal of the charges for they are for the jury to resolve. *Id.* The question for the trial court is whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. *State v. Corbett and State v. Rhone*, 307 N.C. 169, 297 S.E.2d 553 (1982). If so, the motion is denied. *Id.*

In order to sustain a conviction for kidnapping the State must prove that "the defendant unlawfully confined, restrained or removed the person for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). In the present case, the purpose set out in the indictment was terrorizing. The trial court, in conformity with the indictment, submitted the offense of kidnapping to the jury on the theory that the defendant had unlawfully confined, restrained or removed Rodney Burnette for the purpose of terrorizing him. In *Moore*, the Court indicated that terrorizing was 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." *Id.* at 744, 340 S.E.2d at 405.

In the case *sub judice*, the State's witness, Rodney, testified that defendant and his accomplices accosted him in the parking lot of the Golden Corral. They were all armed except Rodney. Defendant personally carried a pump shotgun. After Rodney had been searched, defendant took the pump shotgun and smashed it against Rodney's head. Rodney broke free and ran to escape defendant and his accomplices. He ran to a place called Ely's Club where he caught a ride to his friend Donnell Bennett's house. Donnell's father, Mr. Joseph Bennett, took Rodney to the hospital to receive treatment for the head wound.

Mr. Donnell Bennett testified that he saw three or four men pull up at Golden Corral, confront Rodney and then hit him in the head before Rodney escaped. Mr. Joseph Bennett testified that he took Rodney to the hospital for treatment of the head wound.

After the first incident at the Golden Corral, the State's evidence showed that Rodney was again accosted by the defendant and his accomplices. Rodney signed a written statement relating the details of that incident. The defendant and his accomplices drove to Rodney's apartment on 2 December 1990 in a white limousine. Rodney noticed that the defendant had a pistol. When defendant and one of his accomplices were pushing against the front door to force it open, Rodney opened the apartment door quickly causing the defendant and his accomplice to fall into the apartment. Rodney escaped from the apartment with defendant's accomplices in pursuit and threatening to shoot him. Rodney was caught and while held at bay with a gun was ordered to get into the limousine. The defendant was waiting in the limousine with a pump shotgun. The defendant accused Rodney of stealing some items from his son and told Rodney he was taking him to Durham to retrieve the property.

Danny Eastwood further corroborated Rodney's version of the incident. He stated that he saw two black males chasing a third black male across a nearby field early Sunday afternoon. When they caught him, they started to beat him at which time Danny called 911. He then saw a white limousine leave the area and he did not see the black males anymore.

In addition, the State's evidence showed that the limousine was stopped at a roadblock by law enforcement officials. Rodney was scared, shaking, nervous, and crying when he exited the vehicle. Rodney told an officer at the roadblock, Officer Poole, that he had stolen some items from defendant's son and that defendant was trying to kill him. He also told Officer Poole that, "I did not want to go with Raymond [defendant] but he forced me to go against my will by using a pistol to threaten me. I am still—I am still in fear of my life because Raymond Barnes [defendant] has people working for him that would do anything he tells them to do. I think they're going to kill me."

Defendant contends that the evidence presented was suspicion and conjecture. Defendant also contends that the fear shown by Rodney at the roadblock was due to the show of weaponry by

the law enforcement officials. In fact, defendant contends that at no time was Rodney "in an intense state of fright or apprehension." Lastly, defendant contends that Rodney admitted at trial that the statement he gave Officer Poole was in part untrue, and therefore, the evidence was manifestly insufficient to establish the intent of the defendant. Defendant calls particular attention to the examination by the district attorney when he was questioning the prosecuting witness about the accuracy of his statement.

> Q. All right, Is there anything else on page two that's not correct.
>
> A. The part about he said he was taking me to Durham and make me find the stolen items.
>
> Q. What is not accurate about that?
>
> A. He did not say he was going to make me find the stolen items.
>
> Q. What did he say?
>
> A. He asked me would I sign a statement saying I was going to take him to Durham to help him get the items back.

Considering the evidence in the light most favorable to the State, resolving all contradictions and inconsistencies in the State's favor, we find the State presented sufficient evidence to show that the defendant intended to and in fact did put the victim in an intense state of fright or apprehension when they placed the victim in the limousine and confined him there so that he would agree to retrieve the stolen items. There was sufficient evidence to take the case to the jury.

We find no error.

Judges ORR and McCRODDEN concur.

CECIL V. CHERRY, SR., INDIVIDUALLY, AND CECIL V. CHERRY, SR., EXECUTOR OF THE ESTATE OF BESSIE JONES CHERRY, PLAINTIFFS v. LAWRENCE S. HARRIS, DEFENDANT

No. 923SC349

(Filed 1 June 1993)

Public Officers and Employees § 35 (NCI4th)— forensic pathologist—autopsy at medical examiner's request—public officer—governmental immunity

The doctrine of governmental immunity protected defendant, a forensic pathologist who was also a county medical examiner, from liability for alleged negligence in issuing an initial autopsy report stating that plaintiffs' son died as a result of suicide where defendant was officially requested by the medical examiner of another county to perform the autopsy to serve the public interest, and where defendant acted in good faith and within the scope of his responsibilities and duties as a designated pathologist.

Am Jur 2d, Public Officers and Employees §§ 358 et seq., 375.

Validity and construction of statute authorizing or requiring governmental unit to indemnity public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

Appeal by plaintiffs from order entered in open court 7 October 1991 and filed 10 October 1991 by Judge David E. Reid, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 11 March 1993.

Gaylord, Singleton, McNally, Strickland & Snyder, by Vernon G. Snyder III, for plaintiff appellants.

Williamson, Herrin, Barnhill, Savage & Morano, by Mark R. Morano, for defendant appellee.

COZORT, Judge.

Plaintiffs filed suit against defendant on 26 April 1991 to recover damages for negligent infliction of emotional distress and for recovery of expenses associated with the initial rejection of claims under

life insurance policies under which they were beneficiaries. Plaintiffs' action was filed as the result of an autopsy report issued by defendant stating that their son's cause of death was suicide. The trial court granted summary judgment for defendant based on the doctrine of governmental immunity. Plaintiffs appeal. We affirm.

Plaintiff Cecil V. Cherry, Sr., and plaintiff's testate Bessie Jones Cherry, are the parents of the deceased, William Benjamin Cherry, who died on 13 February 1988. After William Cherry's death, the Beaufort County Medical Examiner, Elizabeth Cook, M.D., requested that defendant Lawrence S. Harris, M.D., perform an autopsy on the body. Defendant is a forensic pathologist employed by the East Carolina University School of Medicine. He also serves as a medical examiner for Pitt County.

Defendant complied with Dr. Cook's request by performing an autopsy at Pitt County Memorial Hospital in Greenville, North Carolina, on 14 February 1988. Defendant prepared a summary report of the autopsy dated 12 April 1988, which was issued and released to plaintiff and plaintiff's testate. The recited opinion of defendant was that the cause of death of William Cherry was "Acute toxicity of trimipramine" and the manner of death was "suicide." Defendant was asked to re-evaluate the cause and manner of death of Mr. Cherry. Defendant issued a revised summary report of the autopsy on 24 August 1988, which indicated that Mr. Cherry's cause of death consisted of "Acute combined toxicity of trimipramine and phentermine," and the manner of death was "Accidental-therapeutic complication."

Plaintiffs thereupon filed this action based upon the alleged negligent acts and omissions of defendant which resulted in the initial autopsy report. Conflicting medical opinions as to the issues of defendant's negligence and conformity with the standard of care for forensic pathologists were submitted in affidavits.

Defendant originally made a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Later, on 27 September 1991, defendant converted his Rule 12(b)(6) motion to a motion for summary judgment by filing affidavits with the trial court in accordance with N.C. Gen. Stat. § 1A-1, Rule 56 (1990). The trial court granted defendant's motion for summary judgment based on the finding that defendant "was acting in the capacity of medical examiner . . . [and] [t]hat in that

capacity, Dr. Harris was acting as a public official protected by immunity; the official immunity that is governmental immunity that is afforded to a public official."

The issue presented on appeal is whether the trial court erred in granting the defendant's motion for summary judgment. Plaintiffs contend the trial court erred in determining that (1) defendant was acting as a public officer for immunity purposes; and (2) defendant should be afforded governmental immunity for his actions. No case in North Carolina speaks to the narrow issue present here: whether the doctrine of governmental immunity protects a medical examiner from alleged liability for negligence when he was officially requested by another medical examiner to conduct an autopsy to serve the public interest.

This Court has previously discussed the applicability of governmental immunity to actions by public officers:

> When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability. A public officer sued individually is normally immune from liability for "mere negligence."

Hare v. Butler, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990) (citations omitted). The definition of a public officer is someone whose "position [is] created by the constitution or statutes of the sovereignty . . . ." *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *Id.* "Officers exercise a certain amount of discretion, while employees perform ministerial duties." *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. "Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are 'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.' " *Id.* (quoting *Jensen v. S.C. Dep't of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988)).

Our Supreme Court has determined that county coroners are public officers, *Gillikin v. U.S.F.& G. Co.*, 254 N.C. 247, 118 S.E.2d 606 (1961), as are medical examiners, *Grad v. Kaasa*, 312 N.C. 310,

321 S.E.2d 888 (1984), for purposes of applying the governmental immunity doctrine. Plaintiffs argue, however, that a medical examiner should be granted public official immunity only for actions performed within the executive level of his or her statutorily defined office as medical examiner and not for actions performed at an operational level in the capacity of physician or forensic pathologist. We disagree.

We find a federal case, *Lawyer v. Kernodle*, 721 F.2d 632 (8th Cir. 1983), instructive. In *Lawyer*, a pathologist who conducted an autopsy was sued by the decedent's family. The plaintiff claimed the defendant negligently diagnosed the cause of death. The defendant pathologist was not a coroner; rather, he was an employee of a company the county coroner had hired to perform autopsies in that county. The court stated:

> We think it clear that [the doctor], in performing the autopsy of [decedent] for [the county], was acting under *color of state law and was exercising his professional judgment and discretion. His services were engaged pursuant to statutory authority* and his opinion as to the cause of death became the basis of the government's decision whether to bring criminal charges. . . . Since he was engaged under the statute to perform official duties, he was performing those duties under color of state law and he clearly enjoyed the same immunity privilege the coroner could assert.

Lawyer, 721 F.2d at 635 (emphasis added).

In the case below, defendant conducted the autopsy and prepared his reports in response to an official request by the Beaufort County Medical Examiner, Dr. Cook. As part of her investigation into the unnatural death of William Cherry, Dr. Cook had the statutory authority pursuant to N.C. Gen. Stat. § 130A-389(a) (1992) to order that an autopsy be performed by a pathologist who has been designated by the Chief Medical Examiner. Defendant, a board certified forensic pathologist, had such approval. Defendant was required to prepare a "complete autopsy report of findings and interpretations" pursuant to N.C. Gen. Stat. § 130A-389(a). He received no compensation for conducting the examination. The materials before the trial court additionally tended to show that defendant acted in good faith and within the scope of his responsibilities and duties as a designated pathologist. Defendant exercised personal deliberation, decision, and judgment in applying his medical

expertise to conduct an autopsy and to render an expert opinion as to the cause and manner of William Cherry's death. Furthermore, there is no allegation, and we find no evidence that defendant acted with any ill will or malice toward Mr. Cherry or his family. We therefore find that defendant is entitled to the immunity afforded a public official. The order granting summary judgment in defendant's favor is

Affirmed.

Judges EAGLES and WYNN concur.

ARCHIE MALONE SMITH v. HARRIS B. GUPTON, AND GUPTON ENTERPRISES, INC.

No. 9221SC528

(Filed 1 June 1993)

Judgments § 44 (NCI4th)— judgment—signed out of district and out of term—agreement of parties—evidence introduced at hearing after judgment entered—conduct of counsel—evidence not sufficient

The trial court erred by denying plaintiff's motion under N.C.G.S. § 1A-1, Rule 60(b)(4) and (6) to set aside a judgment on the grounds that it was signed out of term and out of district where consent does not appear in a writing signed by the parties or their counsel, the fact of consent is not recited in the judgment, the only evidence indicating that the parties consented to entry of the judgment outside the session and district is an affidavit from the trial judge, and it is apparent that the judge deciding the motion determined that plaintiff's attorney's actions in drafting the judgment as directed and not questioning the court's authority to enter the judgment constituted consent. The affidavit cannot support a finding of consent because the judgment had already been entered when the affidavit was introduced and contrary to the court's findings, neither plaintiff's attorney's failure to question whether the trial judge had the authority to enter the judgment nor his drafting of the judgment constitute consent.

Am Jur 2d, Judgments §§ 58 et seq.

Appeal by plaintiff from order entered 24 March 1992 in Forsyth County Superior Court by Judge F. Fetzer Mills. Heard in the Court of Appeals 27 April 1993.

White and Crumpler, by Clyde C. Randolph, Jr., and Dudley A. Witt, for plaintiff-appellant.

David B. Hough for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from an order entered 24 March 1992, denying plaintiff's motion to set aside a prior judgment.

The record reveals that on 8 March 1988, plaintiff filed a complaint against defendants in Forsyth County Superior Court seeking damages for breach of a partnership agreement, an accounting of all partnership affairs, and injunctive relief. Defendants answered, denying the material allegations of the complaint and asserting counterclaims against plaintiff. A six-day bench trial ensued which ended on 14 May 1990, at which time the presiding superior court judge, the Honorable James M. Long, took the matter under advisement. Judge Long filed a judgment on 25 April 1991, and on the same day mailed a copy of the judgment to Steven Smith, the attorney for plaintiff, with a letter explaining a portion of the judgment.

On 28 October 1991, plaintiff made a motion pursuant to North Carolina Rule of Civil Procedure 60(b)(4) and (6) for an order setting aside the 25 April 1991 judgment and declaring the judgment null and void on the grounds that it was signed out of session and was not entered in accordance with Rule 58. Defendants responded to plaintiff's motion, denying that the judgment was void and attaching an affidavit signed by Judge Long which stated that "[a]ll of the parties, through their counsel, consented to my being able to render and enter a Judgment in this case both out of term and out of the Twenty-First Judicial District, if necessary." The affidavit also stated that Judge Long had reviewed his trial notes and determined that he made a written notation that the parties had stipulated and agreed to entry of judgment both out of term and out of district, if necessary. Plaintiff's motion was heard before the Honorable F. Fetzer Mills at the 2 December 1991 civil session of Forsyth County Superior Court.

On 24 March 1992, Judge Mills entered an order denying plaintiff's Rule 60 motion. In his order, Judge Mills made the following pertinent findings of fact:

> 4. The parties, through their counsel, consented to the trial Court's being able to render, sign and enter a Judgment in this case both out of term and out of the Twenty-First Judicial District, if necessary.
>
> 5. The Honorable James M. Long made a hand written notation in his trial notes that the parties had stipulated and agreed that the Court would be able to render and enter a Judgment in this case both out of term and out of the Twenty-First Judicial District, if necessary.
>
> 6. The Court [met with and] instructed [plaintiff's attorney] to draft a final Judgment in the action. During the said meeting, [plaintiff's attorney] never questioned whether or not the Court had the authority to enter such a Judgment out of term and out of district. [Plaintiff's attorney] never broached the subject with the Court.
>
> . . . .
>
> 13. Although [plaintiff's attorney] testified before this Court that he could not recall whether or not the parties hereto had consented to permit the trial Court to render and enter a Judgment in this case both out of term and out of the Twenty-First Judicial District, [plaintiff's attorney's] actions in this case indicate that such a consent had been entered into by the parties hereto. These actions include [plaintiff's attorney's] meeting with Judge Long in June of 1990, his drafting a proposed final Judgment, and his various conferences with [defendants' attorney] to discuss the contents of the said proposed Judgment.

Judge Mills concluded that the judgment was properly entered on 25 April 1991, both out of term and out of district, "with the full consent of the parties," and therefore is not void. From this order, plaintiff appeals.

The dispositive issue is whether the evidence in the record supports Judge Mills' findings that the judgment at issue was entered out of session and out of district with the consent of the parties.

This Court recently reiterated the long-standing rule 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.' " *Capital Outdoor Advertising, Inc. v. City of Raleigh*, 109 N.C. App. 399, 400, 427 S.E.2d 154, 155 (1993) (quoting *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984)). Orders not entered in compliance with this rule are void. *Id.*

> 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." Failure to object to the entry of an order out of session does not, however, constitute consent. Likewise, preparation of a proposed order for the trial judge to sign out of the session cannot infer consent.

Id. at 401, 427 S.E.2d at 155 (citations omitted).

It is undisputed in the instant case that the judgment was signed out of session and out of district.[1] It is also undisputed that consent for entry of the judgment outside the session and district does not appear in a writing signed by the parties or their counsel, nor is the fact of consent recited in the judgment at issue. Moreover, consent does not appear by fair implication from what appears in the record, "the record" being limited to those events of record which occurred up to the point at which the judgment was entered. The only evidence indicating that the parties consented to entry of the judgment outside the session and district is Judge Long's affidavit. However, this affidavit was offered by defendants in opposition to plaintiff's Rule 60 motion to set aside the judgment. Because the judgment had already been entered when the affidavit was introduced, the affidavit cannot support a finding of consent by the parties to entry of the judgment out of session and out of district.

It is apparent from a review of Judge Mills' findings of fact that Judge Mills determined that plaintiff's attorney's actions con-

1. Because our resolution of the issue presented makes it unnecessary to address plaintiff's contention that the judgment was not entered in accordance with Rule 58, we assume without deciding that the judgment was properly entered.

stituted consent to entry of the judgment out of session and out of district. However, contrary to the trial court's findings, neither plaintiff's attorney's failure to "question[ ] whether or not [Judge Long] had the authority to enter" the judgment out of session and out of district, nor his drafting of the proposed final judgment for Judge Long to sign out of session and out of district, constitute consent. *See Capital Outdoor Advertising*, 109 N.C. App. at 401, 427 S.E.2d at 155. Accordingly, the 25 April 1991 judgment was entered out of session and out of district without the consent of the parties and is therefore void. The trial court erred in refusing to grant plaintiff's motion to set the judgment aside on this basis.

Reversed and remanded for entry of an appropriate judgment allowing plaintiff's motion to set the judgment aside.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA, EX REL., WILLIAM W. COBEY, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, AND THE ENVIRONMENTAL MANAGEMENT COMMISSION, PLAINTIFF v. A. J. BALLARD, JR.; JOYCE D. BALLARD, AS TRUSTEE FOR A. C. BALLARD; GARY ALLEN BALLARD; A. J. BALLARD, JR. TIRE & OIL COMPANY, INCORPORATED, DEFENDANTS

No. 923SC550

(Filed 1 June 1993)

Jury § 1 (NCI4th); Environmental Protection § 87 (NCI4th) — leakage from underground storage tank — action to require clean-up — no right to jury trial

Defendants were not entitled to a jury trial in an action by the DEHNR seeking to compel defendants to comply with the requirements of the Oil Pollution and Hazardous Substance Control Act for cleaning up a leakage of petroleum from an underground storage tank because the action cannot be characterized as a nuisance action, and the action did not exist at common law or by statute at the time of the adoption of the Constitution of 1868.

Am Jur 2d, Jury §§ 7 et seq.; Pollution Control §§ 182 et seq.

Appeal from judgment entered 23 March 1992 in Carteret County Superior Court by Judge Herbert O. Phillips, III. Heard in the Court of Appeals 28 April 1993.

Some time prior to November of 1987, a discharge of petroleum products occurred from an underground storage tank which was located on Highway 24 in Carteret County. At the time of the discharge, the property in question was occupied by a gas station/convenience store. The convenience store was operated by a tenant, and A.J. Ballard, Jr. Tire & Oil Company, Inc. owned the site's underground petroleum tanks.

Defendant A.J. Ballard, Jr. is the President of A.J. Ballard, Jr. Tire & Oil Company, Inc. The remaining defendants have ownership interests in the land on which the petroleum discharge occurred.

In November of 1987, defendants reported the discharge to the Wilmington regional office of the North Carolina Department of Environment, Health, and Natural Resources (hereinafter DEHNR). On 28 August 1991, DEHNR and the Environmental Management Commission filed a complaint on behalf of the State in the Carteret County Superior Court against defendants, alleging that defendants had failed to comply with the State's environmental clean-up requirements. The DEHNR seeks compliance of N.C. Gen. Stats. §143, Articles 21 and 21A, [the oil discharge provisions of the Oil Pollution and Hazardous Substance Control Act (hereinafter OPHSCA); the leaking underground storage tank provisions of OPHSCA; and the groundwater standards established by the Environmental Management Commission pursuant to Article 21 of Chapter 143.] In this action, DEHNR sought an injunction compelling defendants to comply with the relevant state environmental statutes.

On 30 October 1991, defendants filed an answer and requested a jury trial on all triable issues of fact. On 18 February 1992, DEHNR filed a motion to deny defendants' jury trial demand. On 23 March 1992, Judge Herbert O. Phillips, III granted plaintiff injunctive relief and denied defendants' request for a jury trial. On 23 March 1993, defendants filed notice of appeal from Judge Phillips' order.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Philip A. Telfer, for plaintiff-appellee.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for defendant-appellant.

WELLS, Judge.

The sole issue defendants raise on appeal is whether the trial court erred in granting the State's motion to deny defendants' demand for a jury trial. Both parties agree that the two prong test set out by our Supreme Court in *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989) is governing in this case. In *Simpson*, the Supreme Court considered whether the right to demand a jury trial exists for a defendant in an action brought by the State to enforce wetland protection provisions of the Coastal Area Management Act of 1974 and the Dredge and Fill Act of 1969, when the statutes themselves do not authorize a jury trial. Finding that the defendant in *Simpson* did not have a right to demand a jury trial, the *Simpson* Court set out the following test:

> [First the court must determine whether the action] brought by the State . . . existed at common law or by statute at the time of the adoption of the 1868 Constitution. Only if such an action existed at that time need we determine whether the remedy sought is one at law respecting property. (Citations omitted.)

In the case at bar, the State sought a permanent injunction requiring defendants to comply with N.C. Gen. Stat. Chapter 143, Parts 21 and 21A. Seeking compliance with the relevant environmental clean-up statutes, the State sought to have the trial court order the defendants to have an independent contractor complete tightness tests on all the tanks and lines located at the discharge site; to enter into a contract for the completion of the Step I assessment previously approved by the plaintiff; to submit a report on the findings of all tightness tests and the Step I assessment, along with a remediation plan to restore the affected groundwater for approval by plaintiff; and to implement the approved remediation plan, presenting any additional engineering plans not contained in the remediation plan for State approval before final implementation.

Defendant asserts that the trial court erred in granting plaintiff's motion to deny defendants' request for a jury trial because the case at bar should be characterized as an action in nuisance, thus qualifying as a cause of action which existed at the adoption of our State's 1868 Constitution and satisfying the first prong of the *Simpson* test. We disagree.

In the typical common law nuisance action, the standard of liability for the asserted wrong is a factual determination of whether, by the improper use of his property, one has done injury to the land, property or rights of another. *See generally Andrews v. Andrews*, 242 N.C. 382, 88 S.E.2d 88 (1955). In this case, the statutory regulatory scheme or system of controls on the disputed activity sets the standards of compliance or noncompliance which constitute the wrong. The only factual determination for the court is whether compliance or noncompliance exists, not whether harm or injury has occurred or may occur. The requirements of the statutory scheme itself is what is at issue.

The very complex and comprehensive set of regulatory requirements and controls established under the pertinent provisions of Chapter 143 of the General Statutes are clearly distinguishable from the parameters of a private nuisance as that term was understood under common law.

Because of our disposition of the first prong of the *Simpson* test, we need not address the second prong of the *Simpson* test. The trial court's order granting the State's motion to deny defendants' demand for a jury trial is

Affirmed.

Judges GREENE and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 JUNE 1993

BRANN v. WEAKLAND No. 9222DC434	Davidson (89CVD1463)	Dismissed
GAST HOMES, INC. v. GWIN No. 9126SC975	Mecklenburg (88CVS9018)	Affirmed
GREER v. COMR. OF MOTOR VEHICLES No. 9223SC1270	Ashe (91CVS107)	Affirmed
HALL v. N.C. LICENSING BD. FOR GENERAL CONTRACTORS No. 9225SC241	Caldwell (91CVS740)	Affirmed
HEINZE v. PATCH No. 9212SC230	Cumberland (89CVS4405)	Reversed
IN RE ROMANO No. 9222DC541	Iredell (90J10)	Affirmed
KAPP v. KAPP No. 9121SC1058	Forsyth (89CVS3794)	Remanded
KUYKENDALL v. AIR EAST, INC. No. 923SC1323	Craven (91CVS0105)	Affirmed
LEATHERWOOD v. LEATHERWOOD No. 9227DC308	Gaston (91CVD1008)	Affirmed in part; reversed in part & remanded
MABE v. HILL No. 9213SC493	Bladen (88CVS623)	Dismissed
NEILL v. A & W ONE STOP, INC. No. 9227DC626	Cleveland (91CVD725)	Reversed & Remanded
REULE REALTY CORP. v. HOKE No. 9226SC327	Mecklenburg (90CVS688)	Affirmed
REYNOLDS METALS CO. v. WELLER No. 9225DC1342	Catawba (92CVD1908)	Dismissed
RICE v. RANDOLPH No. 9224SC249	Madison (85CVS5)	Reversed & Remanded

RICHARDSON v. HITT No. 922DC195	Beaufort (89CVD640)	Affirmed in part; reversed in part & remanded
ROWLAND v. ROREM No. 9220DC1302	Moore (86CVD913) (87CVD8)	Affirmed
STATE v. DAVIS No. 9128SC1252	Buncombe (90CRS22819) (90CRS22820)	No Error
STATE v. DENNIS No. 9221SC1234	Forsyth (91CRS14261) (91CRS14262) (91CRS14263) (91CRS14264) (91CRS14265) (91CRS14266) (91CRS14267) (91CRS14269)	No Error
STATE v. DOUGHTY No. 925SC1252	New Hanover (89CRS24682) (89CRS24683)	No Error
STATE v. FRYE No. 9214SC566	Durham (90CRS23960) (91CRS25738)	No Error
STATE v. GEDDINGS No. 9326SC16	Mecklenburg (92CRS28536) (92CRS35975)	Appeal Dismissed
STATE v. HOOVER No. 9218SC1344	Guilford (92CRS43671)	No Error
STATE v. JACKSON No. 9326SC56	Mecklenburg (91CRS87246)	No Error
STATE v. JOHNSON No. 9218SC1330	Guilford (91CRS49409)	No Error
STATE v. KERR No. 9310SC4	Wake (91CRS85297)	No Error
STATE v. LOVELACE No. 9326SC47	Mecklenburg (91CRS33797)	Affirmed
STATE v. McILWAINE No. 9226SC1235	Mecklenburg (91CRS88321) (92CRS8744)	No Error
STATE v. MOORE No. 9210SC979	Wake (91CRS73318)	Remanded

STATE v. MORTON No. 939SC30	Granville (91CRS843) (91CRS845) (91CRS846)	No Error
STATE v. ODOM No. 9226SC1309	Mecklenburg (92CRS2307) (92CRS2308) (92CRS15689) (92CRS15691)	No Error
STATE v. O'NEAL No. 922SC1328	Hyde (91CRS490)	No Error
STATE v. SCOTT No. 928SC1251	Wayne (91CRS9848)	No Error
STATE v. SMITH No. 9214SC160	Durham (91CRS14663)	No Error
STATE v. SPAULDING No. 9316SC9	Robeson (91CRS22249) (91CRS22250) (91CRS22252) (91CRS22253)	No Error
STATE v. TATE No. 9227SC483	Gaston (90CRS022697) (90CRS025043) (90CRS025044) (90CRS025046)	No Error
STATE v. TROTT No. 934SC19	Onslow (92CRS9706)	No Error
STATE v. UZZELL No. 928SC962	Lenoir (91CRS9883)	No Error
YEARGIN v. KEETON No. 929SC407	Granville (91SP54)	Reversed in part; affirmed in part

FULTON CORPORATION, PLAINTIFF v. BETSY Y. JUSTUS, SECRETARY OF REVENUE, DEFENDANT

No. 9210SC15

(Filed 15 June 1993)

1. **Constitutional Law § 51 (NCI4th)— intangibles tax—standing of taxpayer to challenge constitutionality**

A local taxpayer owning shares of corporate stock had standing to challenge the constitutionality of the North Carolina intangibles tax statute on the ground that the tax violates the Commerce Clause of the U.S. Constitution.

Am Jur 2d, Constitutional Law § 202.

2. **Taxation § 32 (NCI3d)— intangibles tax on corporate stock—taxable percentage provision—violation of Commerce Clause**

The statute levying an intangibles tax on ownership of corporate stock, N.C.G.S. § 105-203, facially violates the Commerce Clause of the U.S. Constitution because the taxable percentage provision of the statute requires shareholders of out-of-state corporations to pay intangibles taxes on a higher percentage of the value of shares than shareholders of corporations operating solely in North Carolina and indirectly encourages the development of local business by placing a greater burden on economic activities occurring outside North Carolina than is placed on similar activities within this state.

Am Jur 2d, State and Local Taxation §§ 244-253.

3. **Taxation § 32 (NCI3d)— intangibles tax on corporate stock—taxable percentage provision—not valid compensating tax**

The facially discriminatory taxable percentage provision of the statute levying an intangibles tax on ownership of corporate stock is not a valid compensating tax because there is no substantially equivalent event justifying the imposition of the intangibles tax at a higher percentage on the stock of out-of-state corporations than on the stock of in-state corporations.

Am Jur 2d, State and Local Taxation §§ 244-253.

4. Taxation § 32 (NCI3d)— intangibles tax on corporate stock— severability of unconstitutional provision—prospective application of revised statute

The unconstitutional taxable percentage provision of N.C.G.S. § 105-203 is severable from the remainder of the statute. Therefore, the Court of Appeals will excise language in the statute stating "less the proportion of the value that is equal to: (1) In the case of a taxpayer that is a corporation, the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . ." As rewritten, the statute levies an intangibles tax upon "[a]ll shares of stock . . . owned by residents of this state," and plaintiff corporation, a resident owner of stock, is subject to the tax and not entitled to a refund. However, since retroactive application of the revised statute would be inequitable, the revised statute will apply prospectively to the 1994 tax year.

Am Jur 2d, State and Local Taxation §§ 244-253.

Appeal by plaintiff from judgment entered 8 November 1991 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 8 December 1992.

Womble Carlyle Sandridge & Rice, by Jasper L. Cummings, Jr., for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for defendant appellee.

COZORT, Judge.

Plaintiff filed suit challenging the constitutionality of North Carolina's intangibles tax levied on ownership of corporate stock. Plaintiff contends the provision violates the Commerce Clause of the United States Constitution by increasing the tax liability for shares of stock of corporations which have business activities, property locations, and tax liabilities outside of North Carolina; and by lessening the tax liability for shares in corporations whose business and property are largely or completely in North Carolina. The superior court granted summary judgment for the defendant Secretary of Revenue. We find the taxing scheme violates the

Commerce Clause, and we reverse. We further find that the provisions of the taxing scheme are severable, and we strike the portion of N.C. Gen. Stat. § 105-203 which gives a reduction in intangibles tax liability under the taxable percentage provision.

We begin with an overview of North Carolina's intangibles tax on corporate stock and other related tax statutes. (Several sections in Chapter 105 were amended in the 1991 and 1992 sessions of the General Assembly. None of the amendments affect the resolution of the issues presented in this case. For convenience to the reader, all references are to the most recent version of the statutes.) Pursuant to N.C. Gen. Stat. §§ 105-130 through 105-130.41 (1992), North Carolina imposes an income tax on corporations doing business in North Carolina. If a corporation does business only in North Carolina, then one hundred percent of the corporation's business income is taxed in North Carolina. N.C. Gen. Stat. § 105-130.3 (1992). If a corporation does business in North Carolina and other states, then only that percentage of business income apportioned to North Carolina is taxable here. N.C. Gen. Stat. § 105-130.4(b) (1992). A corporation's business income is apportioned on the basis of three factors: (1) the corporation's total sales in North Carolina divided by the corporation's total sales everywhere during the income year; (2) the value of the corporation's property owned, rented or used in North Carolina during the income year divided by the value of all the corporation's property owned, rented or used during the income year; and (3) the total amount paid by the corporation in North Carolina during the income year as compensation divided by the total amount paid by the corporation everywhere during the income year. N.C. Gen. Stat. § 105-130.4(i) through (*l*)(3). The first factor, sales, is double-weighted in the apportionment formula. *Id.* A multistate corporation's nonbusiness income, such as rents, royalties, interest, and gains and losses, is subject to North Carolina income tax if the income has some connection to the state; for example, North Carolina is the corporation's principal place of business or the situs of the nonbusiness activities or investments. N.C. Gen. Stat. § 105-130.4(c)-(h) (1992).

Pursuant to N.C. Gen. Stat. § 105-198 through § 105-217 (1992), North Carolina imposes an intangibles tax on accounts receivable; bonds, notes, and other evidences of debt; beneficial or equitable interests in foreign trusts; and shares of stock. N.C. Gen. Stat. § 105-203 (1992) provides in pertinent part:

> All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal to:
>
> (1) [T]he proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . .

The provision beginning with "less the proportion of the value" is commonly referred to as the taxable percentage provision, which is the subject of plaintiff's challenge.

Under the tax scheme, if a corporation does no business in North Carolina and has no taxable income here, then the taxable percentage of a shareholder's stock is one hundred percent. If a multistate corporation does business in North Carolina and earns business and/or nonbusiness income subject to North Carolina income tax, then the taxable percentage of a shareholder's stock is the inverse of the issuing corporation's net taxable income in North Carolina. The tax is collected by the state, made part of the General Fund, and is available for appropriation to the taxpayer's resident county. N.C. Gen. Stat. § 105-213.1 (1992).

Plaintiff is a North Carolina corporation which, as of 31 December 1990, held stock in six corporations. Of the six corporations, only Food Lion, a multistate corporation, conducted business in North Carolina. Since forty-six percent of Food Lion's net income was subject to North Carolina corporate income tax for the 1990 taxable period, the taxable percentage of plaintiff's stock in Food Lion was fifty-four percent. The taxable percentage of plaintiff's stock in the remaining five corporations was one hundred percent. On 8 January 1991, plaintiff filed an intangible personal property tax return and remitted $10,884.00. On 1 May 1991, plaintiff filed suit in Wake County Superior Court seeking a refund of the $10,884.00 paid in intangibles tax, a declaratory judgment that N.C. Gen. Stat. § 105-203 is unconstitutional, and attorneys' fees. Both parties moved for summary judgment. Judge Dexter Brooks granted summary judgment for the Secretary of Revenue.

On appeal, plaintiff argues that the trial court erred in granting summary judgment because the intangibles tax (1) violates the Commerce Clause of the United States Constitution, and (2) violates the Due Process and Equal Protection Clauses of the United States and North Carolina Constitutions. Plaintiff further argues that the trial court erred in denying relief pursuant to 42 U.S.C.S. § 1983 and attorneys' fees pursuant to 42 U.S.C.S. § 1988.

[1] We first consider whether plaintiff-taxpayer has standing to challenge the constitutionality of the statute. In North Carolina, a taxpayer has standing to challenge a tax if " 'the tax levied upon him is for an unconstitutional . . . purpose, . . . the carrying out of all the challenged provisions "will cause him to sustain personally, a direct and irreparable injury," or [if] he is a member of the class prejudiced by the operation of the statute . . . .' " *Orange County v. N.C. Dept. of Transportation*, 46 N.C. App. 350, 361, 265 S.E.2d 890, 899, *disc. review denied*, 301 N.C. 94 (1980) (citations omitted). The United States Supreme Court has recognized, at least implicitly, that a local taxpayer has standing to challenge a tax on the grounds that the tax violates the Commerce Clause. *See Goldberg v. Sweet*, 488 U.S. 252, 261, 102 L.Ed.2d 607, 617 (1989); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 10 L.Ed.2d 202, *reh'g denied*, 374 U.S. 858, 10 L.Ed.2d 1082 (1963); *I.M. Darnell & Son Co. v. Memphis*, 208 U.S. 113, 52 L.Ed. 413 (1908); *Walling v. Michigan*, 116 U.S. 446, 29 L.Ed. 691 (1886). We thus find plaintiff has standing to challenge the taxing provisions.

[2] Next, we consider plaintiff's argument that North Carolina's intangibles tax violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3 confers upon Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Plaintiff argues: (1) that the discrimination appears on the face of the statute; (2) that the tax indirectly discriminates against out-of-state business; and (3) that the compensating tax defense is not available to save the tax. Plaintiff summarizes the discrimination as follows: The more a corporation's business and property are located in North Carolina, the higher is the percentage of its income subject to taxation in this state, and the higher is the percentage of its stock not subject to the intangibles tax. The more a corporation's business and property are located out-of-state, the higher is the percentage of its stock subject to the intangibles tax. Therefore, the tax scheme

favors corporations that operate totally or more in North Carolina and disfavors corporations that operate totally or more in other states. Plaintiff cites two possible impacts on interstate commerce. First, plaintiff alleges the tax encourages investors to buy stock in local corporations, thereby possibly affecting the ability of out-of-state corporations to raise capital in North Carolina, thus lessening the trading of stocks in interstate commerce. Second, plaintiff alleges local corporations may be encouraged not to enter interstate commerce in order to avoid the intangibles taxation for their shareholders.

To survive constitutional challenge under the Commerce Clause, a tax must (1) apply to an activity with a substantial nexus with the taxing state, (2) be fairly apportioned, (3) be fairly related to the services provided by the state, and (4) not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 51 L.Ed.2d 326, 331, *reh'g denied*, 430 U.S. 976, 52 L.Ed.2d 371 (1977). At issue here is the fourth requirement. It is fundamental that "[n]o State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329, 50 L.Ed.2d 514, 524 (1977) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L.Ed.2d 421, 427 (1959)). "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce." *Id.* at 334-35, 50 L.Ed.2d at 527. "Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that 'forecloses tax-neutral decisions and . . . creates . . . an advantage' for firms operating in [the State] by placing 'a discriminatory burden on commerce to its sister States.' " *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406, 80 L.Ed.2d 388, 402 (1984) (quoting *Boston Stock Exchange*, 429 U.S. at 331, 50 L.Ed.2d at 525).

Discrimination may appear on the face of the statute or in its practical operation. "When a tax, on its face, is designed to have discriminatory economic effects, the Court 'need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' " *Id.* at 406-07, 80 L.Ed.2d at 403 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760, 68 L.Ed.2d 576, 604 (1981)). "Once

a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management v. Hunt*, 504 U.S. ---, 119 L.Ed.2d 121, 132 (1992). "[W]here discrimination is patent, . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. v. Limbach*, 486 U.S. 269, 276, 100 L.Ed.2d 302, 310 (1988).

"[A] State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278, 100 L.Ed.2d at 311. A state may also validate a facially discriminatory tax by showing that the tax is a compensatory tax. A tax may be considered a compensating tax when "[the] State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." *Maryland v. Louisiana*, 451 U.S. at 759, 68 L.Ed.2d at 603; *see also Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 111 L.Ed.2d 734 (1990).

Applying these principles to North Carolina's intangibles taxing scheme, we find that the tax facially discriminates against interstate commerce. Shareholders of out-of-state corporations are required to pay intangibles taxes on a higher percentage of shares than shareholders of corporations operating solely in North Carolina. We further find that the facially discriminatory tax indirectly encourages the development of local business by placing a greater burden on economic activities occurring outside North Carolina than is placed on similar activities within North Carolina. The tax forecloses tax-neutral decisions and creates an advantage for firms operating in North Carolina. *See Westinghouse*, 466 U.S. at 406, 80 L.Ed.2d at 402.

[3] We next consider whether the discriminatory effect of the tax is counterbalanced by a compensating tax. We must determine if the State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L.Ed.2d 540, *reh'g denied*, 469 U.S. 912, 83 L.Ed.2d 222 (1984), the United States Supreme Court addressed the constitutionality of West Virginia's business and operation tax. There, plaintiff, an Ohio corporation engaged in the business of manufacturing and selling steel products in West Virginia, challenged on Commerce

Clause grounds the constitutionality of West Virginia's tax requiring persons engaged in the business of selling tangible property at wholesale to pay taxes on gross receipts. Local manufacturers were exempt from the gross receipts tax; however, they were required to pay a higher manufacturing tax. The United States Supreme Court found the tax unconstitutional, rejecting West Virginia's argument that the higher manufacturing tax was a compensating tax for the gross receipt tax. The Court held:

> [M]anufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

Id. at 643, 81 L.Ed.2d at 545-46. The Court further reasoned that there was discrimination against interstate commerce when the two taxes were considered together: "If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* at 644, 81 L.Ed.2d at 546. Finally, the Court rejected West Virginia's argument that Armco had to prove actual discriminatory impact by naming a state that imposes a manufacturing tax resulting in a tax burden higher than that imposed on Armco's competitors in West Virginia. Rather, the test is whether the facially discriminatory tax is internally consistent such that " 'if applied by every jurisdiction' there would be no impermissible interference with free trade." *Id.*

The Secretary of Revenue argues here that taxing shareholders on the proportion of their stock values equivalent to the percentage of the issuing corporation's income taxed outside the state compensates for the state's inability to tax the corporation's out-of-state

property and the income it generates. We disagree. We find the Court's reasoning in *Armco* applicable to this case. We note first that there is only a vague relationship between property taxes paid by a corporation to governmental entities in North Carolina and the intangibles property tax paid by its shareholders on the corporation stock. As plaintiff points out, under the tax scheme a corporation could pay no property taxes in North Carolina, and the taxable percentage of its stock still be less than one hundred percent because the taxable percentage is computed by multiplying *three* factors: sales, payroll, and property. Second, the "compensating tax" is levied upon the shareholder, a taxpayer different from the corporation. If a corporation owns no property in North Carolina, the state has no burden of providing protection to the corporation's property and should not be allowed to tax the corporation's stock as proxy for the corporate property. We find no substantially equivalent event justifying the imposition of the intangibles tax at a higher percentage on the stock of out-of-state corporations than in-state corporations. We thus reject the Secretary's argument on compensating tax.

The Secretary further argues that *Darnell v. State*, 174 Ind. 143, 90 N.E. 769 (1910), *aff'd, Darnell v. Indiana*, 226 U.S. 390, 57 L.Ed. 267 (1912), is dispositive of plaintiff's appeal. In *Darnell*, Indiana sought to collect taxes on stock of a Tennessee corporation owned by an Indiana resident. Under the Indiana statute, the state could levy taxes on all shares in a foreign corporation, except national banks, owned by state residents, and all shares in a domestic corporation owned by state residents when the property of the corporations was not exempt or not taxable to the corporation itself. *Id.* at 397-98, 57 L.Ed. at 272. The value of the stock exceeding the value of the tangible taxable property was also taxable. Plaintiff argued to the Indiana Supreme Court that the tax discriminated "in favor of domestic stocks as against shares in a foreign corporation, and that a resident owning stock in a domestic corporation escapes taxation thereon, while his next-door neighbor owning shares of stock in a foreign corporation is required to pay taxes on his holdings." *Darnell v. State*, 174 Ind. at 153-54, 90 N.E. at 773. The Indiana Supreme Court upheld the tax, finding that the purpose of the tax was "to require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation." *Id.* at 156, 90 N.E. at 774. The Indiana Supreme Court stated:

> Domestic corporations are taxed upon all their property: . . . The state, in its discretion, might tax the shares of stock in such corporation to the individual owners thereof residing in this state, but it would in a sense be double taxation, and it has not been the policy of this state to do so. Shares of stock in a foreign corporation doing business in another state owned and held by a resident of this state are taxed because they have not been and cannot be otherwise taxed by this state. If a corporation organized in this state is engaged in business in another state, and all its tangible property is outside this state, then its shares of stock owned by residents within this state are taxable in the same manner as stock in a foreign corporation. The fact that the state in which the corporate property may be situated taxes such tangible property in no wise affects the right of this state to tax its own inhabitants upon all their personal property including shares of stock in such foreign corporation. The man who resides in one state and enjoys the benefit of its schools, churches, society, highways, and other public accommodations, as well as its governmental protection over his person and property, is in no position to complain when required to contribute by taxation ratably upon his property for the maintenance of these institutions and the local government. It is clear to our minds that the tax law of Indiana is not open to the charge of discrimination against stock in foreign corporations, but imposes only just and equal burdens upon all corporate stocks without regard to the place of incorporating or of conducting the corporate business, and does not violate either the third clause of section 8, art. 1, or the fourteenth amendment to the Constitution of the United States, and is accordingly valid.

Id. at 156-57, 90 N.E. at 774 (citations omitted). The United States Supreme Court affirmed with Justice Holmes writing:

> The case is pretty nearly disposed of by Kidd v. Alabama, 188 U.S. 730, 47 L.ed. 669, 23 Sup. Ct. Rep. 401, where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered. But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other states, contrary to principles often recognized. The most serious aspect of this objection is that the statutes

> of Indiana do not make allowance if a foreign corporation has property taxed within the state. But, as to this, it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that, as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground. . . .
>
> The only difference of treatment disclosed by the record that concerns the defendants is that the state taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in Kidd v. Alabama, 188 U.S. 730, 732, 47 L.ed. 669, 672, 23 Sup. Ct. Rep. 401.

Darnell v. Indiana, 226 U.S. at 397-98, 57 L.Ed. at 272 (citations omitted).

We find *Darnell* distinguishable. Under the 1912 Indiana tax scheme, to the extent that a corporation paid property taxes to Indiana, the corporation's shareholders were exempt from paying taxes on the identical value of property already taxed to the corporation. As noted by the Indiana Supreme Court, the purpose of the tax was to "require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation." *Darnell*, 174 Ind. at 156, 90 N.E. at 774. Under the North Carolina scheme, corporate stock is not viewed as embodying the very same real and personal property owned by the corporation. Unlike the Indiana scheme, there is no effort to tax corporate property only once, to the extent its value is represented in the stock value. There is no one-to-one correlation between *property* tax paid by the corporation and taxes paid by the shareholder on shares owned. There is, however, a correlation between *income* taxed to the corporation and the property (shares) of the shareholder. In determining the amount of business income to be taxed to the corporation, the amount of corporate property located in North Carolina is only one of three unequally weighted factors: sales, payroll, and property. *See* N.C. Gen. Stat. § 105-130.4(i) through (*1*)(3). Since the sales factor is double weighted, the property factor accounts for only one-fourth of the apportionment formula. *See* N.C. Gen. Stat. § 105-130.4(i). We note further that North Carolina has largely abandoned its efforts to avoid double taxation of cor-

porate income. For example, under the scheme for taxing dividends, corporate income in the form of dividends is subject to double taxation. *See* N.C. Gen. Stat. §§ 105-130.7(1) and 105-151.19 (1992). We conclude that the difference in the 1912 Indiana tax scheme and the present North Carolina tax scheme is significant, such that *Darnell* is not dispositive of plaintiff's appeal.

[4] Having found the intangibles taxing scheme to be unconstitutional, we now must determine the proper remedy. Plaintiff argues that the entire tax must be stricken. The Secretary argues that we must enforce the Intangibles Tax Article's severability clause, thus excising the phrasing which reduces the intangibles tax on corporate stock of totally or partially North Carolina corporations. We find the Secretary's argument persuasive. N.C. Gen. Stat. § 105-215 (1992) provides:

> If any clause, sentence, paragraph, or part of this [Intangible Personal Property Tax] Article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Accordingly, we find that we must excise from N.C. Gen. Stat. § 105-203 this language:

> [L]ess the proportion of the value that is equal to:
>
> (1) In the case of a taxpayer that is a corporation, the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . .

As rewritten, the statute levies an intangibles tax upon "[a]ll shares of stock . . . owned by residents of this State . . . ."

Plaintiff, a resident owner of stock, is subject to the tax and not entitled to a refund. Both the United States Supreme Court and North Carolina Supreme Court have "recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a

case the rule is not applied retroactively." *Swanson v. State of N.C.*, 329 N.C. 576, 581, 407 S.E.2d 791, 793 (1991). Accordingly, we find retroactive application of the revised statute inequitable and therefore order the revised statute to apply prospectively to the 1994 tax year.

We further find that plaintiff is not entitled to relief under 42 U.S.C.S. § 1983. A party may bring suit against state officials pursuant to 42 U.S.C.S. § 1983 for violations of the Commerce Clause. *Dennis v. Higgins*, 498 U.S. 439, 112 L.Ed.2d 969 (1991). "[W]hen an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are 'persons' under section 1983 when the remedy sought is monetary damages." *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992). " '[A] state official in his . . . official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " *Id.* at 771, 413 S.E.2d at 283 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 105 L.Ed.2d 45, 58 (1989)) (citations omitted). In its complaint, plaintiff seeks monetary damages and declaratory relief, not injunctive relief. Therefore, plaintiff is not entitled to relief pursuant to 42 U.S.C.S. § 1983 or 42 U.S.C.S. § 1988.

Having decided the issue on Commerce Clause grounds, we need not address plaintiff's Due Process and Equal Protection arguments.

In sum, we hold that the portion of the State's intangibles tax scheme which increases the tax liability for owners of stock in corporations whose business and property is not completely in North Carolina violates the Commerce Clause of the United States Constitution. That language is excised from N.C. Gen. Stat. § 105-203. Plaintiff is entitled to no refund. The trial court's judgment for the defendant is reversed, and the cause is remanded for entry of a judgment declaring the intangibles tax provision at issue in violation of the Commerce Clause. Plaintiff is entitled to no further relief.

Reversed and remanded.

Judges GREENE and WYNN concur.

GUILFORD COUNTY BOARD OF EDUCATION, JEANETTE PIPPIN, PAT EDWARDS, SUE FARLOW, SHEILA GREEN, NATALIE JACKSON, JOHN PARKS, AND ANITA SHARPE, PLAINTIFFS-APPELLANTS v. THE GUILFORD COUNTY BOARD OF ELECTIONS, THE GUILFORD COUNTY BOARD OF COMMISSIONERS, THE GREENSBORO CITY BOARD OF EDUCATION, AND THE HIGH POINT CITY BOARD OF EDUCATION, DEFENDANTS-APPELLEES

No. 9218SC421

(Filed 15 June 1993)

1. **Schools § 3 (NCI3d); Statutes § 2.7 (NCI3d) — act to consolidate school administrative units — no local act — reasonable classification standard met — general welfare test met**

The trial court did not err in holding that an act to consolidate school administrative units in Guilford County or to provide for two administrative units in that county, subject to a referendum, was not a local act, even though it dealt with education only in Guilford County rather than throughout the State, since the number of counties excluded or included is not necessarily determinative, and a statute may be general even if it includes only one county; the Act qualified as a general law under both the reasonable classification standard and the general welfare test in that the students in Guilford County are a class which reasonably warrants special legislative attention and the provisions of the Act apply uniformly to all of the students; in deciding to consolidate the school administrative units of the county the Legislature made a rational distinction reasonably related to the Act's purpose to pursue the goals of excellence and equity in educational opportunity for all children of Guilford County; and legislation which promotes equitable access to educational opportunity among all children attending public school even in a single county is rationally related to the overall purpose of excellence and equity in our school system, which in turn promotes the general welfare of all citizens.

Am Jur 2d, Schools §§ 6-9; Statutes § 7.

2. **Schools § 3 (NCI3d); Statutes § 2.7 (NCI3d) — uniform system of free public schools — act to consolidate school administrative units — uniform system furthered by act — act not unconditional**

Article IX, § 2(1) of the N.C. Constitution providing for a uniform system of free public schools does not require that

every school within every county or throughout the State be identical in all respects but instead requires that a statewide system be established and made available to all children in North Carolina. Such system is in place in North Carolina and is furthered by the Act to consolidate the school administrative units in Guilford County; therefore, the Act in question does not violate Article IX, § 2(1) of the N.C. Constitution.

Am Jur 2d, Schools § 9.

3. **Schools § 3 (NCI3d); Statutes § 2.7 (NCI3d)— merging school systems—funding dictated by General Assembly—constitution not violated**

The N.C. Constitution does not deny, expressly or otherwise, the General Assembly the power to provide a minimum funding level for merging school systems during the transition to a consolidated system, and nothing in the constitution requires that funding of public schools in all counties in the State be identical or addressed through a single uniform law.

Am Jur 2d, Schools § 9.

4. **Schools § 3 (NCI3d); Statutes § 2.7 (NCI3d)— funding of local system mandated by General Assembly—no violation of Constitution**

An act to consolidate school administrative units in Guilford County did not violate Article IX, § 2(2) of the N.C. Constitution, since the first sentence of that section provides that the General Assembly may mandate that local government provide financial support to the public schools as it deems appropriate, and the second sentence means that local government boards may supplement that mandate if they choose. The second sentence does not mean that local governments have complete discretion to fund their public schools, since that interpretation, propounded by plaintiffs, would render the first sentence meaningless.

Am Jur 2d, Schools § 9.

Appeal by plaintiffs from order and declaratory judgment entered 17 January 1992 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 31 March 1993.

Plaintiffs, the Guilford County Board of Education and its duly elected members, brought this civil action "seeking a declaratory judgment that Chapter 78 of the 1991 Session Laws of the General Assembly of North Carolina (ratified Senate Bill 457) is unconstitutional and void, and seeking to enjoin the defendants from any acts in furtherance of the provisions of that Act."

On 8 May 1991, the North Carolina General Assembly enacted Chapter 78 of the 1991 Session Laws entitled "An Act to Consolidate All of the School Administrative Units in Guilford County or to Provide for the Two City School Administrative Units in that County to have Boundaries Coterminous With the Cities, Subject to a Referendum" (hereinafter the "Act"). The Act recited that it was promulgated in order to better pursue the Guilford County school administrative units' common goals of excellence and equity in educational opportunity for all children "regardless of where the children reside or attend school within Guilford County, in order that the needs of all children attending school in Guilford County are met, regardless of the children's race, gender, or social or economic condition." Part I of the Act provided for the consolidation of the existing Greensboro City School Administrative Unit, the existing High Point City School Administrative Unit, and the existing Guilford County School Administrative Unit, effective 1 July 1993. The consolidated school administrative unit would be known as the Guilford County School Administrative Unit with its Board of Education composed of eleven members, elected as provided in the Act. Additionally, section 15 of the Act provides funding for the merged school system as follows:

> (a) The Board of Commissioners of Guilford County shall provide adequate funding for the operations of the Interim Guilford County Board of Education in fulfillment of its responsibilities as are set out in this act during the period from June 1, 1992, through June 30, 1993.
>
> (b) To assist in assuring that the quality of the educational programs existing within Guilford County shall not decline, local funding for current operating expenses for the consolidated system from 1993-94 will be provided by the Guilford County Commissioners at a per student rate which equals the budgeted local expense per student (average daily membership) of the Greensboro Public School System for fiscal year 1989-90 provided by and appropriated to said system by the Commis-

> sioners including the local supplemental tax as found in the adopted budget resolution of the Greensboro City Board of Education dated October 2, 1989 adjusted as follows. For years 1990-91, 1991-92, 1992-93, 1993-94, and 1994-95, the per student rate shall be increased annually by the percentage of salary increase for teachers funded by the State of North Carolina for each previous fiscal year . . . .

Alternatively, Part II of the Act provided for the territorial jurisdictional boundaries of the Greensboro and High Point administrative units to be coterminous with the city limits of those cities within Guilford County. Part III of the Act provided for a referendum to be held 5 November 1991 through which the voters of Guilford County would choose between the two options. The Act provided that the form of the ballot would be:

> "VOTE FOR ONLY ONE CHOICE
>
> 1. [ ] FOR consolidation of the three school administrative units in Guilford County into one administrative unit.
>
> 2. [ ] FOR the Greensboro City School Administrative Unit to have the same boundaries in Guilford County as the current City of Greensboro, and shall expand to include all areas in Guilford County that might hereafter be added to the City of Greensboro and the High Point City School Administrative Unit to have the current boundaries of the City of High Point within Guilford County, including the area specified in the Greensboro-High Point Joint Annexation Agreement . . . and will include any future annexations within Guilford County.

The referendum included only the two options provided above and did not include a choice which would have permitted the voters to vote against both proposals. The election was held and the majority of votes were cast for option one above (hereinafter the "Merger Option").

Plaintiffs filed this action for declaratory and injunctive relief alleging in pertinent part that the Act was a prohibited local act in violation of Article XIV, § 3, Article II, § 24 and Article V, § 2 of the North Carolina Constitution; that the Act mandated a system of public schools in Guilford County that exceeds the requirements mandated elsewhere in North Carolina in violation of Article IX, § 2(1); and that the Act required the taxpayers of Guilford County to bear a heavier burden for the support of

the uniform state system of public schools than required in any other North Carolina county in violation of Article IX, § 2(2) of the North Carolina Constitution.

The trial court found that Chapter 78 of the 1991 Session Laws of the General Assembly was constitutional, valid and enforceable and entered judgment in favor of defendants on all issues. Plaintiffs appealed.

Richard Schwartz & Associates, by Richard A. Schwartz and Reginald T. Shuford; Douglas, Ravenel, Hardy, Crihfield & Mosely, by John W. Hardy, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Jill R. Wilson; Fisher, Fisher, Gayle, Clinard & Craig, by John O. Craig, III; Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Edwin M. Speas, for defendant-appellees Greensboro City Board of Education and High Point City Board of Education.

MARTIN, Judge.

The issue before this Court is whether Chapter 78 of the 1991 Sessions Laws is violative of any of the provisions of the North Carolina Constitution as alleged by plaintiffs. We conclude that it is not and affirm the judgment of the trial court.

At the outset, we note that plaintiffs have failed to set out or argue in their brief several of the assignments of error contained in the record on appeal, and particularly their assignments of error related to the allegation in their amended complaint that the failure to provide a "status quo" option in the referendum required by Chapter 78 violated the plaintiffs' fundamental right to vote. It is well-settled that assignments of error not argued in an appellant's brief are deemed abandoned on appeal. *Wachovia Bank and Trust v. Southeast Airmotive*, 91 N.C. App. 417, 371 S.E.2d 768 (1988), *disc. review denied*, 323 N.C. 706, 377 S.E.2d 230 (1989). *State v. Davis*, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

Because the Constitution is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision. *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 328 N.C. 24, 399 S.E.2d

311 (1991). Therefore, the judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. *Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958). This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality. *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992); *State v. Evans*, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. *Baker v. Martin*, 330 N.C. 331, 411 S.E.2d 143 (1991); *In re Belk*, 107 N.C. App. 448, 420 S.E.2d 682, *disc. review denied*, 333 N.C. 168, 424 S.E.2d 905 (1992). One who attacks an act of the Legislature on the grounds that it is unconstitutional must point out the particular provision of the Constitution which it is claimed the act violated. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963). In passing upon the constitutionality of a challenged subsection of a statute, the subsection must be viewed in context as part of the entire statute in which it is found. *State v. Gurganus*, 39 N.C. App. 395, 250 S.E.2d 668 (1979). It is not this Court's duty to determine the wisdom and expediency of a legislative act but rather to judge whether the act exceeds constitutional limits or prohibitions. *Adams v. Dept. of N. E. R. and Everett v. Dept. of N. E. R.*, 295 N.C. 683, 249 S.E.2d 402 (1978). Finally, "[w]here a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne County Citizens Assn.*, 328 N.C. at 29, 399 S.E.2d at 315.

Plaintiffs have brought forward in their brief twenty-seven of the forty-six assignments of error contained in the record on appeal, and have advanced three arguments in support thereof.

I.

[1] By their first argument, plaintiffs contend that the Act does not promote the general public welfare, and that there is no rational basis for singling out the schools in Guilford County as opposed to those throughout the State. Thus, they argue, the trial court erred in holding that the Act is a general law, as opposed to a local act prohibited by the North Carolina Constitution. They

contend that the trial court erred in holding that the Act was not a local act.

Our Supreme Court has distinguished between a valid general law and a prohibited local act as follows:

> A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. In sum, the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if 'any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories' (citations omitted).

Adams v. Dept. of N. E. R. and Everett v. Dept. of N. E. R., 295 N.C. 683, 690-91, 249 S.E.2d 402, 407 (1978). Additionally, an act is not invalid merely because it is local unless it violates some constitutional provision. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965). The *Adams* Court was faced with a challenge to the Coastal Area Management Act of 1974 which established a cooperative program of coastal area management between local and state governments. The plaintiffs in that case contended that the General Assembly could not reasonably distinguish between the coastal area and the remainder of the State when enacting environmental legislation and that even if the coast could be dealt with separately, the twenty counties covered by the act did not embrace the entire area necessary for the purposes of the legislation. The *Adams* Court concluded that the recreational and aesthetic nature of the coastal zone and its significance to the public welfare amply justified the reasonableness of special legislative treatment. That court also noted that the areas included were reasonably related to the purposes of the act as the "constitutional prohibition against local legislation does not require a perfect fit." *Adams* at 694, 249 S.E.2d at 409.

However, in *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987), the Court, faced with the question of

whether a legislative enactment establishing particular public pedestrian beach access facilities constituted a local act, decided that the traditional reasonable classification analysis previously applied by the Supreme Court in *Adams* was ill-suited to the situation presented by that case, since by definition a particular public pedestrian beach access facility must rest in one location. *Id.* at 650, 360 S.E.2d at 762. Because the primary purpose of the constitutional limitation on legislative enactments of local acts is to allow the General Assembly an opportunity to devote more time and attention to legislation of state-wide interest and concern, the *Emerald Isle* Court found that instead of applying a reasonable classification analysis, it would focus on the extent to which the act in question affected the general public interests and concerns. *Id.* at 651, 360 S.E.2d at 763. In doing so, the Court recognized that a statute will not be deemed private merely because it extends to particular localities or classes of persons. *Id.* The *Emerald Isle* Court concluded that the legislative act before it was not a local act as the coastal areas are among the State's most valuable resources and the act at issue sought to promote the general public welfare by preserving the beach area for general public pedestrian use. *Id.* Plaintiffs in this case argue that the trial court's conclusion that the Act is a general law is erroneous in that the Act deals only with education in Guilford County rather than throughout the State. Plaintiffs contend that the Act fails to qualify as a general law under either the *Adams* reasonable classification standard or an *Emerald Isle* general welfare test, both of which were specifically addressed by the able trial judge in the judgment. Plaintiffs argue that there exists no reasonable basis for singling out the schools of Guilford County for special treatment when there are numerous school systems across the state with problems which deserve legislative attention. Furthermore, plaintiffs assert that the Act merely promotes the public welfare in Guilford County alone while ignoring the remaining counties in North Carolina. We disagree.

The simple fact that the Act affects only Guilford County, rather than all of the counties in North Carolina, does not compel the conclusion that it is a local act. The number of counties excluded or included is not necessarily determinative, and a statute may be general even if it includes only one county. *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E.2d 697 (1965). "For the purposes of legislating, the General Assembly may and does classify

conditions, persons, places and things, and classification does not render a statute 'local' if the classification is reasonable and based on rational difference of situation or condition." *Id.* at 656, 142 S.E.2d at 702. We agree with the trial court that the Act meets the definition of a general law under both the *Adams* and the *Emerald Isle* tests. The students in Guilford County are a class which reasonably warrants special legislative attention and the provisions of the Act apply uniformly to all of the students. In deciding to consolidate the school administrative units of Guilford County, the Legislature made a rational distinction reasonably related to the Act's purpose to pursue the goals of excellence and equity in educational opportunity for all children of Guilford County. Merely because other counties in the State may have similar goals or needs does not preclude the General Assembly from passing legislation designed to address the needs of all students in a single county. Thus, we hold that the Act withstands the reasonable classification analysis.

Application of the general public welfare analysis which the Supreme Court recognized in *Emerald Isle* also leads to the conclusion that the Act is a constitutional general law. Legislation which promotes equitable access to educational opportunity among all children attending public schools even in a single county is rationally related to the overall purpose of excellence and equity in our school system, which in turn promotes the general welfare of all citizens. Our Constitution specifically provides that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. Article IX, § 1.

II.

[2] By their second argument, plaintiffs contend that the trial court erred by concluding that the Act does not violate Article IX, § 2(1) of the North Carolina Constitution. Section 2(1) provides as follows:

> *General and uniform system: term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

Plaintiffs complain that the Act, by singling out Guilford County for special benefits and added burdens, violates the uniformity

requirements of Article IX, § 2(1). Both parties agree that the term "uniform" does not require that every school within every county or throughout the State be identical in all respects; the term requires that a statewide system be established and made available to all children in North Carolina. *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 150 (1982). We hold that such a system is in place in North Carolina which system is furthered by the Act, and therefore, the Act does not violate Article IX, § 2(1) of the Constitution.

Plaintiffs contend that the Act violates the constitutional directive to the General Assembly to provide a uniform school system throughout the State by singling out one county, purporting to cite various needs and goals of that county, and bestowing upon it benefits and mandated funding burdens not conferred upon any other county in the State. Therefore, plaintiffs argue that, while on its face the Act describes problems and needs of children all over North Carolina, the Act's scheme is not statewide but rather is designed solely to provide certain opportunities for the children of Guilford County. While plaintiffs agree that there is no question that funding as applied may and does vary from county to county without violating the constitutional mandate of uniformity, they argue that in this case the State has mandated funding selectively for one particular county. Thus, plaintiffs argue that although "uniform" does not mean identical, it does mean that the Legislature may not selectively provide piecemeal public education. In support of their argument, plaintiffs cite the decisions of our Supreme Court in *Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890) and *Lane v. Stanly*, 65 N.C. 153 (1871). The *Lane* Court construed the forerunner to Article IX, § 2(1) in our 1868 Constitution interpreting the "uniformity" in education requirement as follows:

> It will be observed that it is to be a 'system;' it is to be 'general,' and it is to be 'uniform.' It is not to be subject to the caprice of localities, but every locality, yea, every child, is to have the same advantage, and be subject to the same rules and regulations.

Lane, at 157-58. Similarly, the *Hodgin* Court stated that:

> [T]he Legislature is required to promote popular education by devising and establishing a plan—a scheme—consisting of necessary and well-appointed constituent parts, and the whole

> organized into a complete system of public schools. Such system must be general—not local—not limited to one or more places or localities in the State; it must extend and prevail throughout its borders; and so, also, it must be uniform in all material respects as contemplated by the Constitution—that is, the system cannot be so regulated by statute as that it will apply and operate as a whole in some places, localities and sections of the State, and not in the same, but in different ways, in other places, localities and sections. An essential requirement of the provision above recited is that the system, whatever it may be, in whatever manner constituted, must be general and uniform as a whole, and therefore so in all its material parts, the purpose being to extend to all the children within the prescribed ages, wherever they may reside in the State, the same opportunity to obtain the benefits of education in free public schools—certainly to the extent that the State itself shall supply means to support such schools.

Hodgin, at 186, 11 S.E. at 587.

The principles of law quoted above support the view that Article IX does not require uniform schools from county to county, nor does it forbid the General Assembly from addressing public school funding in a particular county. Rather, Article IX requires only a uniform system of schools across the State. As our Supreme Court has stated:

> The term 'uniform' here clearly does not relate to 'schools,' requiring that each and every school in the same or other districts throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word 'system' and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support (citations omitted).

Board of Education v. Board of Commissioners, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917). North Carolina presently has an overall uniform statewide school system as is required by its Constitution. Chapter 78 is merely one of many statutes enacted to further this uniform system by specifically addressing the problems of one county. This Court has held previously that funding differences

among schools in various counties based on differences in tax bases do not violate the Constitutional mandate that all children in North Carolina receive an equal educational opportunity. *Britt v. N.C. State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, *appeal dismissed*, 320 N.C. 790, 361 S.E.2d 71 (1987). Additionally the evidence demonstrates that Chapter 78 will promote uniformity in Guilford County by creating one school system rather than three, one funding level rather than three, and one school administration rather than three.

[3] Plaintiffs offer no support for their assertion that non-uniform funding resulting from statewide legislation is permissible, but non-uniform funding resulting from legislation directed toward one county somehow violates Article IX § 2(1). Additionally, the portions of the Act that address funding provide merely for temporary interim funding. It is inevitable that every merger act that addresses a single county's school system will create obligations and benefits that differ from those established in other counties. Moreover, the Constitution, in Article IX, § 2(2), contradicts plaintiffs' arguments, as the governing boards of units of local government having responsibility for public education are expressly authorized to "use local revenues to add to or supplement any public school or post-secondary program." Thus, counties with greater financial resources are able to provide greater educational resources to its students. *See Britt, supra.* We agree with defendants' contention that the North Carolina Constitution does not deny, expressly or otherwise, the General Assembly the power to provide a minimum funding level for merging school systems during the transition to a consolidated system, and nothing in the Constitution requires that funding of public schools in all counties in the State be identical or addressed through a single uniform law. Thus, we uphold the trial court's conclusion that the Act does not violate the provisions of Article IX, § 2(1) of the North Carolina Constitution.

III.

[4] In their third argument, plaintiffs contend that the trial court erred in holding that the Act does not violate Article IX, § 2(2) of the North Carolina Constitution. That section provides as follows:

> *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with finan-

> cial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

Plaintiffs assert that the mandatory language found in the funding provisions of the Act which state that "local funding for current operating expenses for the consolidated system from 1993-94 will be provided by the Guilford County Commissioners at a per student rate which equals the budgeted local expense per student . . . of the Greensboro Public School System for fiscal year 1989-90," and that for the years 1990-95, "the per student rate shall be increased annually by the percentage of salary increase for teachers funded by the State of North Carolina for each previous fiscal year" violate Article IX § 2(2) because of the permissive term "may" in the second sentence of § 2(2). Plaintiffs assert that the quoted portion of section 15 prescribes the amount of annual increase in local funding and ties the increase to an arbitrary and capricious standard bearing no rational relation to the purpose of the Act or the funding. Thus, plaintiffs argue, the Act strips the local authorities of their power to determine whether there is a need to supplement state funding for education. Plaintiffs assert further that the first sentence of § 2(2) which gives the General Assembly the power to delegate responsibility to local government units as it deems appropriate must be read in light of the uniformity mandate in § 2(1). Otherwise, they claim, the mandatory uniformity requirement would be rendered meaningless. We disagree.

Section 2(2) merely provides in its first sentence that the General Assembly may mandate that local government provide financial support to the public schools as it deems appropriate. The second sentence of that section merely means that local government boards may supplement that mandate if they choose. This gives both sentences their plain, logical meaning and renders neither meaningless. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E.2d 289 (1968). Plaintiffs' interpretation that the second sentence of that section provides complete discretion to local governments to fund their public schools would render the first sentence meaningless. Power not expressly limited by the Constitution remains with the people acting through their representatives in the legislature. *Brannon v. N.C. State Board of Elections*, 331 N.C. 335, 416 S.E.2d 390 (1992). Therefore, we uphold the trial court's

conclusions that the minimum funding requirement of Chapter 78 does not violate Article IX, § 2(2) of the North Carolina Constitution.

The judgment of the Superior Court of Guilford County declaring Chapter 78 of the 1991 Sessions Laws of the General Assembly of North Carolina to be constitutional and valid, and denying plaintiff's prayer for injunctive relief is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

PHILLIP DRIVER AND NANCY DRIVER v. BURLINGTON AVIATION, INC. AND THE CESSNA AIRCRAFT COMPANY

No. 9215SC193

(Filed 15 June 1993)

1. **Negligence § 9 (NCI4th)— personal injury action—intentional misrepresentation not appropriate theory—sufficiency of allegations based on negligence**

In an action to recover for injuries sustained in a plane crash, plaintiffs could not recover on a theory of negligent misrepresentation, since that action lies where pecuniary loss results from the supplying of false information to others for the purpose of guiding them in their business transactions, and is not the basis for recovery for personal injury; however, the allegations of the amended complaint were sufficient to state a claim for relief based upon traditional negligence rules.

Am Jur 2d, Negligence §§ 126, 127.

2. **Negligence § 86 (NCI4th)— negligence of preparer of instructional manual—sufficiency of complaint to allege simple negligence—insufficiency to allege gross negligence**

Plaintiffs' complaint was sufficient to state a claim of simple negligence but not gross negligence against the preparer or producer of an instructional manual where plaintiffs alleged that defendant plane manufacturer had a duty to the pilot and his passengers to provide complete and accurate instruction concerning carburetor icing and slow flight operation of

the aircraft; defendant omitted such information from the manual and wrongfully instructed about carburetor icing; defendant knew or should have known that the aircraft would be operated for slow flight with a passenger aboard; and the negligence of defendant actually and proximately caused the damages to plaintiffs.

Am Jur 2d, Negligence §§ 81, 239.

3. Limitations, Repose, and Laches § 27 (NCI4th)— negligence in preparing instruction manual—date of sale not alleged—action not barred by statute of repose

In an action to recover for injuries sustained in a plane crash allegedly resulting from defendant aircraft manufacturer's negligence in preparing and producing an instruction manual to accompany the aircraft, there was no merit to defendant's contention that plaintiffs' underlying action was an action for a defective product, the aircraft, that the aircraft was sold to defendant lessee eleven years prior to the accident in question, and that the action was therefore barred by the statute of repose, since plaintiffs' underlying action was a products liability action, the product was the instruction manual, and the date of sale of the manual, a date which was not pled offensively or defensively by the parties, was therefore the date which would trigger the statute of repose.

Am Jur 2d, Products Liability § 921.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery. 25 ALR4th 641.

4. Uniform Commercial Code § 10 (NCI3d)— sale of allegedly defective instruction manual to pilot—no action by passenger for breach of express and implied warranties

Plaintiffs were not entitled to assert claims for breach of express and implied warranties arising out of the sale of an instruction manual to accompany the aircraft which crashed, thereby injuring plaintiffs, since the manual was sold to the pilot of the aircraft, not to plaintiff passenger, and the seller's warranty of N.C.G.S. §§ 25-2-313 through 25-2-315 did not extend to plaintiffs.

Am Jur 2d, Products Liability §§ 459 et seq.; Sales § 708.

Construction and effect of UCC Art. 2, dealing with sales. 17 ALR3d 743.

Third party beneficiaries of warranties under UCC § 2-318. 100 ALR3d 743.

5. Products Liability § 5 (NCI4th)— defective aircraft manual— no ultrahazardous activity—no strict liability

Plaintiffs' complaint was insufficient to state a claim for strict liability where plaintiffs claimed that defendant failed to provide adequate warnings and information in an instruction manual written to accompany an aircraft which crashed while plaintiff was a passenger, since there was no ultrahazardous activity in this case, and strict liability therefor did not apply.

Am Jur 2d, Negligence § 396.

6. Negligence § 75 (NCI4th)— allegedly negligent preparation of aircraft instruction manual—personal injury in plane crash—sufficiency of claim for negligent infliction of emotional distress

In an action to recover for personal injuries sustained in a plane crash allegedly resulting from defendant's negligence in failing to provide a correct and complete instruction manual to accompany the aircraft, plaintiffs' complaint was sufficient to state a claim for negligent infliction of emotional distress but was insufficient to state a claim for intentional infliction of emotional distress.

Am Jur 2d, Negligence § 81.

Appeal by plaintiffs from order entered 26 August 1991 by Judge J. B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 3 February 1993.

On 19 November 1989, plaintiff Phillip Driver was severely injured when a Cessna model 152 aircraft, in which he was a passenger, lost power and crashed in Alamance County. At the time of the crash, the aircraft was being operated by Neil Harris, who had rented it from defendant-owner Burlington Aviation, Inc. Plaintiffs brought this action to recover damages for personal injuries and loss of consortium against Burlington Aviation alleging that it had negligently maintained the aircraft and that such negligence was the proximate cause of the crash. Plaintiffs were later granted leave to amend their complaint to add Cessna Aircraft

Co. [hereinafter "Cessna"] as a defendant. In their amended complaint, plaintiffs allege in part:

> 4. . . . Burlington Aviation made the initial sale for use of a new Cessna 152 Information Manual to Neil Harris. This sale was the initial sale for use of the manual.
>
> 6. . . . Burlington Aviation under authority of Cessna Aircraft, provided flight and ground instruction to Neil Harris, including instruction on the subjects of carburetor icing and the slow-flight operation of a Cessna 152 model . . . .
>
> 7. . . . Cessna Aircraft is engaged in the business of preparing, producing and publishing instructional material on the operation of the Cessna 152 aircraft, including the Cessna Information Manual purchased by Neil Harris.
>
> 9. . . . prior to operating the Aircraft, Neil Harris obtained instructions and studied material concerning carburetor icing and the slow-flight operation of a Cessna model 152, including the Cessna 152 Information Manual. Neil Harris relied upon this instruction and the material contained in the Cessna 152 Information Manual during his operation of the Aircraft.
>
> 10. . . . Cessna Aircraft omitted information concerning carburetor icing from the Cessna Information Manual and the Cessna Information Manual wrongfully instructed concerning carburetor icing and the slow-flight characteristics of the Aircraft. Specifically, the manual:
>
> > (a) did not describe meteorological conditions that were conducive to carburetor icing.
> >
> > (b) did not warn that in slow-flight, the Aircraft would likely crash if carburetor icing occurred, even if the carburetor icing remedy (carburetor heat) was activated after carburetor icing occurred.
> >
> > (c) did not advise pilots to activate carburetor heat during slow-flight to prevent carburetor icing.
>
> 12. . . . Cessna Aircraft and Burlington Aviation knew, or should have known, that the Aircraft would be operated for slow-flight with a passenger aboard.

17. Cessna Aircraft and Burlington Aviation had a duty to exercise due care for those who might foreseeably be affected by their activities.

18. . . . Burlington Aviation and Cessna Aircraft had a duty to Neil Harris and his passengers, such as Phillip Driver, to provide complete and accurate instruction concerning carburetor icing and the slow-flight operation of the Aircraft.

19. The negligence of Cessna Aircraft and Burlington Aviation as alleged herein actually and proximately caused the damages to the plaintiffs.

Based upon these allegations, plaintiffs' complaint asserts seven claims for relief against defendants resting upon theories of negligence, gross negligence, breach of express and implied warranties, strict liability, and intentional and negligent infliction of emotional distress.

In lieu of a responsive pleading, Cessna moved to dismiss the action against it pursuant to G.S. § 1A-1, Rule 12(b)(6) on the grounds that the amended complaint failed to state a claim against Cessna upon which relief could be granted. The trial court allowed the motion and entered an order dismissing plaintiffs' claims against Cessna; plaintiffs appeal.

Wishart, Norris, Henninger & Pittman, P.A., by J. Wade Harrison and Julie A. Risher, for plaintiffs-appellants.

Huff, Poole & Mahoney, P.C., by David N. Ventker, and Maupin, Taylor, Ellis & Adams, P.A., by John T. Williamson, for defendant-appellee The Cessna Aircraft Company.

MARTIN, Judge.

Initially, we note that plaintiffs have appealed from an interlocutory order. Judge Allen's order dismisses plaintiffs' action against Cessna, but does not dispose of plaintiffs' claims against Burlington Aviation, nor does the order contain a certification that "there is no just reason for delay" as required by G.S. § 1A-1, Rule 54(b) for entry of a final judgment affecting fewer than all of the claims or parties. As a general rule, no appeal lies from an interlocutory order. *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979). However, G.S. §§ 1-277 and 7A-27(d) allow an immediate appeal from an interlocutory order which affects

a substantial right. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976). In the present case, we conclude that the trial court's dismissal of plaintiffs' claims against Cessna affects a substantial right to have determined in a single proceeding whether plaintiffs have been damaged by the actions of one, some or all defendants where their claims arise upon the same series of transactions, *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987), and we will consider the appeal.

Plaintiffs' sole contention on appeal is that the trial court erred in granting Cessna's motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6) because their amended complaint states cognizable claims for relief. For the reasons stated below, we reverse in part and remand this case to the trial court.

The question presented by a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). Furthermore, in analyzing the sufficiency of the complaint to withstand a Rule 12(b)(6) motion, the complaint must be liberally construed, *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987), and " 'a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970), *quoting*, *2A J. Moore, Moore's Federal Practice*, ¶ 12.08 (2d ed. 1968) (emphasis original).

[1] In the present case, plaintiffs allege that defendant Cessna "is engaged in the business of preparing, producing, and publishing instructional material," including the Cessna information manual purchased and relied upon by the pilot, Neil Harris, in the operation of the Cessna model 152 aircraft and that the Cessna materials "promulgated dangerously inadequate information about preventing carburetor icing and wrongfully instructed concerning carburetor icing and the slow-flight characteristics of the aircraft," the conditions which allegedly caused the aircraft to crash on 19 November 1989 resulting in plaintiffs' injuries. At the hearing on Cessna's motion to dismiss and in their brief to this Court, plaintiffs argued

that the allegations in the complaint and amended complaint give rise to a claim based upon negligent misrepresentation.

In this State, we have adopted the Restatement 2d definition of negligent misrepresentation and have held that the action lies where *pecuniary loss* results from the supplying of false information to others for the purpose of guiding them in their business transactions. *See* Restatement (Second) of Torts § 552 (1977); *Raritan River Steel v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 339 S.E.2d 62 (1986), *aff'd in part and rev'd in part*, 322 N.C. 200, 367 S.E.2d 609 (1988) (action brought against accountants); *See also, Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981); *Davidson and Jones, Inc. v. Cty. of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979) (actions allowed against engineers); *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981) (action allowed against real estate appraiser); *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, *disc. review denied*, 301 N.C. 527, 273 S.E.2d 454 (1980); *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E.2d 50, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979) (actions allowed against architects); *Ingle v. Allen*, 71 N.C. App. 20, 321 S.E.2d 588 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 391 (1985); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984) (actions allowed against attorneys). However, we have not found, and plaintiffs have not directed us to, any case in which the theory of negligent misrepresentation was approved as a basis for recovery for personal injury.

Though plaintiffs may have mislabeled the theory in their argument, we believe the allegations of the amended complaint, when taken as true and construed liberally, are sufficient to state a claim for relief based upon traditional negligence rules. The courts of this State have long acknowledged that the manufacturer of a chattel is under a duty to use reasonable care in its manufacture, and, when reasonable care so requires, to give adequate directions for its use. 11 Strong's N.C. Index 3d *Sales* § 22 (1978). Furthermore, the manufacturer of a chattel is liable to those whom he should expect to use the chattel, or be in the vicinity of its reasonable use, for injuries resulting to persons or property from a failure to perform his duty. *Id.* Liability of the manufacturer for resulting injuries when he knows that an article is to be used for a specific

purpose rests upon general principles of negligence. *Id.* In identifying the types of negligent conduct for which manufacturers may be held liable, our Supreme Court stated:

> "He [the manufacturer] may be negligent in failing to . . . use proper care to give adequate warning to the user, not only as to dangers arising from unsafe design, or other negligence, but also as to dangers inseparable from a properly made product. The warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it; and the duty continues even after the sale . . . . He is also required to give adequate directions for use, when reasonable care calls for them."

Corprew v. Chemical Corp., 271 N.C. 485, 491, 157 S.E.2d 98, 103 (1967), *quoting, W. Prosser, Law of Torts* 665 (3d. ed. 1964). Applying these principles, this Court found that plaintiff stated a claim for wrongful death against the manufacturer of a chemical where the decedent suffered aplastic anemia resulting from decedent's exposure to the chemical during the course of his employment and where the manufacturer had failed to adequately warn of its inherent dangers. *Davis v. Siloo Inc.*, 47 N.C. App. 237, 267 S.E.2d 354, *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980). In *Davis*, the chemical contained a label, but the manufacturer failed to include on the label any warning of the chemical's dangerous propensities if absorbed through the skin. *Id.* Plaintiff alleged in the complaint that the manufacturer knew or should have known of the dangers inherent in the chemical, knew or should have known that these dangers could be encountered with ordinary use of the chemical, provided a label which inadequately warned of the potential dangers of the chemical if exposed to skin, and knew or should have known that a user would rely upon the inadequate warnings on the label. *Id.* This Court held that these allegations were sufficient to state a claim against the manufacturer based upon negligence, saying:

> . . . the manufacturer . . . will be subject to liability under a negligence theory for damages which proximately result from the failure to provide adequate warnings as to the product's dangerous propensities which are known or which by exercise of care commensurate with the danger should be known by the manufacturer, or from the failure to provide adequate direc-

> tions for the foreseeable user as to how the dangerous product should or should not be used with respect to foreseeable uses.

Id. at 245-46, 267 S.E.2d at 359.

The complaint in *Davis* was filed prior to the effective date of the Products Liability Act, Chapter 99B of the North Carolina General Statutes; and therefore, the Act was inapplicable. However, the application of the Products Liability Act in such cases does not negate the application of general negligence principles. *See McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, *disc. review allowed*, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, 307 N.C. 695, 300 S.E.2d 374 (1983). G.S. § 99B-1(3) defines a "product liability action" as

> . . . any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product.

N.C. Gen. Stat. § 99B-1(3) (1989). Chapter 99B does not adopt the doctrine of strict liability, as clearly demonstrated by the language in G.S. § 99B-4 which codified the common law defense of contributory negligence in products liability actions. N.C. Gen. Stat. § 99B-4; *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 678, 268 S.E.2d 504, 510 (1980). Thus, in enacting the Products Liability Act, the Legislature reaffirmed the reasoning of the pre-statute cases holding that the essential elements of an action for products liability are based upon negligence and include: "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach; and (4) loss because of the injury." *McCollum* at 286, 293 S.E.2d at 635.

[2] In the present case, plaintiffs' amended complaint alleged that Cessna had a duty to the pilot and his passengers "to provide complete and accurate instruction concerning carburetor icing and the slow-flight operation of the [a]ircraft," that Cessna "omitted information concerning carburetor icing from the Cessna Information Manual and the . . . Manual wrongfully instructed concerning carburetor icing and the slow-flight characteristics of the [a]ircraft," that Cessna "knew or should have known, that the [a]ircraft would

be operated for slow-flight with a passenger aboard," and that "[t]he negligence of Cessna . . . actually and proximately caused the damages to the plaintiffs." Clearly, these allegations are sufficient to state a claim for relief based on a theory of negligence against Cessna in the preparation and publication of the Cessna Information Manual. Although this case appears to be a case of first impression involving a claim for negligence against the preparer or producer of an instructional manual, this Court recognized in *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 320 S.E.2d 909 (1984), *cert. denied*, 312 N.C. 798, 325 S.E.2d 631 (1985):

> It is a matter of common knowledge that there is hardly a machine, device, or piece of equipment sold in this country that is not accompanied by an instruction manual, sheet, or label of some kind. The publication and distribution of such information is encouraged, if not required, by innumerable government agencies, consumer groups and industry associations; and *the failure of manufacturers and distributors to properly inform purchasers and other users of a product's hazards, uses, and misuses is a basis for rendering them legally liable for injuries resulting therefrom under some circumstances.* (emphasis added.)

Id. at 710-11, 320 S.E.2d at 913; *See also, Smith v. Selco Products, Inc.*, 96 N.C. App. 151, 385 S.E.2d 173 (1989). Therefore, we cannot say "to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim," *Sutton, supra.*, and the trial court erred in dismissing Count I of plaintiffs' amended complaint stating a claim for relief against Cessna for negligence.

[3] At the hearing on its motion to dismiss and in its brief to this Court, Cessna argued that plaintiffs' underlying action is an action for a defective product and that the "defective product" is the aircraft. Cessna further argued that since the aircraft was sold to Burlington Aviation on 19 October 1978, a fact which was not pled by either party, but which was stipulated at the hearing on Cessna's motion to dismiss, plaintiffs' action was barred by the statute of repose, G.S. § 1-50(6). We find, however, that if plaintiffs' underlying action is a products liability action, the product to which the action applies is not the aircraft as Cessna suggests, but the instructional manual. There are no allegations in plaintiffs' amended complaint contending that the aircraft was in

any way defective. In fact, plaintiffs concede that carburetor icing is a common condition which occurs in any aircraft under certain meteorological and operational conditions. Plaintiffs do not contend that the aircraft functioned defectively or improperly under the circumstances. Instead, plaintiffs argue that the Information Manual prepared and distributed by Cessna omitted information concerning this common, dangerous propensity of the aircraft. Therefore, the "defective" product at issue is the manual, not the aircraft. Although the Legislature did not undertake to define what "products" are covered by Chapter 99B, G.S. § 99B-1(3) anticipates that a products liability action may include an action for personal injuries caused by or resulting from the "warning or instructing" of any product.

Since plaintiffs allege that the Informational Manual at issue was sold separately to the pilot, Neil Harris, the date of this sale is the crucial event triggering the statute of repose in G.S. § 1-50(6). This date has not been pled offensively or defensively by the parties at this time, and the trial court was therefore without sufficient facts to dismiss plaintiffs' action on this basis.

We have also reviewed plaintiffs' claims against Cessna for gross negligence, breach of express and implied warranties, strict liability, and intentional and negligent infliction of emotional distress. Plaintiffs' second Claim for Relief alleges gross negligence. The allegations describing defendant's acts and/or omissions in producing the manual are insufficient as a matter of law to indicate willful and wanton conduct "in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956). The trial court correctly dismissed plaintiffs' claim alleging gross negligence.

[4] In their Third and Fourth Claims for Relief, plaintiffs seek to assert claims for breach of express and implied warranties. They allege, however, that the Information Manual was sold by Cessna to Neil Harris, the pilot. Ordinarily, only the purchaser of a product may institute a claim for liability based upon a breach of an express or implied warranty. *See* N.C. Gen. Stat. §§ 25-2-313 through 25-2-315 (1986). Apparently, plaintiffs contend that they are third party beneficiaries of an alleged express or implied warranty existing between Cessna and Harris. Pursuant to G.S. § 25-2-318 the seller's warranty extends "to any natural person who is in the family or household of his buyer or who is a guest in his home . . . ." Plaintiffs do not allege that any relationship of the type required

by the statute existed at the time of the crash. Therefore, plaintiffs are not entitled to relief based upon these theories as a matter of law. *See Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E.2d 766, *cert. denied*, 284 N.C. 258, 200 S.E.2d 659 (1973).

[5] Likewise, plaintiffs' Fifth Claim for Relief purporting to state a claim for strict liability is without legal merit. Plaintiffs allege that the failure of Cessna to provide adequate warnings and instructions in the Information Manual "constitutes a defective condition and inherently an unreasonably dangerous activity." To date, however, the North Carolina courts have limited the imposition of strict liability to ultrahazardous activities. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). The Court in *Woodson* distinguished inherently dangerous activities from ultrahazardous ones:

> The likelihood of serious harm arising from inherently dangerous activities is less than that associated with ultrahazardous activities, and proper safety procedures can substantially eliminate the danger. Unlike ultrahazardous activities, inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions.

Id. at 351, 407 S.E.2d at 234. Based upon this distinction, the Court affirmed the principle that liability for injuries caused by inherently dangerous activities is not strict, but based on negligence. *Id.* We have already determined that plaintiffs have stated a claim for negligence against Cessna; however, we hold that the law in this State does not support plaintiffs' claim for strict liability based upon these allegations.

[6] In their Sixth Claim for Relief, plaintiffs purport to assert a claim for intentional infliction of emotional distress alleging that Cessna's conduct is "extreme and outrageous and indicates a reckless indifference to the likelihood that their conduct would cause severe, emotional distress." We hold as a matter of law, however, that Cessna's conduct, as alleged in the amended complaint, falls short of that which would be sufficiently outrageous to support a claim for intentional infliction of emotional distress. Furthermore, plaintiff does not allege any intent on the part of Cessna in causing harm to plaintiff. *See Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

By their Seventh Claim for Relief, plaintiffs seek to recover for negligent infliction of emotional distress. Plaintiffs allege that

Cessna's negligence actually and proximately caused each of them to suffer severe emotional distress. As we have already stated, the complaint is sufficient to allege a claim for relief for damages due to Cessna's negligence. North Carolina law allows recovery for emotional injury inflicted negligently, and plaintiffs' allegations, taken as true, are sufficient to state a claim for relief based on this theory. *See Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

In summary, we hold that plaintiffs' amended complaint is sufficient to state claims for relief for negligence and negligent infliction of emotional distress, and the trial court's order dismissing plaintiffs' action with respect to these claims is reversed. The trial court's order dismissing the remaining claims alleged in the amended complaint is affirmed. This case is remanded to the Superior Court of Alamance County.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and GREENE concur.

NORTHWESTERN FINANCIAL GROUP, INC., PLAINTIFF/APPELLEE v. THE COUNTY OF GASTON; DAVID C. BEAM, PORTER McATEER, DAVID R. HOLLIFIELD, C. DAVID WARD, JR., CLAUDE CRAIN, MARY LOU CRAIG, JAMES S. FORRESTER, INDIVIDUALLY AND AS MEMBERS OF THE GASTON COUNTY BOARD OF COMMISSIONERS; THE GASTON COUNTY PLANNING BOARD; AND WILLIAM M. PATRICK, JACK DILL, GEORGE M. MASON, DAVID E. WATTS, FRANCES SPRINGS, JOHN DYER, W. REGGIE HUNDLEY, INDIVIDUALLY AND AS MEMBERS OF THE GASTON COUNTY PLANNING BOARD, DEFENDANTS/APPELLANTS

No. 9227SC177

(Filed 15 June 1993)

1. Appeal and Error § 118 (NCI4th)— issue not raised at trial— no consideration on appeal

Though the denial of a motion for summary judgment on the basis of immunity is immediately appealable, that issue was not before the court on appeal, since defendants expressly abandoned their qualified immunity defense in their brief, and

at no point in the proceedings below did defendants raise the defense of absolute immunity.

Am Jur 2d, Appeal and Error § 104.

Reviewability of federal court's denial of motion for summary judgment. 17 L. Ed. 2d 886.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. **Appeal and Error § 118 (NCI4th)— summary judgment based on res judicata—appealability**

The denial of summary judgment based on the doctrine of res judicata is immediately appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of federal court's denial of motion for summary judgment. 17 L. Ed. 2d 886.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

3. **Judgments § 237 (NCI4th)— actions against members of county boards—official capacities—official and individual capacities—identical parties for res judicata purposes**

The defendants in two actions were identical for res judicata purposes where they were sued in their official capacities as members of county boards in the first action and were sued in both their official and individual capacities in the second action since the defendants in the second action were, at a minimum, in privity with the defendants in the first action.

Am Jur 2d, Judgments § 578.

4. **Judgments § 313 (NCI4th)— permit revoked—claim for equitable relief filed—subsequent claim for monetary damages—subsequent claim barred by res judicata—insufficient evidence**

Where plaintiff developers of a mobile home park sought equitable relief in a 1988 action which ultimately resulted in a permanent injunction requiring defendants to issue a permit to plaintiffs under defendant county's 1986 instead of its 1987 mobile home park ordinance, and plaintiff subsequently brought an action in 1990 seeking monetary damages resulting from

the delay, the Court of Appeals could not determine if the two actions were part of the same claim and therefore whether the second action was barred by res judicata, since this action would be barred if plaintiff had incurred any monetary damages at the time the 1988 action was filed, whether or not the full extent of plaintiff's damages was known with certainty, and the evidence in the record was not conclusive as to when plaintiff incurred monetary damages.

Am Jur 2d, Judgments § 428.

5. **Judgments § 313 (NCI4th)— building permit revoked—equitable relief and monetary damages—claims must be brought in same action—subsequent action barred by res judicata**

Where a developer obtains a building permit which is later revoked, the developer must bring claims for equitable relief and monetary damages in the same suit in order to avoid dismissal of the claim for monetary damages on the ground of res judicata except (1) where a plaintiff needs to act quickly to obtain a temporary injunction and does not have time to bring a claim for damages contemporaneously with the injunction, and (2) where a plaintiff is unable to bring the claim for damages because they have not yet been incurred.

Am Jur 2d, Judgments § 428.

Appeal by defendants from order entered 4 November 1991 and signed 12 November 1991 by Judge Marcus Johnson in Gaston County Superior Court. Heard in the Court of Appeals 1 February 1993.

Michael B. Brough & Associates, by Michael B. Brough and Alison A. Erca, for defendants-appellants.

Weinstein & Sturges, P.A., by T. LaFontine Odom, William H. Sturges and Thomas L. Odom, Jr., for plaintiff-appellee.

LEWIS, Judge.

The facts of this case present two issues on appeal. The first of these is whether or not the denial of a motion for summary judgment asserting the defense of res judicata is immediately appealable. If so, then we must address the merits of defendants' res judicata defense to determine whether or not Northwestern's

claims for damages are barred. On the facts of this case, we hold that the denial of defendants' motion affects a substantial right and we have addressed the merits of defendants' res judicata defense.

[1] In addition to the defense of res judicata, the individual defendants have also raised the defenses of absolute immunity and qualified immunity, and claim that it was error for the trial court to have denied their summary judgment motion on these theories. Recent case law has left no doubt that the denial of a motion for summary judgment on the basis of immunity is immediately appealable. *See EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992); *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991). However, we need not address this part of defendants' appeal because the issues of qualified immunity and absolute immunity are not properly before this Court. In their brief, defendants expressly abandoned their qualified immunity defense, choosing to rely exclusively on absolute immunity. However, at no point in the proceedings below did defendants raise the defense of absolute immunity in the pleadings or otherwise. Since the issue of absolute immunity was not raised below, it is not properly before us now. N.C.R.App.P. 10(b)(1).

The facts of this case and the relationship between the two suits brought by Northwestern are essential to an understanding of this matter. In 1987, Northwestern began developing a tract of land in Gaston County for use as a mobile home park and submitted plans to the Gaston County Planning Board for approval. At the time the initial plans were submitted, Gaston County had in effect a 1986 Mobile Home Park Ordinance. In September of 1987, Gaston County revised its Mobile Home Park Ordinance and adopted a 1987 version. Three days prior to the revision of the Mobile Home Park Ordinance, Northwestern amended its plans to increase the number of available spaces for mobile homes since a package treatment plant would be used instead of septic tanks. When Northwestern submitted its revised plans, the Planning Board rejected them as being a hazard to the public welfare and also said that future plans would need to comply with the 1987 ordinance.

Claiming that its plans had been improperly disapproved by the Gaston County Planning Board, Northwestern filed an action on 26 August 1988 entitled "Complaint, Request for Preliminary and Permanent Injunction, Request for Writ of Mandamus and Request for Writ of Certiorari" (hereafter the "1988 action") against

the County of Gaston, the members of the Gaston County Board of Commissioners, as well as the members of the Gaston County Planning Board. On 19 December 1988 the trial court issued a permanent injunction in favor of Northwestern requiring defendants to issue a permit to Northwestern under the 1986 ordinance. At no point in the 1988 action did Northwestern seek anything other than equitable relief. The 1988 action eventually reached the Supreme Court which upheld the trial court and required the Gaston County Planning Board to issue a permit in favor of Northwestern.

While the 1988 action was pending before the Supreme Court, Northwestern filed a motion to amend its complaint on 27 July 1990 in both the Supreme Court and the Gaston County Superior Court seeking to add claims for monetary damages and attorney's fees. At the same time, Northwestern also filed the complaint in the current action alleging essentially the same facts as in the 1988 action, but this time seeking monetary damages for discrimination under 42 U.S.C. § 1983 and for a wrongful taking without compensation, instead of equitable relief. Both the Supreme Court and the Superior Court denied Northwestern's motion to amend, forcing it to pursue its claims for monetary damages in this separate action. Northwestern alleges that the three year delay from the filing of the 1988 action has caused it irreparable injury which has necessitated the claims for monetary damages.

After Northwestern filed the current action, defendants filed a motion for a more definite statement as to the capacity in which the individual defendants were being sued. Northwestern filed an amended complaint alleging that defendants were being sued in both their individual and official capacities. Defendants answered on 26 December 1990, asserting that Northwestern's claims for monetary damages were barred by res judicata and qualified immunity. Defendants thereafter moved for summary judgment on these grounds. The trial court denied defendants' motion for summary judgment and defendants have appealed to this Court.

[2] As a general rule, the denial of a motion for summary judgment is a nonappealable interlocutory order. *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). However, an exception arises when a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment. *See Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). Defendants claim that the denial of their motion for summary

judgment on the basis of res judicata affects a substantial right and we must agree.

Until recently, none of our appellate courts had thoroughly explored the issue of whether the denial of summary judgment based on the doctrine of res judicata was immediately appealable. However, in *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993), our Supreme Court held that "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." In reaching its decision, the Supreme Court relied on the fact that the denial of such a motion could lead to a second trial which would frustrate the underlying principles of res judicata. *Id.* In contrast to *Bockweg*, there has yet to be a trial in this matter because the 1988 action sought only equitable relief. Thus the possibility for inconsistent verdicts does not exist. *See Green v. Duke Power, Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). Although we feel that the facts of this case are distinguishable from those in *Bockweg*, we have chosen to consider the merits of defendants' appeal.

The doctrine of res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). "*Res judicata* operates as a bar not only against matters litigated or determined in the prior proceeding but also against 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward.' " *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524-25 (1989) (citations omitted); *see also, Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). Res judicata also serves the dual purposes of protecting litigants from having to relitigate previously decided matters and promoting judicial economy. *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161.

[3] It is not disputed that the 1988 action was brought before a court of competent jurisdiction and that the Supreme Court's decision in that case constituted a final judgment on the merits. It is also clear to us that the same parties are involved. The only difference in the parties in the 1988 action and the present matter

is that the defendants have been sued as individuals and additionally in their official capacities. Northwestern claims that this is enough to defeat defendants' claim of res judicata and cites *Roy v. City of Augusta, Maine*, 712 F.2d 1517 (1st Cir. 1983), for this proposition. We do not agree. Even though defendants have been sued in an additional capacity, they are still the same individuals, and at a minimum, would have to be considered in privity with the defendants in the 1988 action. Therefore, the only remaining question is whether or not Northwestern has brought the "same claim" for the purposes of res judicata.

A test or a definition for determining what is the "same claim" for the purposes of res judicata has not been definitively addressed by our appellate courts. Instead, our appellate courts have addressed in an elusive manner several different factual situations and then concluded whether or not the same claim was present, all without much discussion. *See e.g. King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973) (first suit based on damages for personal injury and second suit based on damages for wrongful death are not same cause of action); *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E.2d 909 (1955) (res judicata applicable for breach of an entire and indivisible contract and second action will not lie); *Shaw v. LaNotte, Inc.*, 92 N.C. App. 198, 373 S.E.2d 882 (1988) (res judicata not applicable where first suit sought to accelerate note and determine issue of default, and second suit was for the total amount due). We do not feel that these cases are sufficiently similar to our unique fact situation to be dispositive.

Recently, there has been a strong movement on the part of some litigants for the courts of this State to adopt the Restatement's "transactional approach" to res judicata for determining whether two causes of action are part of the same claim. *See Restatement (Second) of Judgments* § 24. Defendants in this case have urged us to do so, as did the defendants in *Bockweg*. Under the transactional approach "all issues arising out of 'a transaction or series of transactions' must be tried together as one claim." *Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162 (citation omitted). Though the transactional approach has been adopted generally by the federal courts and several state courts, *id.*, as of yet, neither this Court nor the Supreme Court has adopted it.

In *Bockweg*, the Supreme Court had the opportunity to address the transactional approach further, and although they did

not adopt it, we have found guidance in the language used by the Court. The Supreme Court stated that defendants had failed to cite any authority under the transactional approach where "two different instances of negligence leading to two different injuries should constitute one claim which may not be split." *Id.* at 494, 428 S.E.2d at 162. In reaching this conclusion, the Supreme Court distinguished the authorities cited by defendants because they stood for the proposition that "actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata.*" *Id.* Similar language appears in *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986), where Judge (now Justice) Whichard stated "[t]he defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief. . . ." In *Bockweg*, the Supreme Court determined that res judicata was inapplicable because plaintiffs sought separate remedies for distinct acts of negligence leading to separate and distinct injuries. Defendants contend that *Bockweg* is distinguishable since Northwestern's suits are based on the same wrongful act, the denial of the permit. Thus, say defendants, Northwestern's present action falls within the above quoted language because Northwestern has not raised anything new in its pleadings but instead has only changed the remedy sought. We do not agree.

[4] As in this case, the applicability of res judicata is often as difficult as a solution to the Bosnian conflict. *See Shelton v. Fairley*, 72 N.C. App. 1, 323 S.E.2d 410 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985). Typically the doctrine must be applied as justice and fairness require. *Id.* Though it is true that both Northwestern's suits arise out of the same set of facts and circumstances, Northwestern alleges that its claims for damages could not have been known until after it was granted the mandatory injunction. We believe that this is a pivotal distinction. It is well established that all of a party's damages resulting from a single wrong must be recovered in a single action. *See Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993); *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990), *disc. rev. denied*, 328 N.C. 570, 403 S.E.2d 509 (1991); *see also 1B Moore's Federal Practice* ¶ 0.410[1] (1993) ("The plaintiff must seek in his first suit all the relief to which he is entitled, and the judgment in that suit bars a second suit seeking different

or additional relief"). However, for this rule to apply, logic and common sense require that both remedies must have been available at the time the first action was commenced. To hold otherwise would require plaintiffs to include claims for damages not yet incurred for fear that future claims would be forever barred. Such a result would not be consistent with the notions of justice and fair play.

[5] Although the factual situation presented by this appeal is unique to our courts, several of the federal circuits have considered this scenario. In fact, the Seventh Circuit had before it facts virtually identical to those in this matter in the case of *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984). Therein, a developer was granted a building permit only to have it later revoked when the municipality learned that the permit had been improperly issued. The developer sought and obtained injunctive relief prohibiting the municipality from interfering with further construction. More than a year and a half later, after obtaining the mandatory injunction and after completing construction, the developer then sought monetary damages from the municipality for violations of 42 U.S.C. § 1983 and for a wrongful taking without compensation.

On appeal the Seventh Circuit affirmed the district court's ruling that the developer's claims for monetary damages were barred by res judicata. The Seventh Circuit reasoned that the developer's claims for damages were merely a reincarnation of the first suit, simply under a different legal theory and requesting a different relief. Finding no reason why the developer could not have raised the claims for damages at the same time as the claim for injunctive relief, the Seventh Circuit ruled that the damages were within the purview of the first suit and barred by res judicata. We find the reasoning of the Seventh Circuit to be consistent with the policies of this State regarding res judicata and hereby adopt the Seventh Circuit's rationale as the general rule for future cases covering identical facts.

However, in reaching its decision the Seventh Circuit warned, in a footnote, of two scenarios where its rationale should not be applied. The first of these involved the situation where a plaintiff needed to act quickly to obtain a temporary injunction and did not have the time to bring a claim for damages contemporaneously with the injunction. The second exception involved the situation where the plaintiff was unable to bring the claim for damages

because the damages had not yet been incurred. We believe that it is this second exception into which the facts of the case at bar fall.

Northwestern claims that when it filed the 1988 action, the full extent of its damages was not known and it was not until the appeal of the 1988 action was completed that the full extent of damages could be determined with certainty. We have reviewed the record before us to determine whether or not at the time Northwestern filed the 1988 action it had incurred any damages. Unfortunately the record is devoid of any conclusive evidence. Without this information, we cannot determine whether Northwestern is merely seeking a new remedy for the same injury or proceeding on a new claim arising out of a separate and distinct injury.

It has been suggested that certain statements in Northwestern's amended complaint may bar its action as a matter of law. The 1988 action was filed by Northwestern on 26 August 1988. *See Northwestern Fin. Group, Inc. v. County of Gaston*, 329 N.C. 180, 185, 405 S.E.2d 138, 141 (1991). However in its current complaint Northwestern alleges that "[b]y reason of the Defendants' acts the property has been practically useless since June 28, 1988 and, the Plaintiff incurred large expenses in its efforts to overturn the illegal, unwarranted and arbitrary actions of the defendants." Although this statement could be construed as a judicial admission to show that Northwestern had suffered damages at the time it filed the 1988 action, we do not believe that such is its effect. "Practically useless" does not translate into monetary damages as a matter of law. We believe that the reference to 28 June 1988 was made in retrospect and though the property may have been practically useless for fifty-nine days, that does not mean that at the time the 1988 action was filed Northwestern knew it had incurred monetary damages. Instead this is a matter for the trial court to determine. Further, all the expenses referred to in the allegation were incurred after Northwestern initiated the 1988 action. We believe that the above allegation is evidence, but we do not believe that this allegation, by itself, affirmatively establishes that damages or expenses were incurred between 28 June 1988 and 26 August 1988.

We thus remand this matter for trial. If the trial court determines that Northwestern had incurred monetary damages at the

time the 1988 action was filed then the present action is barred whether or not the full extent of Northwestern's damages was known with certainty because all of Northwestern's claims for relief should have been brought in the same action. The failure to do so would violate the rule against claim splitting. *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161.

Therefore, the trial court's denial of defendants' motion for summary judgment is affirmed and this action is remanded to the trial court for a determination at trial as to whether or not Northwestern had incurred any monetary damages at the time the 1988 action was filed.

Affirmed and Remanded with instructions.

Judges WELLS and COZORT concur.

IN THE MATTER OF: THE APPEAL OF LEE MEMORY GARDENS, INC. FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE LEE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR THE TAX YEAR 1990

No. 9210PTC485

(Filed 15 June 1993)

1. **Taxation § 25.11 (NCI3d)— appeal from Property Tax Commission—scope of review**

The scope of review in cases that have been appealed from the Property Tax Commission is the same as under the Administrative Procedure Act. The Commission's findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence. A *de novo* review is applied to review the Commission's statutory interpretation.

Am Jur 2d, State and Local Taxation §§ 810-816.

2. **Taxation § 25.4 (NCI3d)— ad valorem taxes—cemetery—undeveloped land—not exempt**

The Property Tax Commission did not err by ruling that 7.14 acres of undeveloped land held by a corporation licensed to operate a perpetual care cemetery was not tax exempt.

Although the taxpayer contended that the distinction in N.C.G.S. § 105-278.2(a) between real property "set apart for burial purposes" and property held for purposes of "sale" should be interpreted as distinguishing between the undeveloped property in the cemetery and the property which has been platted and developed for burial purposes, the land has been irrevocably dedicated for use exclusively as a cemetery under the North Carolina Cemetery Act and the taxpayer is not holding the undeveloped land for its burial. The taxpayer can only be holding the land for the purposes of sale to others as burial sites and it is not tax exempt under N.C.G.S. § 105-278.2.

Am Jur 2d, State and Local Taxation § 390.

3. **Taxation § 25.4 (NCI3d)— ad valorem taxes—undeveloped cemetery property—method of valuation—findings of Commission supported by evidence**

Although the taxpayer contended that the Property Tax Commission erred in approving the appraisal method used by the County when it valued the taxpayer's undeveloped cemetery property, the findings of the Property Tax Commission were supported by competent, material, and substantial evidence and the taxpayer thus failed to prove that the valuation was substantially greater than the true value. N.C.G.S. § 105-345.2(c).

Am Jur 2d, State and Local Taxation § 390.

4. **Constitutional Law § 92 (NCI4th)— ad valorem taxation—cemeteries—no evidence of discrimination in valuation**

There was no evidence of discrimination against the taxpayer in the 1990 valuation of its cemetery property where there was no evidence that another commercial cemetery cited by the taxpayer owns undeveloped land, as does the taxpayer, the County assessed burial sites in the other cemetery at the same value as the taxpayer's, and, although unsold mausoleum crypts were assessed at a different value, there was evidence that the taxpayer's mausoleum crypts were of a better quality.

Am Jur 2d, Constitutional Law §§ 784-910; State and Local Taxation §§ 170 et seq.

Appeal by taxpayer Lee Memory Gardens, Inc. from the final decision of the North Carolina Property Tax Commission entered

24 February 1992 by Vice-Chairman John A. Cocklereece. Heard in the Court of Appeals 15 April 1993.

Lee Memory Gardens, Inc. (the "Taxpayer") is a corporation licensed to operate a perpetual care cemetery under the North Carolina Cemetery Act, N.C. Gen. Stat. §§ 65-46 to 65-73. Taxpayer is appealing the assessed valuation of its 14.14 acre tract of land (the "Tract") for *ad valorem* taxes effective 1 January 1990.

In 1990, the Lee County Assessor assessed a total valuation to the Tract of $171,500 for *ad valorem* tax purposes, broken down into the following valuations: (1) $2,500 per acre for the 7.14 undeveloped, unplotted acres for a total valuation of $17,900; (2) $2,500 per acre for the 1,216 unsold burial sites consisting of 1.40 acres, amounting to a total valuation of $3,500; (3) $927 for each of the 162 unsold crypts, amounting to a total valuation of $150,100.

Subsequently, the Lee County Board of Equalization and Review (the "Board") declined to reduce this assessment value upon Taxpayer's petition. From the Board's decision, the Taxpayer appealed to the North Carolina Property Tax Commission (the "Commission"). On 24 February 1992, the Commission entered a Final Decision affirming the Board's decision. From this decision, the Taxpayer appeals.

County Attorney Kenneth R. Hoyle, Sr. for appellee Lee County.

Heman R. Clark for appellant Lee Memory Gardens, Inc.

ORR, Judge.

The 14.14 acre tract of land at issue in this case has been irrevocably dedicated for use exclusively as a cemetery under the North Carolina Cemetery Act. Thus, no part of the Tract can be sold, mortgaged or used except for human burial. Of this tract, 7.14 acres are unplotted, undeveloped land, not being offered for sale or use as burial sites. Additionally, as of 1 January 1990, there were 1,216 unsold burial sites plotted and marked off with landscaping and access driveways. In 1989, the Taxpayer added a mausoleum with 288 crypts at a cost of $154,080, of which 126 were pre-sold. As of 1 January 1990, 162 crypts remained unsold.

I.

[1] At the outset, we note that our scope of review in cases that have been appealed from the Commission is determined by

N.C. Gen. Stat. § 105-345.2. "This procedure for review is the same as that under the Administrative Procedure Act, Chapter 150B (formerly Chapter 150A)." *In re Appeal of General Tire*, 102 N.C. App. 38, 39, 401 S.E.2d 391, 393 (1991). G.S. § 105-345.2 states in pertinent part:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

"An appellate court may not, however, 'substitute its judgment for that of the agency when two reasonable conflicting results could be reached. . . .'" *In re Appeal of Foundation Health Sys. Corp.*, 96 N.C. App. 571, 574, 386 S.E.2d 588, 589 (1989), *disc. review allowed*, 326 N.C. 800, 393 S.E.2d 897 (1990), *review dismissed by*, 328 N.C. 322, 401 S.E.2d 358 (1991) (citation omitted). "On appeal, our review is limited to a determination of whether the decision

is supported by substantial evidence, in view of the 'entire record' as submitted." *General Tire*, 102 N.C. App. at 40, 401 S.E.2d at 393 (citations omitted).

The Commission's "findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *In re Humana Hosp. Corp. v. North Carolina Dep't of Human Resources*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986) (applying former Chapter 150A which is now recodified as Chapter 150B). We apply a *de novo* review, however, to our review of the Commission's statutory interpretation, as "[i]ncorrect statutory interpretation by [the Commission] constitutes an error of law. . . ." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988) (applying N.C. Gen. Stat. § 150B-51(b)).

II.

[2] In the present case, the Taxpayer has raised three issues for our review. The first issue relates to whether the Commission erred in ruling that the 7.14 acres of undeveloped land was not exempt from taxation as of 1 January 1990, pursuant to N.C. Gen. Stat. § 105-278.2. The second issue relates to the valuation method employed by the County Assessor. The third issue relates to whether the County unconstitutionally discriminated against the Taxpayer in its valuation of the undeveloped tract of land. We begin by addressing the Taxpayer's arguments under N.C. Gen. Stat. § 105-278.2.

G.S. § 105-278.2(a) states, "Real property set apart for burial purposes shall be exempted from taxation unless it is owned and held for purposes of (i) sale or rental or (ii) sale of burial rights therein." The Taxpayer contends that based on this statute the Commission erred by not finding that the 7.14 acres of undeveloped land was exempt from taxation.

In support of its contention, the Taxpayer argues that the distinction in G.S. § 105-278.2(a) between real property "set apart for burial purposes" and property held for purposes of "sale" should be interpreted as distinguishing between the undeveloped property in the cemetery and the property which has been platted and developed for burial purposes. Based on this argument, the Taxpayer contends that the only part of the cemetery property which is "held for purposes of . . . sale" under this statute is that part

which is platted and developed for burial sites. Further, the Taxpayer argues that the undeveloped property in the cemetery falls under the statutory language, "[r]eal property set apart for burial purposes" that is not held for sale and is therefore exempt from taxation.

We must interpret the language of the statute to determine whether the Taxpayer is correct in its argument. "The words used in the statute must be given their natural or ordinary meaning." *Southeastern Baptist Theological Seminary, Inc. v. Wake County*, 251 N.C. 775, 782, 112 S.E.2d 528, 533 (1960). " 'Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation.' " *Over-look Cemetery, Inc. v. Rockingham County*, 273 N.C. 467, 469, 160 S.E.2d 293, 294 (1968) (citation omitted). This rule does not, however, mean that the statute must " 'be stintingly or even narrowly construed.' " *Id.* at 469, 160 S.E.2d at 294-95 (citation omitted).

Our Supreme Court interpreted the language "set apart for burial purposes" and "owned and held for purposes of sale or rental" in *Over-look Cemetery, Inc., supra.* At the time *Over-look* was decided, this language appeared in G.S. § 105-296(2) which was the applicable exemption statute. At that time, G.S. § 105-296(2) stated, " 'The following real property, and no other, shall be exempted from taxation: . . . (2) Real property, tombs, vaults, and mausoleums set apart for burial purposes, except such as are owned and held for purposes of sale or rental. . . .' " *Over-look Cemetery, Inc., supra*, at 469, 160 S.E.2d at 294.

The plaintiff in *Over-look* was a North Carolina corporation which owned property in Overlook Cemetery that consisted of grave spaces and unmapped and undeveloped land. The plaintiff was appealing the *ad valorem* taxes it had to pay on this property and alleged that its property was exempt under the language of G.S. § 105-296(2).

Our Supreme Court stated:

> The words used in G.S. 105-296(2), when given their ordinary meaning, are clear and require no construction. The statute distinguishes between real property "set apart for burial purposes," which is exempt, and that "owned and held for

> purposes of sale or rental," which is not exempt. Obviously, plaintiff's property will not be used by plaintiff for burial purposes. It is owned and held by plaintiff for sale to purchasers who in turn will use it for burial purposes. When the words, "set apart for burial purposes," and the words, "owned and held for purposes of sale or rental," are considered contextually, we are of opinion, and so decide, that the exemption contemplated by G.S. 105-296(2) refers only to real property presently in use for burial purposes and property owned and held by persons for their use for burial purposes.

Over-look Cemetery, Inc., 273 N.C. at 469-70, 160 S.E.2d at 295. Further, the Court held that the plaintiff's property was not exempt from *ad valorem* taxes under the language of this statute because "plaintiff's property [was] not held for its use for burial purposes but solely for the purpose of sale to others. . . ." *Id.* at 470, 160 S.E.2d at 295.

In the case *sub judice*, the applicable exemption statute contains the same language that the old exemption statute contained. The fact that the General Assembly chose to use language in G.S. § 105-278.2, the exemption statute before us, that is identical to the language found in G.S. § 105-296(2), the old exemption statute, is a strong indication that the General Assembly intended the same interpretation of this language given to it in the old statute. Thus, we will apply our Supreme Court's interpretation of this language in *Over-look* to the case before us.

The Taxpayer in the present case contends that its undeveloped, unmapped land is real property set aside for burial purposes but not held for sale such that it is exempt from taxes under G.S. § 105-278.2. Based on the holding in *Over-look*, we disagree. The Court in *Over-look* held,

> [w]hen the words, "set apart for burial purposes," and the words, "owned and held for purposes of sale. . .," are considered contextually, . . . [the exemption in the statute] refers only to real property presently in use for burial purposes and property owned and held by persons for their use for burial purposes.

Over-look Cemetery, Inc., supra.

Like the plaintiff in *Over-look*, the Taxpayer in the present case is a corporation which owns undeveloped, unmapped land as part of a tract of land set apart as a cemetery. In the case of

the Taxpayer, this land has been irrevocably dedicated for use exclusively as a cemetery under the North Carolina Cemetery Act. Additionally, like the plaintiff in *Over-look*, the Taxpayer is not holding undeveloped land for its burial. Thus, because the undeveloped land is irrevocably dedicated for use exclusively as a cemetery, the Taxpayer can only be holding it for the purpose of sale to others as burial sites, like the plaintiff in *Over-look*. The Taxpayer's undeveloped, unmapped land does not, therefore, fall under the exemption of G.S. § 105-278.2 as tax-exempt property. Accordingly, we find no error with the Commission's decision to affirm the taxing of this property.

III.

[3] Next, the Taxpayer contends that the Commission erred in approving the appraisal method used by the County when it valued the Taxpayer's property. In support of its contention, the Taxpayer brings forward two arguments: (1) that the appraisal method used by the County to assess the undeveloped tract of land and the burial sites failed to follow N.C. Gen. Stat. § 105-278.2(b), and (2) that the replacement cost method should be applied to value all perpetual care cemetery property.

In order to successfully challenge the method of appraisal, the Taxpayer must first overcome the presumption in North Carolina that *ad valorem* property tax assessments are correct. *See, In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975). In order to rebut this presumption and prove that a method used by the tax assessor was incorrect, a taxpayer has the burden of showing by competent, material and substantial evidence that:

> (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. (Citation omitted.) Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*. (Citation omitted.)

Id. at 563, 215 S.E.2d at 762 (emphasis in the original).

In the present case, the Taxpayer has failed to meet the burden of proving that the result of the assessment of his property was "substantially" greater than the true value in money of the property assessed.

On the issue of valuation, the Commission found:

1. During 1989, the Taxpayer constructed a mausoleum containing 288 crypts. One hundred and twenty-six (126) of these crypts were sold by the Taxpayer, on a pre-need basis, prior to 1 January 1990. For each crypt sold, the Taxpayer received a price of approximately $1,495.

. . .

10. In its appraisal of the Taxpayer's mausoleum, the County correctly applied its schedule of values. The Commission finds that the value assigned to the mausoleum ($150,100) did not exceed the true value in money of the mausoleum as of 1 January 1990. To the contrary, the Taxpayer's evidence as to the sales price of crypt spaces in this mausoleum suggests that the County's appraisal may have been substantially less than the true value in money of the property as of 1 January 1990.

11. In its appraisal of the Taxpayer's 1,216 unsold burial sites at a value of $3,500, the County properly applied its schedule of values. Under the schedule, burial land was assigned a value of $2,500 per acre, with improvements to be appraised separately. Based on the Taxpayer's evidence concerning the sales price of burial spaces, the Commission finds that the County appraised these burial sites at a value substantially less than the true value in money of the property as of 1 January 1990.

12. As to the remaining 7.14 acres of undeveloped land, the County properly applied its schedule of values, which required the assignment of a value of $2,500 per acre to burial land, with improvements to be appraised separately. Based on the Taxpayer's evidence as to the sale[s] price of burial sites, the Commission finds that the County appraised the Taxpayer's 7.14 acres of undeveloped land at a value substantially less than the true value in money of the property as of 1 January 1990.

13. It is apparent from the County's evidence concerning land values in the immediate neighborhood of the subject property that both the 1,216 unsold burial sites and the 7.14 acres of undeveloped land were appraised by the County at a value substantially less than the true value in money of the property as of 1 January 1990. Applying the principle of substitution, which holds that one way to determine the value of a thing is to determine the cost of replacing it, it is clear that if another cemetery operator wished, on 1 January 1990, to purchase land near the Taxpayer, dedicate it to cemetery use, and compete with the Taxpayer, that operator would have paid much more for the land than $2,500 per acre, and would then have been required to make additional expenditures to develop it for cemetery use.

14. The Commission finds additional support for its conclusion that the County appraised both the 1,216 unsold burial sites and the 7.14 acres of undeveloped land at a value substantially less than its true value in money as of 1 January 1990 in the Taxpayer's evidence concerning the sales prices of burial spaces.

Our review of the Commission's findings of fact is limited to a determination of whether they are supported by competent, material, and substantial evidence. *See, In re Humana Hosp. Corp., supra.* Further, we must give due account to the rule of prejudicial error. N.C. Gen. Stat. § 105-345.2(c). After careful review of the record before us, we find competent, material, and substantial evidence to support the findings of the Commission. Thus, the Taxpayer has failed to prove that the valuation of the Tract was substantially greater than its true value. Accordingly, we affirm the decision of the Commission affirming the valuation of the Taxpayer's property.

IV.

[4] Finally, the Taxpayer contends that Lee County unconstitutionally discriminated against the Taxpayer in its valuation of the Tract.

In support of its contention Taxpayer states in its brief:

The Buffalo-Jonesboro Cemetery, Inc. owns and operates a commercial perpetual care cemetery in Lee County on a 19 acre tract. None of its property was taxed by Lee County

> prior to 1990. In January 1990 only 3.42 acres of the Buffalo Cemetery tract was assessed for taxation. No undeveloped land was assessed. The unsold mausoleum crypts were assessed at $570.00 per crypt.

First of all, the record before us is void of any evidence that Buffalo-Jonesboro Cemetery owns any undeveloped land. In addition, the record shows that in 1990 and 1991, Lee County assessed the property owned by Buffalo-Jonesboro Cemetery that consisted of unsold burial sites at a value of $2,500 per acre, the same value the County assessed to the Taxpayer's unsold burial sites. Further, on the issue of why the County assessed the unsold mausoleum crypts owned by Buffalo-Jonesboro Cemetery at a value of $570 per crypt, the Assessor testified,

> there is quite a difference in the quality and the construction of the [Buffalo-Jonesboro mausoleum and Taxpayer's mausoleum]. The Buffalo mausoleum is all open. It has a concrete roof covering with overhang for the sides coming down to center. The Lee Memory Gardens mausoleum is a better quality. It does have an enclosed chapel type area between the clusters of crypts.

Additionally, the record before us is also void of any evidence that the County intentionally failed to tax the Buffalo-Jonesboro Cemetery before 1990.

Based on our review of the record, there is no evidence of discrimination against the Taxpayer in the 1990 valuation of its cemetery property. We accordingly overrule the Taxpayer's assignment of error.

Affirmed.

Judges JOHNSON and McCRODDEN concur.

HOMER R. VERNON, EMPLOYEE, PLAINTIFF v. STEVEN L. MABE BUILDERS, EMPLOYER, NATIONWIDE INSURANCE, CARRIER, DEFENDANTS

No. 9210IC551

(Filed 15 June 1993)

1. **Master and Servant § 69.3 (NCI3d) — workers' compensation — Form 26 agreement — no misrepresentation — failure of plaintiff to show misleading statements or reliance**

Evidence was sufficient to support the Industrial Commission's finding that a Form 26 agreement, which paid among other things benefits for plaintiff's permanent partial disability of the back for a period of 45 weeks, was not entered into by reason of misrepresentation, since plaintiff's rehabilitation nurse, who reported to defendant insurance carrier, made no inaccurate or misleading statements to plaintiff; defendant carrier was of the opinion that plaintiff could return to work and thus was entitled to benefits for permanent partial disability; plaintiff's total and permanent disability had not been established; and because plaintiff claimed not to have understood the rating system explained by his rehabilitation nurse and Nationwide's adjuster, he could not have relied on what he was told.

Am Jur 2d, Workers' Compensation § 513.

2. **Master and Servant § 69.3 (NCI3d) — workers' compensation — Form 26 agreement — no material mistake**

The Industrial Commission properly determined that plaintiff was not entitled to have a Form 26 agreement set aside pursuant to N.C.G.S. § 97-17 on the basis of mutual mistake, since it was undisputed that no mutual mistake of fact existed with regard to plaintiff's disability status; plaintiff alleged that neither party was aware of the N.C. Supreme Court decision in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, allowing election of remedies; and a party to an agreement is entitled to set the agreement aside on the ground of mutual mistake only when such mutual mistake is one of material fact, not of law.

Am Jur 2d, Workers' Compensation § 513.

3. Master and Servant § 69.3 (NCI3d) — workers' compensation — Form 26 agreement — finding of fairness not required

Though the Industrial Commission must determine that compromise settlements are fair and equitable and in the best interests of the parties before they are approved, there is no requirement in the Workers' Compensation Act, the Rules of the Industrial Commission, or in case law that the Commission must determine fairness before approving a Form 26 agreement.

Am Jur 2d, Workers' Compensation § 510.

Judge WYNN dissenting.

Appeal by plaintiff from Opinion and Award for the Full Commission entered 19 March 1992. Heard in the Court of Appeals 28 April 1993.

Elliot Pishko Gelbin & Morgan, P.A., by J. Griffin Morgan, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from a 19 March 1992 Opinion and Award For the Full Commission affirming and adopting as its own an Opinion and Award of Deputy Commissioner Morgan S. Chapman filed 21 September 1990, denying plaintiff's motion to set aside a Form 26 agreement.

The evidence before the deputy commissioner at the hearing on plaintiff's motion established that plaintiff suffered a compensable back injury on 16 October 1986, and on 13 August 1987, reached maximum medical improvement. Plaintiff's doctor, David L. Kelly, rated plaintiff as having a fifteen percent permanent disability of the back and stated that he did not think that plaintiff was going to be able to return to work. A copy of Dr. Kelly's report was sent to plaintiff's rehabilitation nurse, Edna Foster (Foster), as well as to Margaret Howell, claims adjuster for defendant Nationwide Insurance (Nationwide). At the time, nurse Foster reported to Nationwide. On 24 August 1987, plaintiff signed a document entitled "Supplemental Memorandum of Agreement As To Payment of Compensation," commonly referred to as an Industrial

Commission Form 26 agreement, which is used for the payment of, among other things, permanent partial disability benefits. The Industrial Commission approved the agreement on 4 September 1987. Pursuant to the agreement, defendants paid plaintiff benefits for permanent partial disability for a period of forty-five weeks, ending on 27 May 1988. On 7 September 1989, plaintiff moved to set aside the Form 26 agreement on the grounds of duress, undue influence, fraud, misrepresentation, or mutual mistake.

After a hearing on 21 March 1990, Deputy Commissioner Morgan S. Chapman made the following pertinent findings: Prior to plaintiff signing the Form 26 agreement, plaintiff told nurse Foster that he did not believe he could return to work. Foster responded that she thought that there was probably something plaintiff could do. Plaintiff did not understand what Foster was talking about insofar as she discussed his disability rating. Deputy Commissioner Chapman also found:

> 4. Shortly after August 28, 1987, plaintiff received a copy of a letter sent by [the insurance adjuster] to his employer which indicated the percentage of his rating and the amount of compensation to which the rating would give rise. The employer was instructed to sign the enclosed Form 26 Agreement, to have the employee sign it and then return it to [the adjuster]. [The adjuster] stated in the letter that payments would begin once the agreement had been approved by the Industrial Commission. Plaintiff's wife read both the letter and the agreement to him.
>
> 5. Plaintiff, who was illiterate and not knowledgeable about workers' compensation benefits, still did not understand what the rating was about, but he made no effort to learn anything more. He did not call an attorney, the insurance adjuster or the Industrial Commission before he signed the agreement. The executed agreement was subsequently submitted to the Commission along with Dr. Kelly's office note of August 13, 1987 in which the doctor not only gave plaintiff the permanent partial disability rating but also stated that he did not believe that plaintiff was going to be able to return to work. The agreement was approved, and defendants began paying compensation to plaintiff pursuant to the award.
>
> . . . .

7. The evidence does not demonstrate that the settlement agreement executed by the parties in this case was entered into by reason of fraud, misrepresentation, undue influence or mutual mistake. The only communication between the parties regarding the settlement occurred on the date plaintiff last saw Ms. Foster and in the letter from the insurance adjuster. Ms. Foster did not make any statements to him which were inaccurate or misleading. Furthermore, inasmuch as he did not understand what the nurse and the adjuster were talking about when the rating was discussed, he cannot claim to have relied on something they said. . . .

. . . .

9. . . . Although [the Industrial Commission employee who approved the agreement] was not aware of changes in the law effected by the Supreme Court in Whitley v. Columbia Lumber Manufacturing Company, 318 N.C. 89 (1986), it was the Industrial Commission's policy not to substitute its judgment for the parties or act as an advocate for either side as long as the information in the file supported the settlement agreement. Plaintiff was free to make an election of remedies, and the Commission would approve the resulting settlement as long as there was supporting documentation and the settlement complied with the law. (This was not a compromise settlement agreement which foreclosed plaintiff's future rights to workers' compensation benefits.)

Deputy Commissioner Chapman concluded that plaintiff is not entitled to have the Form 26 agreement set aside. The Full Commission approved and adopted as its own the Opinion and Award of Deputy Commissioner Chapman. Plaintiff appeals.

The dispositive issues are whether (I) competent evidence exists in the record to support the Industrial Commission's finding that the Form 26 agreement was not entered into by reason of misrepresentation or mutual mistake; and (II) whether the Industrial Commission's failure to make a determination that the Form 26 agreement is fair and just requires that the agreement be set aside.

I

Plaintiff argues that the Form 26 agreement should be set aside because it was entered into by reason of misrepresentation

or mutual mistake. Plaintiff also argues that the agreement was executed as a result of excusable neglect; however, we do not address the issue of excusable neglect because Deputy Commissioner Chapman made no finding in this regard and the record indicates that plaintiff did not raise the issue below. *See Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 516 n.1, 428 S.E.2d 238, 244 n.1 (1993) (issues not raised at trial may not be raised for the first time on appeal).

We repeat initially the well established rule that facts found by the Industrial Commission must be upheld on appeal if supported by any competent evidence, even in the face of evidence to the contrary. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986). Under our Workers' Compensation Act, an employee who has suffered a compensable injury scheduled under N.C.G.S. § 97-31 may instead elect to recover compensation under N.C.G.S. § 97-29 if he has reached his maximum medical improvement and establishes that he is totally and permanently disabled. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 96-99, 348 S.E.2d 336, 340-41 (1986). The employee, however, cannot recover compensation for permanent disability resulting from a scheduled injury under both Section 97-31 *and* Section 97-29. *Hill v. Hanes Corp.*, 319 N.C. 167, 176, 353 S.E.2d 392, 398 (1987). In other words, once an employee recovers permanent disability benefits pursuant to Section 97-31, the employee is precluded from seeking permanent benefits for the same injury pursuant to 97-29, absent a change in his condition. *See* N.C.G.S. § 97-47 (1991) (authorizing the Commission to review any award upon motion of any party in interest on the grounds of a change in the employee's condition).

When an employer and an injured employee reach an agreement with regard to compensation, they may execute a memorandum of agreement in the form prescribed by the Industrial Commission, and any such agreement so executed must be filed with and approved by the Commission. N.C.G.S. § 97-82 (1991). In approving such agreements, the Commission acts in a judicial capacity, and, once approved, the agreement becomes an award enforceable by court decree. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976). Settlement agreements which have been filed with and approved by the Commission may be set aside if "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." N.C.G.S.

§ 97-17 (1991). Such "settlement agreements" include agreements for payment of compensation executed on Industrial Commission Form 26. *See Pruitt*, 289 N.C. 254, 221 S.E.2d 355; *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 398 S.E.2d 604 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 450 (1991).

Misrepresentation

[1] Plaintiff argues that he relied on misrepresentations made by defendant Nationwide, specifically, that plaintiff could receive benefits only for permanent partial disability based on the percentage rating to his back. Plaintiff contends that this information was false because, under *Whitley*, he was in fact entitled to benefits for permanent and total disability.

We note that the Legislature did not specify whether the "misrepresentation" referred to in Section 97-17 is false misrepresentation or negligent misrepresentation. In any event, both false misrepresentation (i.e., fraud) and negligent misrepresentation share two essential elements: (1) the supplying by the defendant of false information, and (2) reliance on the false statement by the plaintiff. *See Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358, *disc. rev. denied*, 313 N.C. 599, 332 S.E.2d 178 (1985); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 595, 394 S.E.2d 643, 647 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). Contrary to plaintiff's contention, the Commission found that no misrepresentation was made, specifically finding that nurse Foster made no inaccurate or misleading statements to plaintiff. The record reveals that defendant was of the opinion that plaintiff could return to work and thus was entitled to benefits for permanent partial disability. In other words, plaintiff's total and permanent disability had not been established. In addition, the Commission found that, because plaintiff claimed not to have understood the rating system explained by Foster and Nationwide's adjuster, he could not have relied on what he was told. The Commission's findings are supported by competent evidence in the record, and therefore must be sustained. Because plaintiff is unable to establish the essential elements of either fraud or negligent misrepresentation, we reject this assignment of error.

Mutual Mistake

[2] Plaintiff argues that "the basic premise upon which plaintiff and defendants based their actions was erroneous," specifically,

that neither party was aware of the decision of the North Carolina Supreme Court in *Whitley* allowing election of remedies, and therefore the agreement should be set aside on the ground of mutual mistake.

A party to an agreement is entitled to set the agreement aside on the ground of mutual mistake only when such mutual mistake is one of material fact, not of law. *See Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 135-36, 217 S.E.2d 551, 560 (1975); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 9-26 (3d ed. 1987); *see also Caudill v. Chatham Mfg. Co.*, 258 N.C. 99, 106-07, 128 S.E.2d 128, 133 (1962) (inviting Legislature to confer upon the Industrial Commission the equitable jurisdiction to set aside settlement agreements on the ground of mutual mistake of *fact*). It is undisputed that no mutual mistake of fact existed with regard to plaintiff's disability status: defendant, upon information supplied by nurse Foster, thought that plaintiff could return to work; plaintiff believed that he could not. Thus, any mistake on the part of either party would have been unilateral and therefore non-actionable. *See Marriott*, 288 N.C. at 136, 217 S.E.2d at 560. Accordingly, we conclude that the Commission properly determined that plaintiff was not entitled to have the Form 26 agreement set aside pursuant to Section 97-17 on the basis of mutual mistake. In so holding, we reject plaintiff's argument that *Cockrell v. Evans Lumber Co.*, 103 N.C. App. 359, 407 S.E.2d 248 (1991) requires a different result.

II

[3] Plaintiff argues that the Industrial Commission failed to act in its judicial capacity in approving the Form 26 agreement by failing to determine that the agreement is fair and just, and that therefore the agreement should be set aside.

Plaintiff misconstrues the rules applicable to the approval of Form 26 agreements. An Agreement For Payment Of Compensation on Form 26 in proper form and conforming to the provisions of the Workers' Compensation Act will be approved by the Industrial Commission. Workers' Compensation Rules of the N.C. Indus. Comm'n, Rule 501(4) (1992). It is true that *compromise* settlement agreements must be determined to be fair and equitable and in the best interests of the parties before they will be approved by the Commission. Workers' Compensation Rules of the N.C. Indus. Comm'n, Rule 502(1) (1992); *see also Glenn v. McDonald's*,

109 N.C. App. 45, 48, 425 S.E.2d 727, 729-30 (1993) (it is presumed that the Commission approves a compromise settlement agreement only after a full investigation to determine whether the settlement is fair and just); *Caudill*, 258 N.C. at 106, 128 S.E.2d at 133. However, there is no requirement—either in the Workers' Compensation Act, The Rules of the Industrial Commission, or in case law—that the Commission, in approving a Form 26 agreement, determine that the agreement is fair. Because the agreement at issue is not a compromise settlement agreement, we reject this assignment of error.

The Opinion and Award For the Full Commission is

Affirmed.

Judge WELLS concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

I disagree with the majority's determination that "there is no requirement that the Commission, in approving a Form 26 agreement, determine that the agreement is fair."

Form 26 agreements are permitted by N.C. Gen. Stat. § 97-82, which provides that an employee may reach an agreement in regard to compensation under the Worker's Compensation Act, execute a memorandum of the agreement in the form prescribed by the Industrial Commission, and file it with the Commission. N.C. Gen. Stat. § 97-82 (1992). The role of the Commission, as emphasized by former Chief Judge Hedrick in a prior opinion of this Court, is as follows: "The Commission acts in a judicial capacity in approving an agreement and the settlement as approved becomes an award enforceable, if necessary, by a court decree." *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 755, 398 S.E.2d 604, 606 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 450 (1991) (citing *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976)). Moreover, our Supreme Court, acknowledging that the Commission acts "as a court to adjudicate those claims which may not be adjusted by the parties themselves," noted that, in so acting, "[t]he Industrial Commission stands by to assure fair dealing in *any* volun-

tary settlement." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953) (emphasis added).

Because I believe that the Commission is required to determine that a Form 26 agreement is fair, and because the Commission has not made a finding that the Form 26 agreement at issue in the instant case is fair, I would remand this case for such a determination.

THOMAS E. BRICKHOUSE, PLAINTIFF v. MARGIE H. BRICKHOUSE, DEFENDANT

No. 921SC504

(Filed 15 June 1993)

1. **Wills § 3.1 (NCI3d)— attesting witness—showing of intention not required**

   There is no requirement in N.C.G.S. § 31-3.3 or elsewhere in the law that the attesting witness must "intend" to witness the will of the testator.

   Am Jur 2d, Wills § 267.

2. **Wills § 3.1 (NCI3d)— attesting witness—witnessing of signature at place different from other witnesses—witness not precluded from being attesting witness**

   The fact that an attesting witness witnessed testator's mark and signed the will in a location different from the other two witnesses did not preclude the witness from being considered an attesting witness, since evidence that the testator made his mark in the presence of the witnesses was sufficient evidence from which to infer that the testator requested the witnesses to attest the testator's signature.

   Am Jur 2d, Wills § 315.

3. **Landlord and Tenant § 86 (NCI4th)— rent increase—tenant holding over—failure to pay rent—fair rental value**

   Evidence was sufficient to support the trial court's award of $10,500 to defendant as back rent for the period that plaintiff was in possession of the disputed property where the evidence tended to show that plaintiff paid $300 monthly rent to testator

until testator died; defendant, to whom testator devised the property in his will, sent plaintiff a letter stating that the rent would go up to $400 per month; plaintiff continued to retain possession of the property; defendant testified that $400 was the fair market rental value of the property; and plaintiff failed to present any evidence to contradict defendant's valuation.

Am Jur 2d, Landlord and Tenant §§ 521 et seq.

Appeal by plaintiff from judgment entered by Judge Napoleon B. Barefoot in Camden County Superior Court. Heard in the Court of Appeals 16 April 1993.

The facts of this case are detailed in a prior decision of this Court, *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 407 S.E.2d 607 (1991), which remanded the case "to have the trial court consider the issue of whether Lucy B. Carr qualified as an attesting witness under N.C.G.S. 31-3.3 . . . [in further proceedings in which] the trial court may consider the affidavit that was filed with the record of this case and should determine whether it should be admitted into evidence." *Id.* at 74, 407 S.E.2d at 611. Upon remand, the trial court entered the following judgment in favor of defendant on 13 February 1992:

FINDINGS OF FACT

1. The Plaintiff [Thomas E. Brickhouse, son of testator] is a citizen and resident of the Camden County, State of North Carolina;

2. The Defendant [Margie H. Brickhouse, wife of testator] is a citizen and resident of the Commonwealth of Virginia;

3. The decedent, Thomas E. Brickhouse, Sr., died testate in the Commonwealth of Virginia on August 18, 1989;

4. On the date of his death, Thomas E. Brickhouse, Sr. was a citizen and resident of the Commonwealth of Virginia and lawfully married to the Defendant, Margie H. Brickhouse;

5. The Last Will and Testament of Thomas E. Brickhouse, Sr. was executed on July 21, 1989 and executed in full compliance with the statutory requirements of the Commonwealth of Virginia;

6. Article Two of the decedent's Last Will and Testament reads as follows:

> "I give and devise my Texaco Service Station located in South Mills, North Carolina, to include the real estate and any personal property which I have at my death used in connection with the service station to my wife, Margie H. Brickhouse, for the terms [sic] of her life, or until she remarries. At the death of the said Margie H. Brickhouse, or at the time she remarries, the said real property and any remaining personal property used in connection with the service station is to pass to Thomas E. Brickhouse, Jr."

7. Article Three of the decedent's Last Will and Testament reads as follows:

"All the rest, residue and remainder of my property, real and personal, tangible and intangible, wheresoever situate and howsoever held, herein referred to as my Residuary Estate, I give, devise and bequeath to my wife, Margie H. Brickhouse, if she survives me, to the express exclusion of any child of mine now living or hereafter born, but if my wife predeceases me, then I give, devise and bequeath my Residuary Estate to Thomas E. Brickhouse, Jr. Should both Margie H. Brickhouse and Thomas E. Brickhouse, Jr. predecease me, then I devise and bequeath my Residuary Estate to the children of Thomas E. Brickhouse, Jr., share and share alike."

8. Thomas E. Brickhouse, Sr. placed "his mark" on his Last Will and Testament instead of his actual signature;

9. Lucy B. Carr was a witness to "the mark" of Thomas Edward Brickhouse (Sr.) and signed his name beside the "mark" of the testator, Thomas E. Brickhouse, Sr., and was accordingly, a witness to the Last Will and Testament of Thomas E. Brickhouse, Sr.

10. The Last Will and Testament of Thomas E. Brickhouse, Sr. was also witnessed by G. Blair Harry and Margie Brickhouse.

11. G. Blair Harry and Lucy B. Carr were disinterested witnesses to the Last Will and Testament of Thomas E. Brickhouse, Sr.

12. The Last Will and Testament was duly notarized by Lucy B. Carr on July 21, 1989. That the notary acknowledgment reads as follows:

> "Before me, the undersigned authority, on this day personally appeared Thomas Edward Brickhouse, G. Blair Harry and Margie Brickhouse, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, Thomas Edward Brickhouse, the testator, declared to me and to the witnesses in my presence that said instrument is his Last Will and Testament and that he had willingly signed or directed another to sign the same for him and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing Will was executed and acknowledged by the testator as his Last Will and Testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said Will, and that the testator, at the time of the execution of said Will, was over the age of eighteen years and of sound and disposing mind and memory."

13. The Last Will and Testament of Thomas E. Brickhouse, Sr. was duly probated on August 28, 1989 in the Circuit Court for the City of Suffolk, Commonwealth of Virginia;

14. An exemplified copy of the Last Will and Testament of Thomas E. Brickhouse was duly recorded in the Office of the Clerk of Superior Court of Camden County on September 12, 1989, and recorded in File Number 89-E-52;

15. The Clerk of Superior Court of Camden County entered a Certificate of Probate dated September 12, 1989, which certificate was attached to the Last Will and Testament of Thomas E. Brickhouse, Sr. and said certificate reads as follows:

> "A paper-writing dated as indicated above, purporting to be the Last Will and Testament or codicil thereto of the above named deceased has been exhibited before me. Sufficient proof of the due execution thereof has been

taken as set forth in the accompanying affidavits which are incorporated and made a part hereof;

It is Adjudged that the paper writing and every part thereof is the Last Will and Testament or codicil thereto of the deceased, and the same is ordered admitted to probate."

16. Lucy B. Carr and G. Blair Harry executed an Affidavit of Subscribing Witness for Probate of Will dated August 31, 1990, which reads as follows:

I, the undersigned affiant, being first duly sworn, say that:

1. I signed the paper-writing referred to above as a subscribing witness;

2. The deceased, in my presence, signed the paper-writing, or acknowledged his signature thereto, and that at such time declared the paper-writing to be his Last Will and Testament.

3. At the request and in the presence of the deceased, I signed the paper-writing as an attesting witness; and

4. In my opinion the deceased was, at the time the will was executed or at the time the execution was acknowledged, of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to my knowledge, information or belief.

17. At the date of his death, Thomas E. Brickhouse, Sr. was the owner of certain real property located in South Mills Township, Camden County, North Carolina, upon which is situate a Texaco Service Station . . .

18. At the time of the death of Thomas E. Brickhouse, Sr., he was survived by his wife, Margie H. Brickhouse, the Defendant herein, and his only son, Thomas E. Brickhouse, Jr., the Plaintiff herein;

19. At the time of the death of Thomas E. Brickhouse, Sr., the real property and Texaco service station was rented to testator's son, Thomas E. Brickhouse, Jr., the plaintiff herein, on a monthly basis, for a monthly rental of $300.00 per month. The last rental payment made by the plaintiff to the defendant was on or about September 17, 1989, approximately one month

after the date of [testator's] death. The Defendant advised the Plaintiff that beginning January 1, 1990, the monthly rental would increase to $400.00 per month. The Defendant has requested that the Plaintiff remove himself from the premises but the Plaintiff has wilfully refused to do so. The Plaintiff is in default under the terms of the oral tenancy due to his failure to pay rent in a timely manner. Under the terms of the oral tenancy, the amount of accrued but unpaid rental as of the date of this trial is $10,500.00.

Based upon the foregoing FINDINGS OF FACT, the Court makes the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter of this action.

2. Lucy B. Carr was a competent and an attesting witness to the Last Will and Testament of Thomas E. Brickhouse, Sr. as provided by N.C.G.S. 31-3.3. Additionally, Lucy B. Carr had no interest in the Last Will and Testament of Thomas E. Brickhouse, Sr.

3. G. Blair Harry was a competent and an attesting witness to the Last Will and Testament of Thomas E. Brickhouse, Sr. as provided by G.S. Sect. 31-3.3. Additionally, G. Blair Harry had no interest in the Last Will and Testament of Thomas E. Brickhouse, Sr.

4. The Last Will and Testament of Thomas E. Brickhouse, Sr. was duly probated in the Commonwealth of Virginia.

5. The Last Will and Testament of Thomas E. Brickhouse, Sr. was duly proven and allowed in the Commonwealth of Virginia and a copy of the will and of the proceedings had in connection with the probate there, duly certified, authenticated by the Clerk of the Circuit Court of the City of Suffolk, were filed with the Clerk of Superior Court of Camden County on September 12, 1989, as provided by G.S. Sect. 31-27.

6. The Last Will and Testament of Thomas E. Brickhouse, Sr. was executed in accordance with the laws of the State of North Carolina, appearing affirmatively from the testimony

of G. Blair Harry, Lucy B. Carr and Margie H. Brickhouse, as provided by G.S. Sect. 31-27.

7. The devise by the testator, Thomas E. Brickhouse, Sr., of the life estate to the Defendant, Margie H. Brickhouse, in the real property described herein above is valid.

8. The Plaintiff is indebted to the Defendant in the sum of $10,500.00 representing the accrued but unpaid rental.

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant has a valid life estate in the real property described hereinabove along with the improvements thereto, that the Defendant is entitled to recover the sum of $10,500.00 together with prejudgment interest accruing on each monthly rental payment, and the Defendant shall be placed in immediate possession of the real property described hereinabove. The costs of this action shall be taxed to the Plaintiff.

John W. Halstead, Jr., for plaintiff-appellant.

Twiford, Morrison, O'Neal & Vincent, by Branch W. Vincent, III, for defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred because there was insufficient evidence that Lucy B. Carr was a competent attesting witness "since her only purpose at the time of subscribing the will was to be a witness to the testator's mark and to take the acknowledgement of the testator and two subscribing witnesses." In addition to noting that Carr witnessed the testator's mark on two different occasions, defendant argues that this is a self-proving will and that from the self-proving "acknowledgement taken by Carr and her testimony at trial, it is clear that she was in fact a third attesting witness in that she witnessed the same acts as did Margie Brickhouse and G. Blair Harry as required by G.S. 31-3.3."

G.S. 31-3.3 provides:

(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.

(b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.

(c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.

(d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

[1] Plaintiff argues that the attesting witness must "intend" to witness the will of the testator and that Ms. Carr did not have this intent when she witnessed the testator's mark. However, our research has failed to reveal this type of "intent" requirement in G.S. 31-3.3 or elsewhere in the law. We note that, unlike other states, there is no provision in our statutes requiring the testator to publish his or her will to the attesting witnesses. *See* N. Wiggins, 1 *Wills and Administration of Estates in North Carolina*, § 90 (2nd Ed. 1983).

[2] The fact that Ms. Carr witnessed the testator's mark and signed the will in a location different from the other two witnesses does not preclude Ms. Carr, on this record, from being considered an attesting witness. *In Re Will of Williams*, 234 N.C. 228, 66 S.E.2d 902 (1951). Evidence that the testator made his mark in the presence of the witnesses is sufficient to infer that the testator requested the witnesses to attest the testator's signature. *In re Will Of King*, 80 N.C. App. 471, 476, 342 S.E.2d 394, 397, *disc. review denied*, 317 N.C. 704, 347 S.E.2d 43 (1986); *In Re Will of Kelly*, 206 N.C. 551, 174 S.E. 453 (1934). Here, Ms. Carr testified and stated in her affidavit that she was a witness to the testator's mark at the request of the testator, who declared the document to be his will. Ms. Carr further testified:

> . . . [H]e [testator] was lying in a hospital bed with the bed raised some. Mr. Harry [testator's attorney] said hello to him and told him why we were there, read the papers to him, every word of them and asked him if that was what he wanted and Mr. Brickhouse [testator] said, yes, it was.

> Mr. Harry said do you want us to be your witnesses and he said—I was there to witness all their signatures and he said, yes. And he said, but I cannot write my name. I'm too weak. The bed was raised a little higher so he was more in a sitting position. Mr. Harry told him that that was all right he could make an "X" mark and I would witness his "X" mark for him.
>
> The papers were handed to him with a pen. He made his "X" mark on all three documents and they were handed to me. I witnessed his "X" mark on all the documents.

Based on the record before us, we conclude that the trial court did not err in finding that Ms. Carr was an attesting witness. This assignment of error fails.

[3] Next, plaintiff argues that there was insufficient evidence to support the trial court's award of $10,500.00 to defendant as back rent for the period that plaintiff was in possession of the property. We disagree.

In *Cotton v. Stanley*, 86 N.C. App. 534, 539, 358 S.E.2d 692, 695, *disc. rev. denied*, 321 N.C. 296, 362 S.E.2d 779 (1987) this Court stated:

> The fair rental value of property may be determined "by proof of what the premises would rent for in the open market, *or* by evidence of other facts from which the fair rental value of the premises may be determined." *Brewington v. Loughran*, 183 N.C. 55[8], 565, 112 S.E. 257, 260 (1922) (emphasis added); *Sloan v. Hart*, 150 N.C. 269, 275, 63 S.E. 1037, 1039 (1909). . . . The rent agreed upon by the parties when entering into the lease is some evidence of the property's "as warranted" fair rental value, *but it is not binding. See Martin v. Clegg*, 163 N.C. 528, 530, 79 S.E. 1105, 1106 (1913).
>
> . . . A party is not required to put on direct evidence to show fair rental value. *Accord, Martin v. Clegg*, 163 N.C. 528, 79 S.E. 1105.

(Emphasis added.) Here, the evidence showed that plaintiff paid $300.00 monthly rent to the testator until the testator died. After the testator died, the record shows that defendant sent plaintiff a letter stating that the rent would be $400.00 per month beginning on 1 January 1990. Thereafter, plaintiff continued to retain posses-

sion of the property. Defendant testified that $400.00 was the fair market rental value of the property. Plaintiff failed to present any evidence to contradict defendant's valuation. Accordingly, this assignment of error fails.

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

Affirmed.

Judges WYNN and JOHN concur.

STATE OF NORTH CAROLINA v. MIKE CLAY CHURCH

No. 9223SC375

(Filed 15 June 1993)

1. **Searches and Seizures § 3 (NCI3d)— tip from informant—officers' presence on defendant's porch—no violation of expectation of privacy**

Officers who had been told by a confidential informant that marijuana was being grown outside a particular white house were entitled to go to defendant's door to inquire about the matter and were not trespassers, and defendant's expectation of privacy in his yard was not violated by the officers' presence there.

Am Jur 2d, Searches and Seizures § 73.

2. **Searches and Seizures § 33 (NCI3d)— search under plain view doctrine—inadvertence not requirement**

Inadvertence is not a necessary condition of a lawful search pursuant to the "plain view" doctrine; therefore, officers who went to defendant's property without a warrant, suspecting that marijuana was grown there, could properly seize marijuana which they found growing in the yard pursuant to the plain view doctrine.

Am Jur 2d, Searches and Seizures § 161.

Applicability of "plain view" doctrine and its relation to Fourth Amendment prohibition against unreasonable searches and seizures—Supreme Court cases. 110 L. Ed. 2d 704.

3. **Searches and Seizures § 1 (NCI3d)— key inserted into lock—peering through blocked garage windows—no unlawful search**

There was no merit to defendant's contention that officers committed an unlawful search of his garage because one officer inserted a key into the lock of that building and attempted to look through a window, thereby rendering the evidence later seized from the garage unlawful, since inserting a key into a lock and attempting, but being unable, to look through a window do not constitute an unlawful search.

Am Jur 2d, Searches and Seizures § 37.

4. **Criminal Law § 1497 (NCI4th)— search conducted by probation officer—assistance from police officers—warrantless search not illegal**

The presence and participation of police officers in a search conducted by a probation officer, pursuant to a condition of probation, does not, standing alone, render the search invalid. Evidence in the case tended to establish that defendant's probation officer conducted the search of defendant's premises with the assistance of the officers, and the search therefore met the requirements of N.C.G.S. § 15A-1343(b1)(7).

Am Jur 2d, Criminal Law § 576.

Appeal by defendant from judgment entered 12 December 1991, in Wilkes County Superior Court by Judge William H. Freeman. Heard in the Court of Appeals 1 April 1993.

On 16 September 1992, a grand jury indicted defendant on charges of maintaining a dwelling for keeping a controlled substance, in violation of N.C. Gen. Stat. § 90-108(a)(7) (1990); manufacturing marijuana, in violation of N.C. Gen. Stat. § 90-95(a)(1) (1990); and possession of marijuana with intent to sell and deliver, in violation of N.C. Gen. Stat. § 90-95(a)(1) (1990). Pursuant to N.C. Gen. Stat. § 15A-945 (1988), defendant waived arraignment and entered pleas of not guilty to all charges. Thereafter he filed a motion to suppress evidence which was seized without a search warrant from defendant's residence, property, and outbuildings. After the trial judge denied defendant's motion, on 12 December 1991, defendant withdrew

his pleas of not guilty and pleaded guilty to all charges. From the denial of the motion to suppress, defendant appeals pursuant to N.C. Gen. Stat. § 15A-979 (1988).

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Vannoy, Colvard, Triplett & McLean, by Howard C. Colvard, Jr. and Anthony R. Triplett, for defendant appellant.

McCRODDEN, Judge.

In his only assignment of error, defendant contends that the trial court erred in denying his motion to suppress the evidence seized from his residence, premises, and outbuildings. This assignment of error requires us (I) to review the law enforcement officers' actions in discovering defendant's marijuana in plain view and, in so doing, to revisit, in light of *Horton v. California*, 496 U.S. 128, 110 L.Ed.2d 112 (1990), whether items seized under the "plain view" doctrine must be discovered inadvertently; (II) to determine whether a law enforcement officer who had no warrant conducted an illegal search when he inserted a key into a lock and attempted to look through a window; and (III) to decide whether officers performed an unlawful search of defendant's premises when, instead of obtaining a search warrant, they asked defendant's probation officer to search, and they assisted the probation officer in searching, defendant's premises as permitted under a condition of defendant's probation.

At the hearing on defendant's motion to suppress, the State's evidence tended to show that on 18 September 1990, a confidential informant told Special Agent Robert Risen ("Agent Risen") of the North Carolina State Bureau of Investigation that marijuana was being grown outside a white frame house located behind C & J Oil Company in Miller's Creek. Prior to this occasion, the informant had never provided information to Agent Risen.

On 19 September 1990, at 3:30 p.m., Agent Risen and Special Agent Jeff Sellers ("Agent Sellers") drove to Miller's Creek to conduct a general investigation of the area. At Miller's Creek the agents discovered a white frame house and a second house with wood siding, which was located approximately 150 feet west of the white frame house. The agents walked to the front porch of the white house, knocked on the door, and received no answer.

From the front porch, they observed two marijuana plants growing along a fence that ran from the white house to another residence east of the white house and a third marijuana plant growing directly behind the second house. All plants were about eight feet tall and were growing in the yard between the white frame and wood sided houses.

After observing the marijuana plants, the agents walked to the second house to determine who lived in the houses. Agent Sellers knocked on the front and side doors and then observed the defendant walk from the garage, which was adjacent to the second house. When asked whether he had come from the garage, the defendant denied having been inside the garage. Defendant informed the agents that he owned both houses, but lived in the second house. The agents, having no warrant, asked defendant if they could search the houses and garage, but he refused.

After placing defendant under arrest, the agents asked him for a garage door key, which defendant produced. Agent Risen inserted the key in the lock, found that it fit, and withdrew the key without opening the door. While there, Agent Risen attempted to look through the side windows of the garage, but was unable to see inside because the windows were blocked.

While Agent Sellers remained at the defendant's house, Agent Risen transported the defendant to the county jail and began working on an application for a search warrant. After receiving information from another officer that defendant was currently on probation, Agent Risen contacted the probation officer, Sandra Rankin, who confirmed that the defendant was on supervised probation and that, as a condition of that probation, the defendant was obligated to consent to warrantless searches by a probation officer.

Agent Risen informed Ms. Rankin that he had discovered marijuana plants growing outside defendant's house, and he asked Ms. Rankin if she would be interested in conducting a search of the defendant's premises pursuant to the special conditions of probation. Ms. Rankin stated that she would be willing to conduct a warrantless search if she saw marijuana growing outside the defendant's house and determined that the plants more than likely belonged to the defendant. Although she had visited defendant's residence three times, Ms. Rankin had no plans to search the defendant's property prior to 19 September 1990.

Agent Risen ceased his application for a search warrant, and he, Ms. Rankin, and the defendant returned to the defendant's residence. Once there, Ms. Rankin saw the marijuana plants, determined that the plants probably belonged to the defendant, and authorized a search of defendant's premises. Ms. Rankin and nine law enforcement officers conducted the search during which Ms. Rankin discovered additional marijuana plants in the garage, a rifle in the defendant's bedroom, and six baggies of marijuana in the kitchen.

I.

Defendant contends that within this factual setting there were three violations of his Fourth Amendment rights. First, although he does not contest that the marijuana plants growing in his yard were in plain view, defendant contends that the evidence of those plants should be suppressed because Agents Risen and Sellers entered his property without a warrant and because the officers did not discover the plants inadvertently.

In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, *reh'g denied*, 404 U.S. 874, 30 L.Ed.2d 120 (1971), the United States Supreme Court held that under certain circumstances, law enforcement officers may seize evidence in plain view without a search warrant. Following *Coolidge*, North Carolina courts have held that police may, without a warrant, seize evidence which is in plain view if three requirements are met. "First, the initial intrusion which brings the evidence into plain view must be lawful. Second, the discovery of the incriminating evidence must be inadvertent. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure." *State v. Williams*, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986) (citation omitted). We confine our analysis to what the courts heretofore have interpreted as the three requirements resulting from *Coolidge*.

[1] Defendant's first contention relates to the first requirement and is that, since he had a reasonable expectation of privacy in his yard, the officers' warrantless entry onto his property violated that expectation and was unlawful. We disagree. In *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), *disc. review denied*, 299 N.C. 124, 261 S.E.2d. 925-26, *cert. denied*, 447 U.S. 906, 64 L.Ed.2d 855 (1980), this Court held that, when officers enter private property for the purpose of a general inquiry or interview,

their presence is proper and lawful. The Court further stated that "officers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances." *Id.* In that case, the Court upheld the denial of defendant's motion to suppress marijuana found in defendant's house when the evidence showed that officers received an anonymous tip that a house near a dairy farm was full of marijuana; that after deciding the information was not sufficient to obtain a search warrant, they went to the area to conduct a general investigation and, while standing on the front porch, discovered marijuana in defendant's house in plain view. *Id.* at 453, 259 S.E.2d at 598. The facts of the case before us are sufficiently analogous to those of *Prevette* for that case to control our determination that the entry onto defendant's property was lawful.

[2] With regard to what has been interpreted as the second requirement of the "plain view" doctrine, that of inadvertency, we believe that *Horton v. California* answers defendant's argument, not posed by *Coolidge*, of whether discovery of items, which law enforcement officials suspect but which are not named in a search warrant, may ever be inadvertent. In *Horton*, a law enforcement officer filed an affidavit for a warrant to search the home of Horton who was suspected of armed robbery. Although the officer's affidavit referred to police reports that described the weapons used in the robbery as well as the proceeds of the robbery, the warrant only authorized a search for the proceeds. The officer acknowledged in his testimony that, as he searched for the proceeds, he was also interested in finding other evidence which would connect Horton with the robbery. Indeed, he did find in plain view, and he seized, weapons that he believed were associated with the robbery. As the Supreme Court noted, the items were not discovered inadvertently, and the Court faced the issue of whether the items were seized illegally and were, therefore, inadmissible as evidence against Horton.

Noting that former Justice Stewart's analysis of the "plain view" doctrine in *Coolidge* did not receive the support of a majority of the Court, the *Horton* Court determined that the inadvertency limitation was not necessary to the result reached in that case. *Id.* at 137, 110 L.Ed.2d at 123. So long as a law enforcement officer confines his search to the area and duration set by a warrant or a valid exception to the warrant requirement, "no additional Fourth Amendment interest is furthered by requiring that the

discovery of evidence be inadvertent." *Id.* at 140, 110 L.Ed.2d at 125. *Horton* thus has eliminated as a requirement for the "plain view" doctrine that officers discover items of contraband inadvertently. We follow *Horton* and find that inadvertence is not a necessary condition of a lawful search pursuant to the "plain view" doctrine.

The State's evidence clearly met the other requirement of the "plain view" doctrine, that the officers immediately recognize the item (marijuana) as a contraband substance. We conclude, therefore, that the officers were lawfully present on the defendant's property and that, even though they had gone to defendant's premises suspecting that defendant was growing marijuana, the subsequent seizure of the marijuana was authorized by the "plain view" doctrine.

II.

[3] In the second argument supporting his assignment of error, defendant contends that the officers committed an unlawful search of his garage because Officer Risen inserted a key into the lock of that building and attempted to look through a window, thereby rendering the evidence later seized from the garage unlawful. Again, we disagree. Assuming *arguendo* that defendant had an expectation of privacy in the garage, the officer's actions do not constitute an unlawful search. Agent Risen did not open the garage door; instead he inserted the key in the lock, found that it fit, and withdrew the key. His attempt to peer in the garage through side windows was unsuccessful, because the windows were blocked. Inserting a key into a lock and attempting, but being unable, to look through a window do not constitute an unlawful search.

Defendant cites *State v. Tarantino*, 86 N.C. App. 441, 358 S.E.2d 131, *disc. review denied*, 320 N.C. 797, 361 S.E.2d 86 (1987), *and aff'd*, 322 N.C. 386, 368 S.E.2d 588 (1988), as support for his contention that the officers impermissibly invaded an area in which he had an expectation of privacy. The *Tarantino* Court held that an officer impermissibly invaded defendant's right to privacy when the officer entered defendant's enclosed porch without a warrant, bent his body to look through a crack about three feet from the porch floor, and viewed contraband from this vantage point. *Tarantino*, however, is not on point. In the case before us, the officer's actions do not constitute an unlawful search because the garage door was never opened and the windows were blocked so that the officer never observed any of the marijuana later discovered.

III.

[4] Finally, defendant contends that the officers performed an unlawful warrantless search of his premises. Defendant concedes that, as a condition of his probation, he was properly required to submit to warrantless searches conducted in a lawful manner by his probation officer. N.C. Gen. Stat. § 15A-1343(b1)(7) (1988); *State v. McCoy*, 45 N.C. App. 686, 691, 263 S.E.2d 801, 804-05, *disc. review denied*, 300 N.C. 377, 267 S.E.2d 681 (1980). Defendant argues, however, that the warrantless search was initiated and conducted by police officers, rather than his probation officer, and, therefore, the search was unlawful. We agree that a search pursuant to N.C.G.S. § 15A-1343(b1)(7) cannot be conducted by law enforcement officers, but must be conducted by a probation officer. *State v. Grant*, 40 N.C. App. 58, 252 S.E.2d 98 (1979). However, the presence and participation of police officers in a search conducted by a probation officer, pursuant to a condition of probation, does not, standing alone, render the search invalid. *State v. Howell*, 51 N.C. App. 507, 509, 277 S.E.2d 112, 114 (1981). Evidence presented at defendant's hearing tended to establish that the probation officer conducted the search of defendant's premises *with the assistance of the officers*. Indeed, the evidence establishes that Ms. Rankin withheld her commitment to search the premises until she had seen the marijuana plants growing outside the buildings and had determined that they more than likely belonged to the defendant.

The trial court found as fact that Ms. Rankin "searched the [d]efendant's garage and residence . . . [and] was assisted in that search by Agent Risen and several other officers." A court's findings, when supported by competent evidence in the record, should not be disturbed on appeal, *Prevette*, 43 N.C. App. at 452, 259 S.E.2d at 598, and we decline to do so.

Defendant's three arguments attacking the trial court's denial of his motion to suppress fail, and we affirm the judgment.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. GRADY MORRIS MATHESON

No. 9330SC58

(Filed 15 June 1993)

Evidence and Witness § 373 (NCI4th)— second degree rape of stepdaughter—rape of other stepdaughter ten years earlier—relevancy—remoteness—admissibility to show common plan or scheme

In a prosecution of defendant for second degree rape of his stepdaughter, testimony by another stepdaughter concerning earlier rapes committed by defendant against her was admissible, since the testimony was substantially similar to that of the victim in this case and was therefore relevant to show a common plan or scheme on the part of defendant to sexually assault his stepdaughters; furthermore, the acts to which the witness testified were not so remote in time as to make the testimony unfairly prejudicial where the evidence showed that defendant continuously assaulted the witness weekly from 1979 to 1981 and the victim weekly from 1984 to 1991 with the only break being the time he was incarcerated. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Rape § 73.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Appeal by defendant from judgments entered 23 September 1992 by Judge Robert D. Lewis in Clay County Superior Court. Heard in the Court of Appeals 7 June 1993.

Defendant was charged with two counts of second degree rape in violation of N.C. Gen. Stat. § 14-27.3. Evidence was presented at trial as follows:

George Heilner, a psychologist with the Smoky Mountain Center, testified that he had conducted various intelligence tests on the victim. He further testified that the victim scored seventy-five

on her IQ test, statistically below the average range of intellectual functioning. He also testified that tests indicated the victim was not a "significant risk for confabulating fantasy."

The victim testified that she was twenty-one years old at the time of the trial and had been defendant's stepdaughter since she was thirteen. On 23 February 1991, the victim was sleeping on a couch when defendant came home. The victim slept on the couch because she had told her mother that defendant molested her and her mother instructed her to sleep there. The victim also was sleeping in jeans and a shirt due to her fear of defendant. Defendant sat down on a chair in the living room wearing only a shirt and underwear. Defendant then "scooted" behind the victim on the couch and put his right hand up her shirt and bra. The victim tried to move defendant's hand away from her breasts, but she was unable to do so. Defendant put his right hand down the victim's pants and panties and put his finger in her vagina. The victim was unable to move defendant's hand. Defendant pulled the victim's pants down to her knees and using his right hand, placed his penis into her vagina. Defendant pulled his penis out of the victim's vagina, used his right hand to ejaculate, and then went to the bathroom. Although the victim's mother was close by, the victim did not call out or yell because she was afraid that defendant would hurt her. Later that evening, the victim told her mother about the incident in the presence of her sister.

On 9 May 1991, the victim was at home alone with defendant. Defendant grabbed the victim by her left hand and took her to her mother's room. The victim struggled to get away, but she was unable to do so. Defendant forced the victim onto the bed and put his right hand up into her shirt and bra. Defendant told the victim that he loved her and pulled her shirt and bra off. Defendant laid on his side and forced the victim to lie on her side while he inserted his finger into her vagina. Defendant pushed the victim's pants and panties down to her knees. He took off his pants, climbed on top of the victim, and used his right hand to insert his penis into her vagina. He then ejaculated with his right hand and left to go to the bathroom.

The victim further testified that incidents similar to the 23 February 1991 and 9 May 1991 incidents happened two or three times a week since she was thirteen years old. Defendant otherwise treated the victim as a daughter; however, he would not allow

the victim to go out on dates. The victim did not report the incidents until 1991 because defendant had threatened to kill her if she told anyone.

Dewana Deshaies testified that she was the victim's sister. She further testified that defendant was very protective of the victim and would not let her go out on dates. In February 1991, the victim told Deshaies that defendant had been sleeping with her. Deshaies then told the victim's mother about defendant's sexual activity with the victim. In May 1991, the victim's mother called Deshaies wanting to know where the victim was. The next day Deshaies began looking for the victim and eventually picked her up at the Huddle House in Blairsville. The victim was crying hysterically, and Deshaies took her to the sheriff's station. At the station, Deshaies wrote down the victim's statement concerning the incident of 9 May 1991.

Tina Lyons testified that she was the manager of the Hardee's where the victim worked. In mid-February 1991, the victim came to work noticeably upset. She told Lyons that her stepfather had raped her. In May 1991, the victim telephoned Lyons after the 9 May 1991 incident.

Caroline Sibley testified that in 1979 she lived in Colorado with her mother, brother, and defendant, who was her stepfather. She routinely slept with her clothes on so that it was more difficult for defendant to get to her. On one specific occasion in 1979, Sibley awoke to find defendant in her bedroom. Defendant pulled Sibley's pants down and put his penis into her vagina from behind her. When defendant was done, he pulled his penis out and ejaculated on the bed.

Sibley further testified that on another occasion in 1979 or later she was left at home alone with defendant. Defendant locked the door and led Sibley to a bedroom despite her objections. Defendant laid Sibley on the bed, pulled off her pants, pulled down his pants, and got on top of her. Defendant then put his penis into Sibley's vagina. After he was done, defendant pulled out his penis and ejaculated.

Sibley testified that the last time she could remember defendant forcing her to have sexual intercourse was sometime in 1981. Between 1979 and 1981, similar incidents occurred "two or three times a day, sometimes every day, at least every other day." Sibley

never discussed her relationship to defendant with the victim, and the victim never discussed her relationship to defendant with Sibley. While defendant was Sibley's stepfather he gave her material things, but she was not allowed to have any friends or boyfriends. She did not tell her mother about the incidents because she was afraid for herself and her family since defendant said he would kill her if she told.

Alice Matheson, defendant's wife and the victim's mother, testified that on 23 February 1991, she slept on the floor beside defendant. She further testified that the victim never had any conversation with her about any alleged rape.

Billy Long and Charles Martin each testified that on 9 May 1991 they were at defendant's house and worked on Martin's truck. After working on the truck, the three men cleared some land for a mobile home site. Neither Long nor Martin saw the victim at defendant's house that day.

The jury found defendant guilty as charged. From sentences imposing prison terms of forty years for each offense, defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Norma L. Ware, for the State.

Hyde, Hoover & Lindsay, by R. Scott Lindsay, for defendant-appellant.

WELLS, Judge.

Defendant's only argument brought forward on appeal is that the trial court erred by allowing the introduction of evidence of prior bad acts. Specifically, defendant contends Caroline Sibley's testimony concerning prior sexual assaults was not admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404 because it was admitted to show that he acted in conformity therewith. Defendant also contends that even if the testimony were admissible pursuant to Rule 404, its probative value was substantially outweighed by the danger of unfair prejudice in part because the prior bad acts were so remote in time. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character

> of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This rule is a general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to the one exception requiring exclusion if its only probative value is to show the defendant had a propensity or disposition to commit an offense like the one charged. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). Even though the evidence may show the defendant's propensity to commit a particular offense, it is admissible if it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401.

The question first before us is whether the testimony of Caroline Sibley was relevant for a purpose other than to show defendant had the propensity to commit the type of offense charged. We conclude that it was, and that it was properly admitted by the trial court.

Prior to ruling that the testimony of Caroline Sibley was admissible, the trial court conducted a *voir dire* hearing. At the conclusion of the hearing the trial court made findings as to the similarities of the sexual assaults committed against Sibley and the victim in this case:

> (a) In both instances on occasions the defendant would shut and lock a door, take the step-daughters by the hand and walk them to the bedroom.
>
> (b) The defendant professed his love for both of the step-children.
>
> (c) Both step-children testified that the defendant would not let them go out on dates.

(d) Both step-children testified that the defendant would approach the step-daughters from behind, penetrate the vagina, and then withdraw before ejaculation.

(e) Both step-daughters testified that the defendant threatened to hurt each if they told and threatened to kill both of them if they reported the incidents.

(f) The defendant had sexual intercourse in a top position in addition to on the side, and that was testified to by both of the step-daughters.

Based upon the findings, the trial court concluded that Sibley's testimony was relevant "for the intent to establish a common plan or scheme embracing the commission of these crimes."

We hold that the testimony of Caroline Sibley was admissible. The testimony was substantially similar to that of the victim in this case and was therefore relevant to show a common plan or scheme on the part of defendant to sexually assault his stepdaughters. *See State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988).

Having found that the testimony of Caroline Sibley was relevant and admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), we must now determine whether it should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, which provides:

> 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.

"[T]he period of time elapsing between the separate sexual events plays an important part in this balancing process, especially when the State offers the evidence of like misconduct to show the existence of a common plan or design for defendant's perpetration of this sort of crime." *State v. Shane*, 304 N.C. 643, 655, 285 S.E.2d 813, 820 (1982), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1604, 80 L.Ed.2d 134 (1984).

In this case, Caroline Sibley testified that defendant sexually assaulted her on a weekly basis from 1979 until 1981. Sibley further testified on *voir dire* that defendant went to prison in Colorado in 1982 and was released from prison in 1984. In 1984, defendant began living with the victim's mother, and in November 1984 he

began having forcible intercourse with the victim two or three times a week until she reported it in 1991.

Despite the fact that the offenses charged in this case occurred at least ten years after the last sexual assault on Sibley, the assaults on Sibley were not too remote in time so as to make them inadmissible. Our Supreme Court has stated:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). (Citations omitted.) The evidence shows that defendant continuously assaulted Caroline Sibley weekly from 1979 to 1981 and the victim weekly from 1984 to 1991. The only break in defendant's pattern of assaults on his stepdaughters was during the time he was incarcerated in Colorado, and defendant should not be allowed to assert remoteness due to his lack of opportunity to continue his sexual assaults on his stepdaughters. *See State v. Riddick*, 316 N.C. 127, 340 S.E.2d 422 (1986); *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250, *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

Defendant's other contentions concerning the probative value of Sibley's testimony being outweighed by the danger of unfair prejudice are likewise without merit. The balancing of probative value against the danger of unfair prejudice is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent abuse of that discretion. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 108 S.Ct. 1598, 99 L.Ed.2d 912 (1988). Defendant has failed to show that the testimony of Sibley was unduly prejudicial. *See State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986). We hold that the trial court did not abuse its discretion in concluding that the probative value of Sibley's testimony outweighed the danger of unfair prejudice.

In summary, we have found that the testimony of Caroline Sibley was relevant and admissible pursuant to N.C. Gen. Stat.

§ 8C-1, Rule 404(b) to show a common plan or scheme. We have further found that the acts to which Sibley testified were not so remote in time as to make the testimony unfairly prejudicial and that defendant has failed to show that the trial court abused its discretion in concluding that the probative value of the testimony outweighed any danger of unfair prejudice pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. Defendant's argument that the trial court erred by admitting Sibley's testimony is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges EAGLES and McCRODDEN concur.

STATE OF NORTH CAROLINA v. CARRIE Y. TRAPP

No. 924SC163

(Filed 15 June 1993)

Arrest and Bail § 64 (NCI4th); Searches and Seizures § 8 (NCI3d)—warrantless arrest—probable cause—information from informants—cocaine on defendant's person—motion to suppress properly denied

The warrantless arrest of defendant was based on probable cause and was lawful, and the trial court did not err in denying defendant's motion to suppress cocaine found on her person subsequent to the arrest, where officers independently corroborated information received from confidential informants; the officers had personally verified every piece of information given them by the informants except whether defendant had accomplished her mission of hiding drugs on her person; the informants provided detailed information of the future action of third parties ordinarily not easily predicted; the officers had reasonable grounds to believe that the remaining unverified information, that defendant and her boyfriend sold drugs at a named address and that defendant did in fact conceal the drugs during transport, was likewise true; and, considering all the facts and circumstances within the officers' knowledge and based upon the practical considerations of every-

day life, a reasonable person acting in good faith could reasonably believe that defendant was engaged in criminal activity.

Am Jur 2d, Arrest §§ 22, 32, 44; Searches and Seizures §§ 63, 69.

What constitutes probable cause for arrest—Supreme Court Cases. 28 L. Ed. 2d 978.

What constitutes "reasonable grounds" justifying arrest of narcotics suspect without warrant under § 104(a) of Narcotics Control Act of 1956 (26 USC § 7607(2)). 6 ALR Fed. 724.

Appeal by defendant from judgments entered 16 September 1991 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 5 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Bryan E. Beatty, for the State.

Robert T. Hargett for defendant appellant.

COZORT, Judge.

Defendant appeals from the trial court's order denying her motion to suppress evidence obtained after her warrantless arrest. Finding her arrest to be lawfully based on probable cause, we affirm.

Defendant was charged with possession of cocaine with intent to sell and deliver, possession of cocaine, misdemeanor possession of marijuana, maintaining a dwelling for controlled substances, and possession of drug paraphernalia. Defendant moved to suppress the evidence on the grounds of illegal search and seizure in violation of the United States Constitution and the North Carolina Constitution.

The State presented the following evidence at the suppression hearing. On 3 January 1991, Jacksonville Police Detective Donald Hines received a telephone call from a confidential informant advising him that Steven James, also known as "Caboobie," would be driving a gray, dented four-door vehicle from Jacksonville to Maysville to make a cocaine purchase that night. The informant further advised Detective Hines that upon returning to Jacksonville, James would go to 106 Circle Drive and then to the Triangle Motel. Jacksonville Police Detective Steve Selogy also received

information from a second confidential informant that drugs were being sold at 106 Circle Drive and that James and his girlfriend, defendant Carrie Trapp, lived at that address. The informant further advised Detective Selogy that defendant Trapp hid the drugs in her vagina while they were being transported.

Detectives Hines and Selogy set up surveillance on Highway 17. Detective Hines and Detective Suarez parked at a nearby church school. At approximately 10:45 that night, Detective Hines observed three people exit the vehicle matching the description given by the informant. The three people entered 106 Circle Drive. They later left that address and went to the Triangle Motel. Two people then left the Triangle Motel in the same vehicle. Detective Selogy followed the car and activated his blue lights. Detective Selogy, who was in a van, observed the female passenger, later identified as defendant Trapp, move close to the driver, later identified as James, and then saw the male driver put his hand over the female's lap as he was looking in the rearview mirror. The vehicle stopped in the church school parking lot. James consented to a search of his person and the vehicle; no contraband was found.

The officers transported James and defendant Trapp to the police station. At the station, defendant Trapp waived her *Miranda* rights and stated that she had swallowed three bags of marijuana because she was unable to hide the bags in her vagina. Lieutenant Robert Toth then obtained a search warrant for defendant's person. At the hospital, Detective Cynthia Douquet observed a doctor remove a plastic bag containing 1.6 grams of cocaine from defendant's vagina.

The trial court denied defendant's motion to suppress. In addition to finding facts in accordance with the State's evidence, the trial court found that the defendant was under arrest when she was taken to the police station. Based upon the findings of fact, the trial court concluded that the officers had probable cause to arrest the defendant in the parking lot, and that the officers had probable cause to obtain a search warrant based upon information supplied by the informant, the observation of the officers, and the statements of the defendant after her arrest. Following the denial of her motion to suppress, defendant entered into a plea bargain with the State wherein she entered a guilty plea to possession of cocaine. The State dismissed the remaining charges. In accordance with the plea agreement, the trial court sentenced defendant to two years in prison.

On appeal, defendant argues that the trial court erred in denying her motion to suppress on the ground that the detectives did not have probable cause to arrest her. Specifically, defendant argues that the detectives justified the arrest solely on the basis of information from a confidential informant whose reliability was not established by the evidence. We find no error.

Our review of a denial of a motion to suppress is limited to determining whether the trial court's findings of facts are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct. *See State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We agree with defendant that she was legally seized in the church school parking lot. To determine " 'whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' " *State v. Poindexter*, 104 N.C. App. 260, 265, 409 S.E.2d 614, 616 (1991), *disc. review denied*, 330 N.C. 616, 412 S.E.2d 93 (1992) (quoting *Florida v. Bostick*, 501 U.S. ---, ---, 115 L.Ed.2d 389, 401-02 (1991)). Detective Hines testified, and the trial court properly found, that defendant was not free to leave after the vehicle was stopped.

At the time of the arrest, the detectives did not have a search warrant. A warrantless arrest is lawful if based upon probable cause and permitted by state law. *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991). An officer may make a warrantless arrest of any person the officer has probable cause to believe has committed a criminal offense in the officer's presence. N.C. Gen. Stat. § 15A-401(b)(1) (Cum. Supp. 1992). "Facts establishing probable cause must be sufficient to justify the issuance of an arrest warrant even though one has not been requested prior to the arrest." *Mills*, 104 N.C. App. at 728, 411 S.E.2d at 195. " 'Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L.Ed. 1879, 1890 (1949)). "[P]robabilities . . . are not technical; they are the factual and practical considerations of every-

day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Id.*

In *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, *reh'g denied*, 463 U.S. 1237, 77 L.Ed.2d 1453 (1983), the United States Supreme Court rejected the rigid two-prong test requiring affidavits supporting a warrant to demonstrate (1) the basis of the informant's knowledge, and (2) past reliability of the informant. Although the two factors remain highly relevant, *id.* at 230, 76 L.Ed.2d at 543, the Court determined that the courts must review the "totality of circumstances" in determining whether information received from a confidential informant properly forms the basis of probable cause to arrest or search. *Id.* at 238, 76 L.Ed.2d at 548. The Court emphasized the importance of police corroboration, citing *Draper v. United States*, 358 U.S. 307, 3 L.Ed.2d 327 (1959). In *Draper*, an informant reported that the defendant would be arriving in Denver by train from Chicago on one of two days and that he would be carrying an amount of heroin. The informant described defendant's physical appearance, including the defendant's clothing, and stated that he would be walking very fast. The Court concluded that there was probable cause to arrest defendant because the officer observed a man matching the informant's description exit a train from Chicago and walk very quickly toward the station exit. The Court noted that the officer

> had personally verified every facet of the information given him by [the informant] except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of [the informant's] information being thus personally verified, [the officer] had "reasonable grounds" to believe that the remaining unverified bit of [the informant's] information—that Draper would have the heroin with him—was likewise true.

Id. at 313, 3 L.Ed.2d at 332.

The *Gates* Court noted that the showing of probable cause therein was as compelling as in *Draper*. In *Gates*, police officers received an anonymous letter indicating that the defendants purchased drugs in Florida and transported them back to Illinois in the family car. Drug Enforcement Agents tracked the defendants' activities which substantially complied with the details set forth in the anonymous letter. In finding that the magistrate had prob-

able cause to issue a search warrant, the Court noted that the facts obtained through investigation suggested that defendants were involved in drug trafficking. Specifically, the Court commented that Florida is known as a source of narcotics and that defendant husband's brief trip to Florida was as consistent with a drug run as it was an ordinary vacation trip. *Id.* at 243, 76 L.Ed.2d at 551. The Court further noted that the anonymous letter had been corroborated by independent police investigation: "The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true." *Id.* at 244, 76 L.Ed.2d at 552. Finally, the Court found it important that

> the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities.

Id. at 245, 76 L.Ed.2d at 552-53.

In *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991), the North Carolina Supreme Court addressed the sufficiency of affidavits to support a magistrate's finding of probable cause and issuance of a warrant. The affidavits included statements by the submitting law enforcement officer that the relevant information had been received from a reliable informant. On voir dire, the arresting officer testified that he did not consider the informant to be reliable. The officer's opinion apparently was based on his mistaken belief that an informant was "reliable" only if he had been involved in at least two prior controlled purchases of illegal drugs. In concluding that the magistrate had probable cause to issue the warrant based upon the officer's affidavits, our Supreme Court stated:

> In showing that information is reliable for purposes of obtaining a search warrant, the State is not limited to certain narrowly defined categories or quantities of information. *What is popularly termed a "track record" is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause.* The clearest illustration of this fact is found in *Illinois v. Gates*, which has been accepted by this Court as setting the appropriate standard for showing probable cause under both the federal and state constitutions.

Id. at 219, 400 S.E.2d at 433 (citations omitted) (emphasis added).

Applying these principles to this case below, we find that under the totality of the circumstances the detectives had probable cause to arrest defendant in the parking lot. The evidence shows that Detective Hines received a telephone call from a confidential informant that Steven James would be driving from Jacksonville to Maysville to make a cocaine purchase on 3 January 1991. The informant stated that James would return to Jacksonville and go to 106 Circle Drive and then to the Triangle Motel. Detective Selogy received information from a second source that James and his girlfriend Carrie Trapp were selling drugs at 106 Circle Drive. The informant also told Detective Selogy that James would purchase the drugs and defendant would hide them in her vagina. Although Detective Hines personally had not spoken to the informant prior to 3 January 1991, the informant had previously informed the Jacksonville police that drugs were being sold at 106 Circle Drive. While under surveillance, the informant had twice gone into the residence at 106 Circle Drive. In addition to the two informants who contacted Detectives Hines and Selogy, Lieutenant Toth testified that "there were others [informants] prior to that night that stated that Ms. Trapp was in fact concealing drugs for Mr. James in her vagina."

Based upon the information received, the detectives set up surveillance. At approximately 10:45 p.m., the detectives observed a car matching the description given by one of the informants arrive at 106 Circle Drive. Three people exited the vehicle and entered the apartment. The detectives later observed the vehicle leaving the apartment and traveling south on Highway 17. The detectives proceeded to the Triangle Motel where they observed the same vehicle that had been parked outside 106 Circle Drive.

The detectives observed the vehicle leave the motel and turn north on Highway 17. At that point, Detective Selogy activated his blue light. Detective Selogy observed the female passenger move close to the male driver and the driver put his hand in her lap as he frequently checked the rearview mirror. The vehicle stopped in the parking lot. The driver and passenger were identified as Steven James and defendant Carrie Trapp.

As in *Draper* and *Gates*, the officers independently corroborated the information received from the confidential informants. The officers had personally verified every piece of information given them by the informants except whether defendant had accomplished her mission of hiding drugs on her person. The informants provided detailed information of the future action of third parties ordinarily not easily predicted. We find that the officers had reasonable grounds to believe that the remaining unverified information, that defendant and her boyfriend sold drugs at 106 Circle Drive and that defendant did in fact conceal the drugs during transport, was likewise true. Although each piece of information, standing alone, might not have been sufficient to establish probable cause, considering all the facts and circumstances within the officers' knowledge, and based upon the practical considerations of everyday life, we find that a reasonable person acting in good faith could reasonably believe that defendant was engaged in criminal activity. *See Mills*, 104 N.C. App. at 729, 411 S.E.2d at 196. Accordingly, we conclude that the warrantless arrest of defendant was lawful as based upon probable cause. The trial court did not err in denying defendant's motion to suppress.

Affirmed.

Judges EAGLES and WYNN concur.

STATESVILLE STAINED GLASS, INC. v. T. E. LANE CONSTRUCTION & SUPPLY CO., INC., TERRENCE E. LANE, INDIVIDUALLY, AND TEMPLE CONSTRUCTION CO., INC.

No. 9222SC555

(Filed 15 June 1993)

1. Corporations § 5 (NCI4th)— piercing the corporate veil— evidence not sufficient

The trial court erred by concluding that a corporate entity should be disregarded where plaintiff furnished stained glass to T. E. Lane Construction Company for churches which Lane was building; plaintiff's invoices indicated payment due for work sold to T. E. Lane Construction Company; Lane, the sole shareholder and chief executive officer, dissolved Lane Construction; plaintiff received no more payments; Lane subsequently organized Temple Construction, of which he was the sole shareholder, president, and chief executive officer, which was in the business of constructing commercial buildings and churches; and the trial court concluded that piercing the corporate veil was justified and entered a judgment for defendants. The trial court's findings are supported by the evidence, but that evidence cannot provide the basis for the court's conclusion. The evidence establishes and the parties stipulated that plaintiff contracted with Lane Construction, not Lane individually, plaintiff's invoices were to Lane Construction, and plaintiff presented no evidence that Lane used Lane Construction to conduct personal business or for personal benefit. Plaintiff's bare assertion that Lane used Lane Construction to defraud plaintiff, without supporting evidence, does not support the court's conclusion that Lane exercised excessive control of Lane Construction at least partly to escape liability in violation of plaintiff's rights. Furthermore, the determination that the corporate entity of Temple Construction should be disregarded is contrary to law because both of plaintiff's contracts were with Lane Construction, not Temple Construction.

Am Jur 2d, Corporations §§ 43-45.

2. Corporations § 227 (NCI4th)— successor corporation—liability for debts of first corporation—no transfer of assets

The trial court's determination that Temple Construction was a successor corporation to Lane Construction and is

therefore liable for Lane's debts was not supported by the evidence where there was no evidence whatsoever of any transfer of assets from Lane Construction to Temple Construction. In order to become liable as a successor corporation for the debts of another corporation, there must *at a minimum* be a transfer of assets from the old corporation to the transferee corporation.

Am Jur 2d, Corporations §§ 2704-2722.

Appeal by defendants from judgment entered 13 February 1992 in Iredell County Superior Court by Judge James M. Webb. Heard in the Court of Appeals 28 April 1993.

Pressly & Thomas, P.A., by Edwin A. Pressly, for plaintiff-appellee.

James H. Toms & Associates, P.A., by James H. Toms and Christopher A. Bomba, for defendant-appellants.

GREENE, Judge.

Defendants T.E. Lane Construction & Supply Co., Inc., Terrence E. Lane, individually, and Temple Construction Co., Inc. appeal from a judgment of the trial court entered against defendants, jointly and severally, in the amount of $15,374.00 on 13 February 1992.[1]

The record establishes that in 1978, defendant Terrence E. Lane (Lane), as initial incorporator, established defendant T.E. Lane Construction and Supply Co., Inc. (Lane Construction). According to its articles of incorporation, Lane Construction engages in the business of constructing commercial buildings. In 1986, Lane Construction built two churches in Georgia and South Carolina, and plaintiff manufactured stained glass in connection with this construction. Plaintiff's invoices for both jobs indicate payment due for work "sold to T.E. Lane Construction Company." Lane Construction paid plaintiff a portion of the money owed. On 1 July 1989, Lane, the sole shareholder and chief executive officer of Lane Construction, dissolved Lane Construction. Since then, despite repeated demands by plaintiff, no further payments have been

1. Defendant T.E. Lane Construction & Supply Co., Inc. asserts no ground for reversal of the judgment against it; therefore, we leave undisturbed the judgment against this defendant.

made to plaintiff. On 13 July 1989, Lane organized defendant Temple Construction Co., Inc. (Temple Construction), of which Lane is president and chief executive officer and the sole shareholder, and which is in the business of constructing commercial buildings, including churches.

On 15 February 1990, plaintiff filed a complaint against defendants seeking $15,374.00, the balance due for the work performed by plaintiff on the churches. A bench trial was held on 3 February 1992, at which plaintiff presented one witness and fourteen exhibits. Defendants moved for a directed verdict at the close of plaintiff's evidence, which was denied. Defendants presented no evidence. The trial court made the following pertinent findings and conclusions:

> 3. At all times herein, plaintiff dealt with Lane, and the documents were signed between plaintiff and Lane with Lane signing them on behalf of T.E. Lane Construction & Supply Co., Inc. . . .
>
> 4. Following the completion of its work by plaintiff, Lane, as the chief executive officer, the sole shareholder and the controller of T.E. Lane Construction & Supply Co., Inc., caused said corporation to go out of business and dissolve as of July 1, 1989. Simultaneously therewith, Lane created a second business, defendant Temple Construction Co., Inc., which came into being pursuant to its Articles of Incorporation filed July 13, 1989.
>
> 5. These two businesses . . . were companies organized to do identical business activities; Lane is and was the sole shareholder for both companies as well as the sole director, chief executive officer and the president of both companies. Neither companies paid any dividends. T.E. Lane Construction & Supply Co., Inc., went out of business owing debts in connection with its business enterprise, and the successor company, Temple Construction Co., Inc., was capitalized by Lane's promise to pay $4000.00 for stock. There are no records showing any officer other than Lane or that anyone other than Lane has conducted any business or activities on behalf of either defendant corporation.
>
> . . . .
>
> 7. It is . . . clear that Lane sought to escape liability to plaintiff by dissolving defendant T.E. Lane Construction

& Supply Co., Inc., and by creating the new successive company, Temple Construction Co., Inc., immediately thereafter. There may have been other business reasons for this change; however, no evidence was offered by defendants to shed further light on this subject.

8. Plaintiff has been damaged in that it has been unable to collect its debt for its work from its judgment rendered against defendant T.E. Lane Construction & Supply Co., Inc., and, therefore, has been proximately harmed by the actions of Lane.

9. The new successor corporation, defendant Temple Construction Co., Inc., was inadequately capitalized in issuing stock to Lane in exchange for Lane's promise to pay at a later time money into the corporation for late stock.

From the foregoing findings, the court made the following conclusions of law:

1. Lane completely dominated the two defendant corporations with regard to finance, policy and business practices to the extent that neither corporation had any will or existence separate and apart from Lane.

2. Lane exercised excessive control on the two defendant corporations, at least partially, in order to escape liability in violation of the plaintiff's rights.

3. The actions of Lane through the two defendant corporations were improper and proximately caused the injury to the plaintiff by prohibiting plaintiff from recovering its monies due.

4. The stock control as exercised by Lane justifies piercing the corporate veil of both defendant corporations, and justifies treating the liability owed to plaintiff jointly and severally against each defendant.

The trial court entered a judgment against defendants, jointly and severally, in the amount of $15,374.00. From this judgment, defendants appeal.

The issues presented are whether (I) even if the evidence supports the trial court's findings regarding the degree of Lane's

involvement in Lane Construction and Temple Construction, the court's conclusions therefrom are contrary to law; and (II) there is evidence in the record to support the trial court's finding that Temple Construction is a successor corporation to Lane Construction and therefore liable for its debts.

In an action tried without a jury, the court is required to find facts, state separately its conclusions of law, and enter judgment accordingly. N.C.G.S. § 1A-1, Rule 52(a)(1) (1990). It is well established that the court's findings must be supported by competent evidence in the record in order to be upheld on appeal. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Furthermore, the court's conclusions must be based on the facts found by the court and must be reached by an application of fixed rules of law. *Farmers Bank v. Michael T. Brown Distribs., Inc.*, 307 N.C. 342, 346, 298 S.E.2d 357, 359 (1983).

I

Terrence E. Lane, Individually

[1] Defendants argue that the trial court erroneously concluded that the evidence supports disregarding the corporate entities of both Lane Construction and Temple Construction. We agree.

In North Carolina, our courts "will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). When a

> corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Security Mortgage and Fin. Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). In order to disregard the corporate entity under the aforementioned "instrumentality rule," the court must determine the existence of the following elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and

business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn, 313 N.C. at 455, 329 S.E.2d at 330.

Our Legislature recognizes, however, that the acquisition of the entire capital stock of a corporation by one person, standing alone, does not affect the corporate entity. *See* N.C.G.S. § 55-2-03(c) (1990) (no provision in North Carolina Business Corporation Act or any prior act shall be construed to require that a corporation have more than one shareholder); *accord Waff Bros. v. Bank of North Carolina, N.A.*, 289 N.C. 198, 210, 221 S.E.2d 273, 280 (1976); Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 2.10, at 40 (1990). Moreover, "[i]n a close corporation, the principal or sole stockholder [is] permitted by law to play an active role in management, [and] may deal with third parties without incurring personal liability, as long as the separate corporate identity is maintained." 18 Am. Jur. 2d *Corporations* § 45 (1985). In cases arising out of contracts with a close corporation, where another party has voluntarily dealt with the corporation, corporate separateness is usually respected. 1 F. Hodge O'Neal and Robert B. Thompson, *O'Neal's Close Corporations* § 1.10, at 49 (3d ed. 1992). This is so because "[i]f the other contracting party has agreed to look to the corporation, and thus only to the assets that have been contributed to it, courts understandably are reluctant to remake the bargain by permitting the other party to pierce the corporate veil and pursue the shareholders' noncorporate assets." *Id.*

In the instant case, with certain exceptions not material to the disposition of this case, the court's findings regarding Lane's involvement in Lane Construction are supported by the evidence. Based on the evidence in the record, Lane was the chief executive officer, sole shareholder, and "controller" of Lane Construction. The evidence also supports the court's findings that plaintiff at all times dealt with Lane, and that Lane dissolved Lane Construc-

tion in July, 1989, at which time Lane Construction owed business debts. However, these findings, even though supported by the evidence, cannot provide the basis for the court's conclusion of law that "[Lane Construction] had [no] will or existence separate and apart from Lane," or that "[t]he stock control as exercised by Lane justifies piercing the corporate veil of [Lane Construction]." The evidence establishes and the parties stipulated that plaintiff contracted with Lane Construction—not Lane individually—to manufacture stained glass for the two church projects. Plaintiff's invoices indicate payment due for work "sold to T.E. Lane Construction Company." In addition, plaintiff presented no evidence that Lane used Lane Construction to conduct personal business or for personal benefit. *See generally* 18 Am. Jur. 2d *Corporations* § 48. Furthermore, plaintiff's bare assertion that Lane used Lane Construction to defraud plaintiff, without supporting evidence, does not support the court's conclusion that "Lane exercised excessive control on [Lane Construction], at least partially, in order to escape liability in violation of plaintiff's rights." To the contrary, the evidence presented by plaintiff shows only that Lane and the other members of the board of directors agreed to dissolve Lane Construction due to the financial condition of the corporation, and that its assets were liquidated to help pay off company debts. Our review of the evidence reveals that the trial court erred in concluding that the corporate entity of Lane Construction should be disregarded.

Furthermore, the evidence establishes that both of plaintiff's contracts were with Lane Construction and that plaintiff did not contract to provide stained glass to Temple Construction. Therefore, the court's determination that the corporate entity of Temple Construction should be disregarded is contrary to law. *See Glenn*, 313 N.C. at 454, 329 S.E.2d at 330 (there must exist a corporate obligation before court can achieve equity by piercing the corporate veil).

II

Temple Construction

[2] Defendant Temple Construction argues that the trial court's determination that Temple Construction is a successor corporation to Lane Construction, and therefore is liable for the debts of Lane Construction, is not supported by the evidence. We agree.

In order to become liable as a successor corporation for the debts of another corporation, there must *at a minimum* be a transfer of assets from the old corporation to the transferee corporation. *See Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988). In the instant case, plaintiff presented no evidence whatsoever of any transfer of assets from Lane Construction to Temple Construction. Therefore, the trial court's finding that Temple Construction is a successor corporation to Lane Construction cannot be sustained.

Based on the foregoing, the judgment of the trial court against Terrence E. Lane, individually, and against Temple Construction Co., Inc. is reversed. The judgment against T.E. Lane Construction & Supply Co., Inc. is affirmed.

Affirmed in part and reversed in part.

Judges WELLS and WYNN concur.

TERRY HOPE, PETITIONER v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, RESPONDENT

No. 9226SC206

(Filed 15 June 1993)

1. Schools § 13.2 (NCI3d)— teacher dismissal—attorneys for superintendent and board in same firm—no due process violation

A school teacher was not denied due process in a dismissal hearing before the school board because the superintendent's attorney who presented the case against her was a member of the same firm as the attorney who advised the board at the hearing. The school board is presumed to have acted correctly, and no due process violation will be found absent a showing of actual bias or unfair prejudice.

Am Jur 2d, Schools §§ 147 et seq.

Insubordination as ground for dismissal of public school teacher. 78 ALR3d 83.

2. Schools § 13.2 (NCI3d)— teacher dismissal—document used to refresh recollection—notice statute not violated

Even though a teacher received a copy of a document showing standardized writing test results only moments before her dismissal hearing, there was no violation of the notice requirement of N.C.G.S. § 115C-325(j)(5) where the document was used only to refresh a school principal's recollection of the test results and was never presented into evidence.

Am Jur 2d, Schools §§ 147 et seq.

Insubordination as ground for dismissal of public school teacher. 78 ALR3d 83.

3. Schools § 13.2 (NCI3d)— dismissal of teacher for insubordination—sufficiency of evidence

The evidence supported a school board's dismissal of a seventh grade social studies teacher for insubordination where it tended to show that parents of the teacher's students complained early in the school year about her classroom behavior; the principal told the teacher to cease a doll-making project in her class because it had no educational value; the principal discovered that students were still making dolls in the teacher's class several weeks later; the teacher was eventually placed on conditional status, which required her to work with the principal to develop a professional development plan; the teacher ignored several invitations to meet with the principal and never participated in developing a plan; the principal finally developed a plan without the teacher's input and instructed the teacher to implement it; the teacher told the area superintendent that she did not agree with the principal's evaluation of her performance and saw no need to implement the plan; and although the superintendent told the teacher that failure to implement the plan was insubordination and that by not implementing the plan she was placing her job in jeopardy, the teacher still failed to implement the plan.

Am Jur 2d, Schools §§ 147 et seq.

Insubordination as ground for dismissal of public school teacher. 78 ALR3d 83.

HOPE v. CHARLOTTE-MECKLENBURG BD. OF EDUCATION

[110 N.C. App. 599 (1993)]

Appeal by petitioner from judgment entered 31 October 1991 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 March 1993.

Petitioner, Terry Hope, was employed by the Charlotte-Mecklenburg School System for eight years. During the 1989-1990 school year she taught language arts and social studies to seventh graders at Northwest Middle School. Problems relating to petitioner's dismissal began early that school year when parents of petitioner's students complained about her classroom behavior.

During December and January, petitioner implemented a doll making project in her social studies class which the principal of Northwest Middle School felt had no educational value and took up too much class time. The principal requested the curriculum specialist for social studies to evaluate the doll making project. The curriculum specialist agreed with the principal that the project had no educational value. Thereafter, the principal told petitioner to cease doll making projects. However, the principal discovered that students still were making dolls in petitioner's class several weeks later.

Eventually petitioner was placed on conditional status. As a result of being placed on conditional status, petitioner was required to work with the principal to develop a professional development plan, but petitioner failed to meet with the principal in spite of several invitations to do so, and never participated in developing the plan. The principal finally developed a plan without petitioner's input and instructed petitioner to implement it. The principal revised the plan once, extending the time to implement it after receiving a letter from petitioner's attorney regarding the plan. However, petitioner never implemented the plan.

Finally, petitioner was recommended for dismissal on the grounds of inadequate performance, insubordination, and neglect of duty. A Professional Review Committee found that all the grounds for dismissal were true and substantiated. Petitioner was later provided a hearing before the Charlotte-Mecklenburg Board of Education (the Board). The Board concluded that petitioner should be dismissed for inadequate performance, insubordination, and neglect of duty. Petitioner appealed to Mecklenburg County Superior Court seeking reversal of the Board's decision and reinstatement on the grounds that (1) she was denied due process of law, (2) she was prejudiced by the introduction of an inadmissible document, (3)

the Board's decision was arbitrary and capricious, and (4) the Board's decision was not supported by substantial evidence. The superior court decided against petitioner on all grounds and entered judgment accordingly. From this judgment petitioner appeals.

Murphy & Chapman, P.A., by Calvin E. Murphy, for petitioner appellant.

Weinstein & Sturges, P.A., by Judith A. Starrett, for respondent appellee.

ARNOLD, Chief Judge.

[1] Petitioner contends that she was denied due process in the hearing before the Board. This claim is based on the roles played by attorneys for the Board and for the superintendent. The superintendent presented the case against petitioner to the Board, and the Board was the final decision maker on whether or not to dismiss petitioner. The lawyer representing the superintendent and the lawyer advising the Board worked in the same law firm. Petitioner argues that her right to due process was violated because the lawyer who presented the case against her was a member of the same law firm as the lawyer who advised the Board at the dismissal hearing.

Due process is a fluid concept, and what constitutes due process required at a school board hearing is different from due process which is required in a court of law. *Crump v. Board of Educ.*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990). Boards of education are vested with control and supervision of all matters pertaining to public schools in their district, a responsibility greatly different from that of a court. *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979). Carrying out the Board's responsibilities requires a wider latitude in procedure than in a court of law. Therefore, although the Board was required to provide petitioner with all the essential elements of due process, it was permitted to operate under a more relaxed set of rules than is a court of law. *Id.* One of the essential elements of due process is a fair hearing by a fair tribunal. In order to provide a fair hearing, due process demands an impartial decision maker. *Crump v. Board of Educ.*, 93 N.C. App. 168, 178-79, 378 S.E.2d 32, 38 (1989), *modified and aff'd*, 326 N.C. 603, 392 S.E.2d 579 (1990).

Petitioner's argument that the conflicting roles played by the attorneys deprived her of an impartial decision maker and violated principles of fundamental fairness does not hold up. The Board is the decision maker, not its attorney, who acts only in an advisory capacity.

Furthermore, "because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove [bias or unfair prejudice]." *Crump*, 326 N.C. at 617, 392 S.E.2d at 586. The record contains no evidence of bias or unfair prejudice. Petitioner contends the roles played by the attorneys, standing alone, constitute a violation of due process. To decide that these facts alone are sufficient to establish bias or unfair prejudice would amount to a per se rule of unconstitutionality, completely disregarding the presumption that the Board acted correctly and the presumption of honesty and integrity in those serving as adjudicators. *Taborn v. Hammonds*, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986). There is no such rule and we decline to adopt such a rule.

Petitioner argues that a per se rule is necessary because it is difficult or impossible to prove that the attorneys communicated with each other about the case, or that the Board's attorney reviewed the firm's files pertaining to this case. This argument also fails. The possibility that the Board obtained information from their attorney about the case does not establish a due process violation. "Members of a school board are expected to be knowledgeable about school-related activities in their district." *Crump*, 326 N.C. at 616, 392 S.E.2d at 586. Such knowledge is an inevitable aspect of their multi-faceted roles as administrators, investigators and adjudicators. *Id.* "[M]ere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decisionmaker." *Baxter*, 42 N.C. App. at 411, 257 S.E.2d at 75 (quoting *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 412, 230 S.E.2d 164, 170 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977)). The chance that the Board acquired knowledge of the facts of this case from its attorney, who happens to work with the superintendent's attorney, does not taint that knowledge.

Moreover, the United States Supreme Court has held that there is no per se violation of due process when an administrative

tribunal acts as both investigator and adjudicator on the same matter. *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712 (1975). *See also Holley v. Seminole County School District*, 755 F.2d 1492 (11th Cir. 1985) (not a violation of due process for school board's attorney to act as hearing examiner and aid in preparing the case against teacher). In addition, another federal court has held that "the combination of an advisory function with a hearing participant's prosecutorial or testimonial function does not create a *per se* facially unacceptable risk of bias." *Lamb v. Panhandle Community Unit School District No. 2*, 826 F.2d 526, 529 (7th Cir. 1987).

We reiterate that the Board is presumed to have acted correctly. Absent a showing of actual bias or unfair prejudice petitioner cannot prevail on this argument. There is no such evidence, so this argument is rejected.

[2] In her second argument, petitioner argues that the superintendent's use of a document containing a summary of standardized test results was a violation of N.C. Gen. Stat. § 115C-325(j)(5). N.C. Gen. Stat. § 115C-325(j)(5) (1991 & Cum. Supp. 1992) provides:

> At least five days before the hearing, the superintendent shall provide to the teacher a list of witnesses the superintendent intends to present, a brief statement of the nature of the testimony of each witness and a copy of any documentary evidence he intends to present. . . . Additional witnesses or documentary evidence may not be presented except upon consent of both parties or upon a majority vote of the board or panel.

During the superintendent's presentation of evidence, the principal testified about the results of a standardized writing test, and she was shown documentary evidence which contained the results of that test. The document was prepared by the area writing specialist and was presented to area principals at a principals' meeting. It contained the percentage of all students who passed at Northwest Middle School and each class's percentage of passing students.

This document was never presented into evidence, but petitioner argues that because the principal read from the document at the hearing, and because petitioner did not receive a copy of the document until moments before the hearing, its use was a violation of the notice requirement of N.C. Gen. Stat. § 115C-325(j)(5).

Examination of the transcript reveals that the document was used to refresh the principal's recollection of the test results. The principal misstated the percentage of students at Northwest Middle School who passed the test, and the superintendent's attorney showed her the document so that she could correct her answer. Because the document was used only to refresh the principal's recollection and was never presented into evidence, there was no violation of G.S. § 115-325(j)(5).

[3] Finally, petitioner argues that the Board's findings and conclusions concerning the reasons for her dismissal are not supported by competent and substantial evidence. When reviewing a school board's findings and conclusions, the reviewing court uses the whole record test. The whole record test does not allow the reviewing court to replace the board's judgment as between two conflicting views. Instead, the whole record test requires the reviewing court, "in determining the substantiality of evidence supporting the [b]oard's decision, to take into account whatever in the record fairly detracts from the weight of the [b]oard's evidence." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

The Board concluded that petitioner should be dismissed for (1) inadequate performance, (2) insubordination, and (3) neglect of duty. Petitioner produced evidence that she received good evaluations prior to the 1989-1990 school year. She contends that the problems between her and the principal began in December 1989, when the principal exhibited disapproval of the doll making project. Petitioner argues that her poor evaluations flowed from a disagreement over the validity of this teaching technique. However, the record indicates that petitioner's problems began when parents complained about petitioner's behavior towards her students near the beginning of the school year.

Regardless of how and when the conflict between petitioner and the administration began, the record reveals that petitioner was insubordinate on several occasions. Competent evidence supports the finding that petitioner continued the doll making project after the principal directed her to stop. In addition, when petitioner was placed on conditional status, she was required to develop a professional development plan with the principal. Petitioner did not meet with the principal to discuss the plan in spite of the principal's instructions to do so. When the principal drafted a professional growth plan without petitioner's input, petitioner refused

to implement the plan. Before the dismissal, the area superintendent questioned petitioner about her refusal to implement the plan. Petitioner admitted that she did not implement the plan and that she did not intend to implement the plan. Petitioner told the area superintendent that she did not agree with the principal's evaluation of her performance, and therefore saw no need to implement the plan. The area superintendent told petitioner that failure to implement the plan was insubordination and that by not implementing the plan she was placing her job in jeopardy. However, petitioner still did not implement the plan.

We understand petitioner's inference that her dismissal resulted from the principal's dislike of the doll making project, and some evidence in the record supports her argument. However, after carefully examining the entire record, we find that competent and substantial evidence exists to support the Board's findings and conclusion that petitioner should be dismissed for insubordination. Because we find substantial evidence to support petitioner's dismissal on the grounds of insubordination, we need not address the remaining grounds for dismissal. "A finding that the evidence of any of the grounds listed under G.S. § [115C-325(e)(1)] was substantial justifies dismissal where, as here, the teacher was notified that dismissal was based on that ground." *Baxter*, 42 N.C. App. at 416, 257 S.E.2d at 78.

The decision of the superior court is affirmed.

Affirmed.

Judges GREENE and McCRODDEN concur.

THE DURHAM HERALD CO., INC., CHAPEL HILL PUBLISHING, INC., THE NEWS AND OBSERVER PUBLISHING CO., THE CHATHAM NEWS PUBLISHING COMPANY, AND THE NORTH CAROLINA PRESS ASSOCIATION, INC., PLAINTIFFS v. THE NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY, DEFENDANT

No. 9210SC542

(Filed 15 June 1993)

1. **State § 1.2 (NCI3d)— Low-Level Radioactive Waste Management Authority—papers and items generated by contractors—when become public records**

The legislature did not intend for papers and items generated by the Low-Level Radioactive Waste Management Authority's contractors and consultants to become public records upon creation or collection by the contractors or consultants. Instead, when N.C.G.S. § 104G-6(a)(18) and § 132-1 are read together, it is clear that the legislature intended that such papers and items would become public records only when they are received by the Authority in the proper exercise of its discretion.

Am Jur 2d, Records and Recording Laws §§ 1-4.

2. **Appeal and Error § 342 (NCI4th)— ineffectual cross-assignments of error**

Plaintiff appellees' purported cross-assignments of error were ineffectual where they did not present an alternative basis to support the trial court's decision but merely stated that certain portions of the trial court's judgment were erroneous.

Am Jur 2d, Appeal and Error § 653.

Appeal by defendant from judgment filed 6 March 1992 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 28 April 1993.

On 28 June 1991 plaintiffs filed a complaint against the defendants, North Carolina Low-Level Radioactive Waste Management Authority (Authority) and John H. Mac Millan, Executive Director of the Authority, seeking disclosure of certain documents alleged to be public records. Specifically, plaintiffs asked *inter alia* "that this action be treated as a petition for extraordinary injunctive

relief pursuant to N.C. Gen. Stat. § 132-9" and "[f]or an order declaring that all records made or received on behalf of the Authority are public records as defined by N.C. Gen. Stat. § 132-1[.]" The same day, plaintiffs filed a motion to show cause in which they asked the court to order defendant to "show cause, if any, why the documents that are the subject matter of this action should not be ordered disclosed to the public pursuant to G.S. 132-9."

On 16 August 1991 defendants filed an amended answer in which they admitted that the plaintiffs requested to be able to review and copy "records made or received by many of the Authority's approximately forty private contractors and subcontractors[.]" Defendants also admitted that the Authority's records are public records as defined by G.S. 132-1, "subject to the exceptions and limitations generally applicable to Chapter 132 of the General Statutes, having been 'made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of the North Carolina government or its subdivisions.' " However, defendants denied that "records that are and have been exclusively in the hands of private-sector contractors and subcontractors are public records within the meaning of Chapter 132 of the General Statutes." On 20 August 1991 Mr. Mac Millan was dismissed from the suit by order of the Superior Court.

The case was heard at the 10 February 1992 civil term of Superior Court in Wake County before Judge Gregory Weeks. On 6 March 1992 Judge Weeks filed a judgment making the following findings of fact and conclusions of law:

> (1) The Court adopts the parties' stipulated facts and incorporates them herein;
>
> (2) Plaintiffs do not seek records in the following categories:
>
> a. personnel records relating to employees or prospective employees of private contractors, except to the extent that such records have been disclosed to the Authority in connection with a bid, proposal, or similar document;
>
> b. personnel records of public employees, except to the extent that such records are public records pursuant to North Carolina law;
>
> c. records protected by the attorney-client privilege and/or the attorney work-product doctrine;

d. records used or created in connection with the formulation or preparation of any bid, proposal or similar document;

e. trade secrets as defined by N.C.G.S. § 66-152;

(3) The Public Records law, G.S. §§ 132-1 et seq., applies to the records of "any agency of North Carolina government or its subdivisions." G.S. § 132-1 defines "Agency of North Carolina government or its subdivisions" as "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government;"

(4) The private businesses hired by the Authority are not government agencies within the meaning of G.S. § 132-1, and this is so notwithstanding that these businesses may be reimbursed or compensated with funds appropriated by the General Assembly and disbursed by the Authority;

(5) G.S. § 104G-6(a)(18) establishes that the Authority "shall receive all field data, charts, maps, tracings, laboratory test data, [and] soil and rock samples" that are "collected or produced by [the Authority's] employees, contractors or consultants pursuant to siting, operating or closing of low-level radioactive waste facilities;"

(6) "Pursuant to G.S. 104G-6(a)(18), all records containing or constituting field data, charts, maps, tracings, laboratory test data, or soil and rock samples relating to the siting, operation or closing of low-level radioactive waste facilities are public records, and are therefore subject to public inspection and copying, when they are made or received by the Authority or by its employees, contractors or consultants."

(7) G.S. 104G-(a)(18) also authorizes the Authority to receive "such other records as the Authority deems appropriate." The Authority "receives" such "other records" only when the records, or copies of the records, are submitted to the Authority.

(8) At such time as the Authority, in the exercise of its statutory discretion, actually receives these "other" records at its administrative offices, they, too, become public records; and

(9) The court does not have before it particular records to determine whether they are public records. Therefore, disputes that may arise as to whether specific records must be made available for public inspection pursuant to this judgment will need to be resolved in accord with applicable law and any remedies available at law under this judgment.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Authority shall make available for public inspection and copying all records containing or constituting field data, charts, maps, tracings, laboratory test data, or soil and rock samples collected or produced by the Authority's employees, contractors or consultants pursuant to siting, operating or closing of low-level radioactive waste facilities;

2. The Authority shall make available for public inspection and copying all other records received by it in the exercise of the discretion conferred upon it by G.S. 104G-6(a)(18);

3. All requests to inspect and copy records pursuant to this judgment shall be directed to the Authority. If some or all of the records requested are encompassed by paragraph 1 but have not been received by the Authority, the Authority shall promptly obtain the records, or copies of them, and make them available for public inspection and copying.

4. All parties' shall bear their own costs.

Defendant Authority appeals.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and Katherine R. White, for the plaintiff-appellees.

Attorney General Lacy H. Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr., Special Deputy Attorney General Terry Richard Kane and Assistant Attorney General K.D. Sturgis, for the defendant-appellant.

EAGLES, Judge.

I

[1] This case presents a question of first impression here — whether records made by contractors and subcontractors (contractors) of the Authority, kept by the contractors and not actually received

by the Authority are public records, as defined under G.S. 132-1, requiring disclosure under North Carolina's public records law.

G.S. 132-1 provides:

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council department, authority or other unit of government of the State or any county, unit, special district or other political subdivision of government.

Under this statute, in determining access issues two questions must be answered: first, whether a contractor is an "[a]gency of North Carolina government or its subdivisions"; and second, if a contractor is found to be an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business. . . ." *News & Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803, 74 L. Ed. 2d 42 (1982). The trial court found that the contractors are *not* agencies as defined by G.S. 132-1, and there has been no appeal from that finding. That finding is the subject of a cross-assignment of error by appellees but the cross-assignment is not effective to attack the judgment itself. Cross-assignments have limited utility; they can be effective to provide additional bases or alternative grounds to support a judgment or portion of a judgment which successfully has been attacked by appellant. There is no dispute that the Authority itself is a State agency. We now address the issue of when papers and items produced and held by consultants acting pursuant to contracts with the Authority become subject to disclosure pursuant to the Public Records Act.

"It is established '[u]nder the rules of statutory construction, statutes *in pari materia* must be read in context with each other.' *Cedar Creek Enterprises, Inc. v. Department of Motor Vehicles*,

290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976). *Accord, Newlin v. Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977). '*In pari materia*' is defined as '[u]pon the same matter or subject.' Black's Law Dictionary 898 (4th ed. 1968)." *News & Observer*, 55 N.C. App. at 8-9, 284 S.E.2d at 546. Furthermore, " '[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.' " *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (quoting *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). Finally, "[i]n the interpretation of statutes the legislative will is the controlling factor." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975).

G.S. 132-1 and G.S. 104G-6(a)(18) both address the issue: under what circumstances do papers and items generated by the Authority's contractors become public records?

G.S. 104G-6(a) provides in part:

(a) To carry out the purposes of this Chapter, the Authority:

* * *

> (18) Shall receive all field data, charts, maps, tracings, laboratory test data, soil and rock samples, and such other records as the Authority deems appropriate, collected or produced by its employees, contractors, or consultants pursuant to siting, operating, or closing of low-level radioactive waste facilities. All such data and materials shall become the property of the State and shall not be disposed of except in accordance with G.S. 132-3 except that soil and rock samples may be subjected to tests and reduced in volume for purposes of storage in a manner approved by the Authority. The Authority may enter into agreements with other State agencies for the purpose of storage and preservation of data and materials.

It is clear that under G.S. 104G-6(a)(18) the Authority must receive certain enumerated papers and items generated by its contractors, and that the Authority has discretion to receive other papers and items generated by its contractors. G.S. 104G-6(a)(18) provides that the Authority *shall* receive "all field data, charts, maps, tracings, laboratory test data, soil and rock samples . . ." generated by the Authority's contractors. It also provides that

the Authority shall receive "such other records as the Authority deems appropriate. . . ." However, the second sentence of G.S. 104G-6(a)(18) provides, in pertinent part, that "[a]ll such data and materials shall become the property of the State. . . ." The phrase "[a]ll such data and materials" obviously includes those items that the Authority is mandated to receive and those which the Authority has exercised its discretion to receive. The phrase "shall become the property of the State" clearly indicates that the General Assembly intended that at some unstated time the data and materials would become *State* property, as distinguished from being the property of the consultant. The statute does not spell out precisely when the items "shall become the property of the State" and, therefore, subject to the Public Records Act's disclosure provisions. Accordingly, we hold that the General Assembly did not intend that the consultant-generated papers and items would be public records immediately upon creation or collection by the consultants or contractors. Instead, reading G.S. 104G-6(a)(18) and G.S. 132-1 together, we conclude that the General Assembly intended that the papers and items would become public records only when they are received by the Authority in the proper exercise of its discretion.

Here, the appellees have not pled and the trial court did not find or conclude that the Authority abused its discretion by attempting to prevent public disclosure of information by delaying or declining receipt of contractor-generated papers and items from contractors. Accordingly, the trial court's order requiring the Authority to obtain records from its contractors must be vacated.

II

Because of our disposition of the foregoing issue we need not address the remaining arguments raised by the appellant.

III

[2] Finally, we note that the appellees bring forward four "cross-assignments of error." Each cross-assignment states that certain portions of the trial court's judgment were erroneous. They do not present an alternative basis for the trial court's decision. "The proper means by which to raise such an attack is an independent appeal." *Whedon v. Whedon*, 68 N.C. App. 191, 196, 314 S.E.2d 794, 797 (1984), *reversed on other grounds*, 313 N.C. 200, 328 S.E.2d 437 (1985). The appellees have failed to cross-appeal. Accordingly,

to the extent appellees' cross-assignments have not already been addressed they are overruled.

Vacated.

Judges MARTIN and JOHN concur.

STATE OF NORTH CAROLINA v. DAVID ROY EGGERT

No. 9226SC619

(Filed 15 June 1993)

Evidence and Witness § 1026 (NCI4th)— trafficking in LSD— possession of LSD—exclusion of hearsay statements as to ownership—reversible error

In a prosecution of defendant for trafficking in LSD by possession, the trial court committed reversible error by excluding hearsay statements allegedly made by a person arrested at the same time and place as defendant to a second person arrested at the same time and place as defendant, but the court did not err in excluding the first person's statements to defendant, since the first person allegedly told the second person that he felt bad about defendant's having been arrested because the LSD was in fact his and not defendant's; the statement was clearly against the first person's penal interest; the first person was unavailable as a witness because he asserted his privilege against self-incrimination; there were sufficient corroborating circumstances to indicate the trustworthiness of the statement, including the fact that the first person was seated next to defendant in a van, the drugs were found where defendant was seated which was necessarily in close proximity to the first person, and the first person admitted owning a bag found by officers which contained drug paraphernalia and "one suspected hit of LSD"; but the first person's statements to defendant indicated that he knew that LSD was not defendant's, but stopped short of claiming ownership; and the first person's statements to defendant therefore were not against his penal interest. N.C.G.S. § 8C-1, Rule 804(b)(3).

Am Jur 2d, Evidence § 620.

Appeal by defendant from judgment entered 20 November 1991 by Judge A. Leon Stanback, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 May 1993.

Defendant was indicted and convicted of trafficking in lysergic acid diethylamide (LSD) by possession. He was sentenced to fourteen years in prison.

At trial the State's evidence tended to show the following: On 11 June 1991 Officer Faulkenbury of the Charlotte Police Department's Street Drug Interdiction Squad was patrolling the Charlotte Coliseum during a Grateful Dead concert. Officer Faulkenbury was working on a team which included Agent Sellers of the North Carolina Alcohol Law Enforcement Division of the Department of Crime and Control and Public Safety and Officer Sauciuc, a Charlotte police officer assigned to the Vice and Narcotics Division.

At approximately 7:00 p.m. Officer Faulkenbury and his teammates saw three people standing beside a van with an open sliding door. The defendant and Mr. Burton were seated in the van on a bench seat. As Officer Faulkenbury approached the van, he saw the defendant smoke from a bong, a device used to smoke marijuana. The defendant handed the bong to Mr. Burton, seated closest to the van's door, who in turn handed the bong to Mr. Malezewski, who was standing beside the van. Officer Faulkenbury walked over to the van and detected "a very strong odor of marijuana[.]" Officers arrested the defendant, Mr. Burton, Mr. Malezewski and a fourth person standing outside the van holding two bongs.

After handcuffing and searching Mr. Malezewski and the person holding the two bongs outside the van, officers instructed Mr. Burton to step out of the van. He complied and was searched. Officers then instructed the defendant to step out of the van. Officer Faulkenbury searched the defendant and found a small square "containing 80 plus hits of LSD" in defendant's left front overalls pocket. Officer Sauciuc handcuffed the defendant to Mr. Burton. At the same time Agent Sellers called Officer Faulkenbury's attention to a small box that "he had found from underneath Mr. Eggert when Mr. Eggert had stood up." The box contained "numerous suspected hits of LSD[.]" The officers also found a bag which contained a marijuana pipe, a marijuana cigarette and a small ceramic egg containing a small square of LSD. Mr. Burton claimed ownership of the bag, but did not claim to own the box containing the LSD.

Agent Sellers testified that he entered and secured the van prior to Mr. Burton or the defendant exiting the van. When the defendant stood to leave the van, Agent Sellers saw a small box located "exactly right where [the defendant] was sitting." The box, a hard plastic container about three inches by three inches in size, contained approximately 698 doses of LSD. Agent Sellers testified that the LSD in the box and the LSD taken from the defendant's pocket were on blotter paper which "appeared to [have] the same design." Officer Sauciuc also testified that the blotter papers had the same design.

The defendant presented the testimony of three witnesses. First, John Malezewski testified *inter alia* that he was handcuffed to Mr. Burton for about fifteen minutes. After the two were separated they were then taken to the Mecklenburg County Intake Center where they were processed. Mr. Malezewski testified out of the jury's presence that while he was in a holding cell with Mr. Burton, Mr. Burton said that "he felt bad because [the defendant] was busted and that he pretty much admitted that the LSD was his." Mr. Malezewski then testified that Mr. Burton "did admit" that the LSD was his. However, he never said "that it was not [the defendant's]."

The defendant then testified in his own behalf. The defendant testified that he spoke with Mr. Burton two or three days after they had been arrested and while they were still in jail. Out of the presence of the jury, defendant testified that although he was not able to remember Mr. Burton's exact words, "basically [Mr. Burton] said that he felt bad for me being arrested, and I said why, and he said because that wasn't your stuff." When the defendant asked Mr. Burton who owned the LSD, Mr. Burton "declined to answer."

Finally, the defendant called Mr. Burton to the stand. However, Mr. Burton asserted his Fifth Amendment privilege against self-incrimination, and refused to testify as to his involvement in the incident involving the defendant.

From judgment imposing sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General L. Darlene Graham, for the State.

Charles L. Morgan, Jr., for the defendant-appellant.

EAGLES, Judge.

The sole issue on appeal is whether the trial court committed reversible error by excluding hearsay statements allegedly made by Mr. Burton to Mr. Malezewski and by Mr. Burton to the defendant. Specifically, defendant argues that Mr. Burton made statements admitting that the LSD found in the box underneath the defendant was his and that his statements were admissible as statements made against his penal interests under G.S. 8C-1, Rule 804(b)(3).

"G.S. 8C-1, Rule 804(b)(3) provides that, if the declarant is not available as a witness, statements against the declarant's interest are not excluded by the hearsay rule." *State v. Agubata*, 92 N.C. App. 651, 655, 375 S.E.2d 702, 704 (1989). The State concedes in its brief that because "[Mr.] Burton asserted his privilege against self-incrimination, he was clearly an unavailable witness." Our attention focuses now on whether the statements were against Mr. Burton's penal interest as required by Rule 804(b)(3).

" 'Rule 804(b)(3) requires a two-pronged analysis.' *State v. Wilson*, 322 N.C. 117, 134, 367 S.E.2d 589, 599 (1988). First, the trial court must be satisfied that the statement is against the declarant's penal interest. Second, corroborating circumstances must clearly indicate the trustworthiness of the statement. G.S. 8C-1, Rule 804(b)(3)." *Agubata*, 92 N.C. App. at 655, 375 S.E.2d at 705.

Here, Mr. Malezewski testified, outside the presence of the jury, that Mr. Burton "did admit" that the LSD found in the box was his. The defendant testified, outside the presence of the jury, that although he was not able to remember Mr. Burton's exact words, "basically [Mr. Burton] said [to me] that he felt bad for me being arrested . . . because that [LSD in the box] wasn't your stuff." However, when the defendant asked Mr. Burton who the LSD belonged to, Mr. Burton declined to answer.

Clearly, the alleged statement made by Mr. Burton to Mr. Malezewski was against Mr. Burton's penal interest. Moreover, we find sufficient corroborating circumstances to clearly indicate the trustworthiness of the statement: (1) Mr. Burton was seated next to the defendant in the van; (2) the drugs were found where the defendant was seated, necessarily in close proximity to Mr. Burton; and (3) Mr. Burton admitted owning a bag found by officers which contained drug paraphernalia and "one suspected hit of LSD." Accordingly, we reverse and remand for a new trial.

The State argues, however, that the alleged statement should not have been admitted because Mr. Malezewski was unable to "recall the exact statement allegedly made by Mr. Burton." We disagree. Mr. Malezewski testified on direct examination as follows:

> Q. What did Larry Burton tell you, Mr. Malezewski?
>
> A. He told me it was—well, he told me he felt bad because David was busted and that he pretty much admitted that the LSD was his.
>
> Q. When you say that he pretty much admitted—
>
> A. He did admit.
>
> Q. He did admit?
>
> A. Yes.
>
> * * *
>
> Q. Tell me again, I am not clear, tell the Judge for the record exactly what you recall Mr. Burton telling you. What was the conversation about?
>
> A. We were talking about being arrested and all that, and he brought up about David being charged with trafficking and possession of LSD, and Larry said he felt bad about that and I asked him, well, it was yours, wasn't it, and he said yes.

On cross-examination Mr. Malezewski testified:

> Q. His words were that he owned it. Is that right? Is that your testimony, that it was his?
>
> A. He didn't say own. He said it was his.
>
> MR. WALKER: That is all I have, Your Honor.
>
> THE COURT: Let me ask him one thing. Did he tell you, his words were—tell me what his exact words were again.
>
> A. Sir, this was in July. I can't remember his exact words. Our conversation was about him feeling bad about David being charged for that, and he admitted that LSD was his.
>
> THE COURT: But you testified that you asked him was it yours.
>
> A. Yes, I did ask him that particular comment. We talked for a while.

THE COURT: I mean, did you ask him was it yours, is it yours?

A. Yes, sir.

THE COURT: And what did he say?

A. He said yes.

THE COURT: Did he ever tell you—

A. I asked him why he felt bad.

THE COURT: Did he ever tell you that it was not David's?

A. Not specifically, no, but I assumed that it was when he said that it was his.

THE COURT: But he didn't tell you that?

A. No, sir, he didn't tell me that.

Mr. Malezewski's testimony was sufficiently definite to form a statement as defined by our hearsay rules. Accordingly, the State's argument is overruled.

The State also argues that Mr. Burton would not understand the statement's "damaging potential" and that the alleged statement was not trustworthy because it "was made to another prisoner outside the presence of law enforcement officers or personnel. Under these circumstances, Mr. Burton would not necessarily understand that his statement would subject him to criminal liability." This argument is wholly without merit. *See State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990) (statements against interest were admissible although made to persons outside the presence of law enforcement officers or personnel).

Defendant next argues that the alleged statement made by Mr. Burton to the defendant was admissible as a statement against penal interest. We disagree. The defendant testified:

Q. Tell the court reporter, please, and the Judge the nature of that conversation, what was said.

A. I don't recall the exact words but basically what he said that he felt bad for me being arrested, and I said why, and he said because that wasn't your stuff.

Q. He said, "I know that wasn't your stuff."?

A. Yes.

Q. Very good. Did you respond to him at that point?

A. I just said whose stuff was it and he declined to answer.

Q. He did decline to answer?

A. Yes.

On cross-examination the defendant testified:

Q. You said, in answer to Mr. Morgan's questions that you did not recall his exact words? Isn't that what you said?

A. I don't recall the exact words of the conversation but that is a good part of what I just spoke of. I do recall the words.

"In order for a statement to be a declaration against interest, the statement must expose the declarant to criminal liability. Rule 804(b)(3) (1988)." *State v. Artis*, 325 N.C. 278, 304, 384 S.E.2d 470, 484 (1989), *judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Here, the statements allegedly made by Mr. Burton to the defendant were not against Mr. Burton's penal interest. The State correctly points out in its brief, "[i]t is simply not a crime to know that drugs do not belong to a particular individual." In addition, the defendant admitted that Mr. Burton expressly declined to say to whom the LSD belonged. Accordingly, we conclude that the trial court did not err by excluding Mr. Burton's alleged statements to the defendant.

Finally, we note that the defendant argues that his constitutional rights were violated by exclusion of the alleged statements. " '[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal.' " *State v. Ainsworth*, 109 N.C. App. 136, 151, 426 S.E.2d 410, 419 (1993) (quoting *Boyd v. Nationwide Mutual Ins. Co.*, 108 N.C. App. 536, 543, 424 S.E.2d 168, 172, *disc. review allowed*, 333 N.C. 536, 429 S.E.2d 553 (1993) and *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991)). Here, the defendant's sole assignment of error does not purport to raise any constitutional challenge to the exclusion of the statements attributed to Mr. Burton. Accordingly, this argument is overruled.

New trial.

Judges LEWIS and McCRODDEN concur.

EDWARD L. HALE v. AFRO-AMERICAN ARTS INTERNATIONAL, INC. AND RICK SLADE

No. 9218SC475

(Filed 15 June 1993)

Appeal and Error § 210 (NCI4th)— notice of appeal—no indication of service of notice—appeal dismissed

An appeal was dismissed where the record contained a notice of appeal but nothing in the notice showed that plaintiff was given notice through service as required by App. R. 26(b). The notice of appeal contains no acknowledgement of service, nor is there affixed to the notice any proof of service in the form of a statement of the date and manner of service and of the names of the persons served as required by Rule 26(d). The Court of Appeals obtains no jurisdiction over the appeal without proper service of notice of appeal on the other party as required by Rule 26(b) and proof pursuant to Rule 26(d) in the record before the Court that such notice was given.

Am Jur 2d, Appeal and Error §§ 316 et seq.

Judge WYNN dissenting.

Appeal by defendants from judgment signed 28 March 1991 and order signed 24 February 1992 in Guilford County Superior Court by Judge W. Douglas Albright. Heard in the Court of Appeals 15 April 1993.

Lee D. Andrews for plaintiff-appellee.

James W. Swindell for defendant-appellants.

GREENE, Judge.

Defendants Afro-American Arts International, Inc. (Afro-American) and Rick Slade (Slade) appeal from judgment signed 28 March 1991, in favor of plaintiff Edward L. Hale (Hale), and from order signed 24 February 1992, denying defendants' motions for amended findings of fact and for a new trial.

Slade and Hale formed Afro-American on 15 January 1988. Hale was named president and Slade chairman. Hale believed that he was to serve a two-year term of employment as president of Afro-American. Slade believed that there was no agreement as

to the length of Hale's employment. In August, 1988, Hale was hospitalized and was unable to work until October, 1988. Hale then attempted to return to work, but Slade refused to allow him to resume his duties, and terminated his employment on 7 October 1988.

Hale filed a complaint against defendants on 19 April 1989, alleging that he was terminated without just cause; that defendants wrongfully refused to sell Hale's artwork subsequent to his termination, resulting in lost profits to Hale; and that defendants refused to redeem Hale's stock in Afro-American despite a clause in the corporation's shareholder agreement requiring that the stock be redeemed upon Hale's leaving the company.

Defendants answered, denying Hale's allegations and counterclaiming that Hale had used Afro-American funds for personal gain and failed to reimburse Afro-American.

Hale served interrogatories on defendants, which were answered. Hale served a second set of interrogatories on defendants on 16 February 1990, and defendants partially answered on 21 March 1990. Because of defendants' failure to fully answer the second set of interrogatories, Hale filed a motion to compel. A hearing on the motion was held 23 May 1990, at which time the trial court ordered defendants to fully answer the interrogatories and to produce all documents requested by Hale. Defendants did not comply with this order. A second hearing was held on the matter on 6 August 1990, at which time the trial court again ordered defendants to provide documents and answer interrogatories. Again defendants did not comply. Due to defendants' willful failure to comply with the trial court's orders, the trial court filed an order that defendants' answer be stricken and a default entered on 1 February 1991. The trial court conducted a hearing to determine the amount of damages due Hale, at which time the trial court made findings of fact and conclusions of law. The trial court found as a fact that the stock which defendants should have redeemed was worthless, that Hale had incurred no lost profits, that Hale had a two-year term of employment with Afro-American, and that Hale had been wrongfully terminated. Based on the foregoing findings of fact, the trial court awarded Hale $26,672.00 for wrongful discharge. Defendants made a motion to amend findings of fact and a motion for a new trial, both of which were denied in an order signed 24 February 1992. Defendants filed notice of appeal 9 March 1992.

The dispositive issue is whether this court has jurisdiction to entertain this appeal absent proof of service of defendants' notice of appeal on plaintiff.

Our Rules of Appellate Procedure require that notice of appeal must, "at or before the time of filing, be served on all other parties to the appeal." N.C. R. App. P. 26(b) (1993); *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979), *disc. rev. denied*, 299 N.C. 122, 262 S.E.2d 6 (1980). Rule 26(d) further requires that

> [p]apers presented for filing [in this Court] shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

N.C. R. App. P. 26(d) (1993). Without proper service of notice of appeal on the other party as required by Rule 26(b), and proof pursuant to Rule 26(d) in the record before this Court that such notice was given, this Court obtains no jurisdiction over the appeal. *See Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 628, 51 S.E.2d 6, 7 (1948). This Court is bound by the record on appeal, and "[i]f [the record] fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal." *Id.* at 629, 51 S.E.2d at 8 (citation omitted); *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 670, 228 S.E.2d 46, 48 (1976) ("timely filing and service of notice of appeal are jurisdictional matters requiring dismissal for noncompliance"); *Smith*, 43 N.C. App. at 339, 258 S.E.2d at 835 ("timely filing and service of notice of appeal is jurisdictional, and unless the requirements of . . . Rules of Appellate Procedure are met, the appeal must be dismissed"); *Shaw v. Hudson*, 49 N.C. App. 457, 459, 271 S.E.2d 560, 561 (1980).

The record on appeal contains a notice of appeal, which was filed 9 March 1992. Nothing in the notice, however, shows that plaintiff was given notice of the appeal through service as required by Rule 26(b). The notice of appeal contains no acknowledgement of service from Hale, nor is there affixed to the notice of appeal any proof of service in the form of a statement of the date and manner of service and of the names of the persons served as required by Rule 26(d).

Accordingly, because proof of service which would vest this Court with jurisdiction does not appear in the record, the appeal is

Dismissed.

Judge WELLS concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

The life of this appeal began with a Notice of Appeal from the judgment below. In apt time, the appellant served the Record on Appeal on the appellee, who made no objection thereto, and the Record was accordingly filed in this Court on 14 May 1992. Thereafter, the attorneys for each party undertook the necessary research and analysis to address the issues on appeal and, again in apt time, filed the completed briefs for the appellant and the appellee on 26 June 1992 and 15 July 1992, respectively.

Following a hearing of this appeal without argument in this Court on 15 April 1993, the majority now snuffs out the life of this appeal based on the failure of the appellant to include in the Record proof that the Notice of Appeal was served on the appellee. This they do even though the appellee neither contends that the Notice was not served on him nor makes an issue of the fact that the proof of service certificate is not in the Record on Appeal.

In *Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 51 S.E.2d 6 (1948), the appellants failed to include the Notice of Appeal in the Record. The Supreme Court stated, "[t]he record filed in this Court must show *at least* that an appeal was taken from the judgment. Otherwise this Court acquires no jurisdiction of the action." *Id.* at 628, 51 S.E.2d at 7 (citations omitted) (emphasis added). Thus, the Court did not address the issue of whether jurisdiction is acquired where the Record contains a Notice of Appeal but fails to also contain a certificate of service and moreover, the appellee has not raised an issue regarding the missing certificate. As such, contrary to the majority, it is my opinion that *Mason* does not hold that without proof of service of the Notice of Appeal in the Record on Appeal, this Court obtains no jurisdiction.

The majority cites three cases from this Court in support of their holding. However, none of those cases address facts similar

to the case at hand. In *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 669, 228 S.E.2d 46, 48 (1976), *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979), and *Shaw v. Hudson*, 49 N.C. App. 457, 459, 271 S.E.2d 560, 561 (1980), this Court reviewed the dismissal of an appeal by the trial court where the appellant failed to timely serve the Notice of Appeal on the appellee. These cases appear to indicate that the proper course of action to contest lack of service is for the appellee to raise the issue of lack of service at the *trial court level.* This factor significantly distinguishes those cases from the present appeal, where no such issue was raised by motion of the appellee in the trial court (nor in this Court).

It is clear that the failure to include the Notice of Appeal in the Record renders this Court jurisdictionally infirm. *Mason*, 229 N.C. at 628, 51 S.E.2d at 7. The cases cited by the majority clearly state that both the requirement of timely filing the Notice of Appeal and that of serving the Notice are jurisdictional. *Giannitrapani*, 30 N.C. App. at 670, 228 S.E.2d at 48; *Smith*, 43 N.C. App. at 339, 258 S.E.2d at 835. However, in my opinion, the service of the Notice of Appeal is a matter that may be waived by the conduct of the parties. As such, I quarrel only with the majority's apparent presumption that the jurisdiction indicated is subject matter jurisdiction, which cannot be waived. Instead, I find the filing and service of the Notice of Appeal to be analogous to the Complaint and service thereof. The Complaint itself indicates whether the trial court has jurisdiction of the subject matter contained therein, and proper service on the defendant confers personal jurisdiction. The service of the Complaint, however, can be waived by the defendant by his voluntary appearance before the trial court. Likewise, it appears to me that, while the timely filing of the Notice is necessary to grant this Court subject matter jurisdiction over the appeal, the service of the Notice may be waived by the appellee without depriving this Court of subject matter jurisdiction. In examining the service of a Complaint on the opposing party, the Supreme Court has determined that

> "[d]ue process of law" requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard. "When the defendant has been duly served with summons personally within the State, or has accepted service *or has voluntarily appeared in court*, jurisdiction over the person exists and the court may proceed to render a personal judgment against the defend-

ant. If there has been no service of summons *and no waiver by appearance*, the court has no jurisdiction and any judgment rendered would be void."

B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 10, 149 S.E.2d 570, 577 (1966) (quoting 1 McIntosh, N.C. Civil Practice and Procedure, 2d Ed., § 933(1)). Therefore, by analogy in the case at hand, where the appellee failed, by motion or otherwise, to raise the issue as to service of notice in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case, I vote to hold that he has waived service of notice and, thus, the failure to include the proof of service in the Record is inconsequential. Having so concluded, I find that this Court should consider the merits of this case as argued by the parties.

STATE OF NORTH CAROLINA v. STEVEN RAY WILLIAMSON

No. 923SC275

(Filed 15 June 1993)

1. Narcotics, Controlled Substances, and Paraphernalia § 105 (NCI4th)— conspiracy to sell certain quantity of marijuana— sufficiency of evidence

Evidence was sufficient to prove the existence of one master agreement to deal in more than 100 but less than 2,000 pounds of marijuana where the evidence tended to show that, even though other people were sometimes involved in this particular conspiracy, the two main participants, defendant and Dixon, were consistent throughout; despite the fact that the course of dealing between Dixon and defendant extended over a three and a half year period, the time intervals between transactions were short and fairly consistent in that Dixon made purchases from defendant as often as three times per week; the primary objective of the relationship between defendant and Dixon, to sell as much marijuana as they could, never changed; and there was only one meeting at which the scheme itself was discussed, while all other meetings were in furtherance of the scheme Dixon and defendant adopted at the first meeting.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47; Evidence §§ 1124 et seq.

2. Narcotics, Controlled Substances, and Paraphernalia § 105 (NCI4th)— conspiracy to sell quantity of marijuana—open-ended agreement to sell—sufficiency of evidence

Evidence of the cumulative quantity of controlled substance that a defendant sells in the course of a single open-ended conspiracy is sufficient to support his conviction for conspiracy to sell that quantity even though the agreement of the conspirators is silent as to exact quantity.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47; Evidence §§ 1124 et seq.

3. Criminal Law § 360 (NCI4th)— violation of sequestration order—testimony excluded—no error

The trial court did not abuse its discretion by limiting the testimony of a defense witness who had violated a sequestration order, since there was a distinct possibility of collusive testimony, and, in light of consistent testimony from the State's witnesses, it is unlikely that the witness's testimony would have effectively controverted any of the State's case.

Am Jur 2d, Trial § 339.

Appeal by defendant from judgment entered 24 July 1991, in Pitt County Superior Court by Judge Cy A. Grant. Heard in the Court of Appeals 29 March 1993.

Defendant was indicted and tried for multiple violations of the Controlled Substances Act (N.C. Gen. Stat. §§ 90-86 to -113.8 (1990)), including conspiracy to sell or deliver at least 100, but less than 2000, pounds of marijuana. The jury returned verdicts of guilty on five charges, and the court, after arresting judgment on one count, sentenced defendant to 29 years imprisonment. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley, for defendant.

McCRODDEN, Judge.

Defendant presents two questions, the first of which is whether there was sufficient evidence to prove a conspiracy to sell more than 100, but less than 2000, pounds of marijuana. The first of his two contentions on this question is that there was insufficient evidence to prove the existence of one master agreement to deal in that amount of marijuana.

At trial, the State's evidence tended to show that, while he was the assistant director of the Greene County Parks and Recreation Department in 1982, defendant became acquainted with Elmer Lee Dixon, Jr., a part-time worker at the Department from 1982 through the summer of 1986. In December 1986, while Dixon was at defendant's house, defendant asked Dixon if he would sell marijuana to make money. When Dixon responded affirmatively, defendant showed him some marijuana in a clear plastic bag. Dixon could tell from smelling it and looking at it that it was good marijuana, and he indicated to defendant that he could sell it without problem. Defendant told Dixon that he wanted him to set up deals, by which he meant that he wanted Dixon to find people who would buy the marijuana. Over the course of the period from December 1986, until approximately May 1989, Dixon arranged deals for defendant. When he first started selling marijuana for defendant, Dixon sold amounts of two to three pounds, and occasionally up to five pounds, three times per week. On several occasions, Dixon also sold amounts of eight pounds to buyers in Wilson. There were four times when Dixon sold as much as twenty-five pounds of marijuana obtained from defendant. From the time he began selling marijuana for defendant through February 1988, Dixon had obtained at least 150 pounds from defendant. From February 1988, through the summer of 1988, Dixon obtained marijuana from defendant at least three times a week, in amounts of two to five pounds, totalling at least 75 pounds. From the fall of 1988 until the time at which Dixon quit working with defendant in May or June of 1989, Dixon obtained at least 250 pounds of marijuana from defendant.

The manner in which the deals were arranged was consistent throughout the time defendant dealt with Dixon. Dixon would contact the defendant, either at home or at work, and would request a number of pounds. Defendant would then contact his supplier and tell Dixon where he could pick up the marijuana. Sometimes Dixon would meet at defendant's house to pick up the marijuana,

and sometimes defendant would tell Dixon where the marijuana would be hidden. When Dixon met defendant at his house to pick up an order of marijuana, defendant would get the marijuana from a space above the door to his garage.

When he was told to pick up the marijuana from somewhere other than defendant's house, Dixon was able to locate the marijuana easily because it was always wrapped in a trash bag. One pound units of marijuana were in clear plastic freezer storage bags found within a trash bag. Dixon would deliver the marijuana to the buyer, return to defendant with the money, and receive from defendant his share of the proceeds.

The State also presented several other witnesses who had had marijuana dealings with defendant. Each gave testimony that corroborated Dixon's testimony. Each gave a description, consistent with Dixon's testimony, of how the deals were arranged, where the marijuana was found, and how it was packaged.

In his attack on the sufficiency of the evidence to support a conviction for one overarching conspiracy, defendant relies on the case of *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893, *disc. review denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). However, a more instructive and factually analogous case is *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992), which relies heavily on *Rozier*. In *Wilson*, the defendant was convicted on four conspiracy charges that arose out of a series of robberies that occurred during a two week period. One of the admitted participants in the robberies testified that the participants, including the defendant, had planned the course of robberies to get cash. The duration of the conspiracy was to be indefinite. Indeed, the conspirators planned for it to last "to the death." *Wilson*, at 346, 416 S.E.2d at 605. A unanimous panel of this Court stated:

> Because the crime of conspiracy lies in the agreement itself, and not the commission of the substantive crime, a defendant can, under certain fact situations, be convicted of a single conspiracy when there are multiple acts or transactions. To determine whether single or multiple conspiracies are involved, the "essential question is the nature of the agreement or agreements . . . but factors such as time intervals, participants, objectives, and number of meetings all must be considered."

Wilson, at 345, 416 S.E.2d at 605 (quoting *Rozier*) (citations omitted). The Court applied what it called "the *Rozier* factors" to the evidence, found that there was a single conspiracy, and vacated three of the conspiracy convictions.

[1] In this case, defendant asserts that the State failed to show sufficient evidence as to each of the four *Rozier* factors and, therefore, failed to show a master agreement.

It is well settled that the test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence to support a finding of each element of the offense charged and that the offense was committed by the defendant. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). 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 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. Fletcher*, 301 N.C. 709, 712, 272 S.E.2d 859, 860-61 (1981).

In applying a *Rozier* analysis to the evidence in this case, we find ample evidence from which a jury could conclude that there was a single conspiracy between defendant and Dixon. First, even though other people were sometimes involved in this particular conspiracy, the two main participants, defendant and Dixon, were consistent throughout. "The entering and exiting of various participants in an otherwise ongoing plan to commit a particular felonious act does not convert a single conspiracy into several." *Wilson*, at 346, 416 S.E.2d at 605.

Second, despite the fact that the course of dealing between Dixon and defendant extended over a three and a half year period, the time intervals between transactions were short and fairly consistent. Dixon testified that he made purchases from defendant as often as three times per week.

Third, the primary objective of the relationship between defendant and Dixon, to sell as much marijuana as they could, never changed. Finally, as to the number of meetings, there was sufficient evidence supporting the State's contention that there was only one meeting at which the scheme itself was discussed. All the other meetings were in furtherance of the scheme Dixon and defendant adopted at the first meeting. Hence, we find that there

was sufficient evidence to demonstrate the existence of a single agreement to traffic in marijuana.

[2] Defendant's second contention regarding sufficiency of the evidence raises the issue of whether one can be convicted of conspiring to sell or deliver at least 100, but less than 2000, pounds of a controlled substance where the evidence shows an open-ended agreement with no reference to quantity. Defendant argues that the fact that the Controlled Substances Act contains a provision dealing with conspiracies other than trafficking conspiracies, N.C.G.S. § 90-98, combined with the fact that the trafficking conspiracy section, N.C.G.S. § 90-95(i), refers to the substantive trafficking provision, N.C.G.S. § 90-95(h), shows that the trafficking conspiracies section is meant to apply only to conspiracies to deal in specific amounts of drugs. He also cites *Rozier* for the proposition that "it is the amount of contraband agreed upon, not the amount actually delivered, which is determinative in a narcotics conspiracy case." *Rozier*, 69 N.C. App. at 49, 316 S.E.2d at 900.

We believe that defendant's argument based on the statute is fatally flawed. To find that a person who agreed to sell a specific quantity of controlled substance is more culpable than one who agrees to sell an indefinite, and potentially unlimited, amount would be anomalous. Given *Rozier's* proscription of multiple conspiracies based on a series of events, the only reasonable interpretation of the statute is that given to it by the trial court.

Insofar as *Rozier* holds that the amount of contraband referenced in the agreement controls the nature of the offense, that case is distinguishable. The defendant Rozier agreed to the exchange of a specific quantity, one ounce (28.349 grams), of cocaine. *Id.* at 48, 316 S.E.2d at 900. In the present case, the agreement defendant and Dixon entered, to sell as much marijuana as possible, was open-ended. Since the evidence shows that it was possible for them to sell an amount greater than 100, but less than 2000, pounds, it defines the agreement and is sufficient to prove the offense charged. Accordingly, we hold that evidence of the cumulative quantity of controlled substance that a defendant sells in the course of a single open-ended conspiracy is sufficient to support his conviction for conspiracy to sell that quantity even though the agreement of the conspirators is silent as to exact quantity.

[3] Defendant's second question on appeal is whether the trial court abused its discretion by limiting the testimony of a defense

witness who had violated a sequestration order. The record reflects that defendant was not allowed to introduce, through the testimony of one Smith, evidence about the contents of defendant's garage from which Dixon retrieved bags of marijuana.

An order to sequester witnesses is issued in the sound discretion of the trial judge. The purpose of the order is to prevent colluded testimony, and, if the order has been violated, the court may exclude that witness's testimony. *Lee v. Thornton*, 174 N.C. 288, 93 S.E. 788 (1917). In the present case, Smith was present during approximately two hours of defendant's testimony, including an exchange in which defendant averred that drugs had never been in his garage and that Smith used the garage often. Since these were precisely the matters about which Smith was to testify, there was a distinct possibility of collusive testimony. In addition, the State's witnesses, who were sequestered from one another, were consistent in their testimony that defendant kept marijuana above the door in his garage. It is, therefore, unlikely that Smith's testimony would have effectively controverted any of the State's case. We find that the trial court did not abuse its discretion in excluding this testimony of the witness.

We find defendant received a fair trial free of prejudicial error.

No error.

Judges JOHNSON and ORR concur.

GEORGE DOUGLAS ROBINSON AND CATHY P. ROBINSON v. GENERAL MILLS RESTAURANTS, INC., D/B/A RED LOBSTER INNS OF AMERICA v. SALT WATER SEAFOOD, INC. AND OLDE TOWNSITE COMPANY, INC., T/A SALTWATER SEAFOOD AND GEORGE DOUGLAS ROBINSON AND CATHY P. ROBINSON v. GENERAL MILLS RESTAURANTS, INC., D/B/A RED LOBSTER INNS OF AMERICA, OLDE TOWNSITE COMPANY, INC., T/A SALTWATER SEAFOOD, AND SALT WATER SEAFOOD, INC.

No. 9119SC1159

(Filed 15 June 1993)

1. **Rules of Civil Procedure § 41.1 (NCI3d)— voluntary dismissal—filed in correct county—wrong county named in motion—dismissal effective**

A voluntary dismissal is effective if, although filed in the correct county, it recites a different county, since the crucial element in a notice of dismissal is the intention of the party actually to dismiss the case, and the recitation of the county in the caption in this case was mere surplusage.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 35.

2. **Rules of Civil Procedure §§ 41.1, 60.3 (NCI3d)— voluntary dismissal without prejudice—final adjudication—Rule 60 motion for relief—court's determination that it had no authority to grant—misapprehension of law—error**

A voluntary dismissal without prejudice can act as a final adjudication for purposes of relief pursuant to N.C.G.S. § 1A-1, Rule 60(b) once the one-year period for refiling an action has elapsed and the action can no longer be resurrected; therefore, the trial court, in determining that it had no authority to act on plaintiffs' Rule 60 motion, misapprehended the law, and its denial of plaintiffs' motion for relief on that basis was error requiring reversal and remand.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 78, 84.

Appeal by plaintiffs from order entered 30 August 1991, by Judge William H. Freeman in Forsyth County Superior Court and from order entered 21 August 1991, by Judge W. Douglas Albright in Montgomery County Superior Court. Heard in the Court of Appeals 26 February 1993.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner and Steven M. Fisher, for plaintiffs.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., for defendant General Mills Restaurants, Inc.

Bell, Davis & Pitt, P. A., by Richard V. Bennett and Howell A. Burkhalter, for defendants Olde Townsite Company, Inc., Salt Water Seafood, Inc. and Saltwater Seafood.

McCRODDEN, Judge.

This case presents two questions: first, whether a voluntary dismissal is effective if, although filed in the correct county, it recites a different county; and second, when, if ever, a trial court may grant a Rule 60 motion for relief from a voluntary dismissal without prejudice. Because of the intricate nature of the procedural questions involved, we must first give a brief recitation of the procedural history of this case.

On 24 January 1989, plaintiffs filed an action for personal injury and loss of consortium, and on 27 December 1989, they filed a notice of voluntary dismissal without prejudice (the first notice). Both of these documents were filed in Forsyth County Superior Court. The notice of voluntary dismissal correctly recited the Forsyth County docket number and the names of the parties but it misstated the county in which the action pended. Nonetheless, the Forsyth County Clerk of Superior Court accepted and filed the notice of dismissal.

When he received his copy of the notice of dismissal, the attorney for defendant Salt Water notified plaintiffs' counsel of the error. As a result, on 24 January 1990, plaintiffs filed a second, corrected notice of voluntary dismissal (the second notice).

On 8 January 1991, more than one year after the filing of the first notice but within one year of the filing of the second notice, plaintiffs refiled this action in Montgomery County Superior Court. Defendants General Mills and Salt Water filed answers which contained Rule 12(b)(6) motions to dismiss based on plaintiffs' failure to refile the action within one year of filing the first notice of voluntary dismissal, a requirement of N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990).

On 11 July 1991, before defendants' motions could be heard in Montgomery County, plaintiffs filed in Forsyth County a motion for relief from the first notice of dismissal, pursuant to Rule 60. On 2 August 1991, the Forsyth trial court denied the motion and, in its 30 August 1991 written order, stated that "[i]f . . . [it] had the authority to vacate the December 27, 1989 Notice of Voluntary Dismissal, it would, in its discretion grant Plaintiff's Motion for relief from that Notice of Dismissal; however, such authority does not exist." After the 2 August 1991 denial of plaintiffs' motion, the Montgomery County court took judicial notice of the Forsyth County court's decision and concluded that the first notice was valid and that the period of limitation of Rule 41(a) barred plaintiffs' action in Montgomery County. Plaintiffs properly took appeal from both of these decisions.

Plaintiffs' first assertion is that the Montgomery County court erred in concluding that the first notice of dismissal was valid, because the notice, filed in Forsyth County but reciting Richmond County as the county of venue, was fatally defective. Although we reverse and remand based upon the Forsyth County trial court's action, a review of this issue is necessary to show that plaintiffs' Rule 60 motion in Forsyth County was necessary.

[1] To persuade us that the first notice filed without proper notation of venue was defective, plaintiffs cite *Everhart v. Sowers*, 63 N.C. App. 747, 306 S.E.2d 472 (1983), and attempt to analogize the instant case with one dealing with a summons. The analogy does not hold. In *Everhart*, the summons at issue designated Cabarrus County in its caption although the action was actually pending in Davidson County. This Court found the summons fatally defective and incapable of conferring jurisdiction because it failed to notify the party of the proceeding against him and did not, therefore, afford him due process. *Id.* at 750, 306 S.E.2d at 474.

Reflecting this due process requirement, the Rules of Civil Procedure of North Carolina, specifically N.C. Gen. Stat. § 1A-1, Rule 4 (1990), require that a valid summons contain the title of the cause, the name of the court and the county in which the action has been commenced. With regard to the requirements for a notice of voluntary dismissal, however, the rules are silent. Indeed, a party may take a voluntary dismissal by oral declaration in open court. *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d

161, 164 (1980). The crucial element in a notice of dismissal is the intention of the party actually to dismiss the case. *See Thompson v. Newman*, 101 N.C. App. 385, 399 S.E.2d 407 (1991), *vacated in part on other grounds*, 331 N.C. 709, 417 S.E.2d 224 (1992).

In the instant case, there is no question that the plaintiffs actually intended to dismiss their action by filing the first notice. The recitation of the county in the caption was mere surplusage. Since plaintiffs filed the first notice of dismissal in the correct county, we find that that notice was effective to dismiss the plaintiffs' action on 27 December 1989. From this date, plaintiffs had one year within which to refile their action. Since they did not *and since Forsyth County had not granted plaintiffs any relief from the voluntary dismissal*, the trial court's dismissal on the basis of the one-year period was appropriate at the time. Because of our decision on the ruling of the Forsyth County court, however, the Montgomery County court's dismissal of the plaintiffs' action must also be reversed and reconsidered on remand after Forsyth County has reconsidered its denial of plaintiffs' Rule 60 motion, to which we now turn.

[2] Plaintiffs' second argument is that the Forsyth County court erred in finding that it lacked the authority to vacate the first notice of voluntary dismissal. Plaintiffs assert that *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991), is controlling authority in this case. We believe that, although that case is not quite on point, it is instructive.

In *Carter*, the plaintiff had mistakenly taken a Rule 41 voluntary dismissal with prejudice as against one of two defendants. A panel of this Court held that a notice of voluntary dismissal with prejudice was a final judgment and could therefore be subject to a motion for relief from judgment pursuant to Rule 60.

In the instant case, the plaintiffs took a voluntary dismissal *without* prejudice, necessarily raising the question of whether a voluntary dismissal without prejudice is a final adjudication to which a Rule 60(b) motion might be directed. North Carolina's appellate courts have never squarely addressed this issue.

Rule 41(a) provides that an action may be dismissed by the plaintiff without order of the court by filing a notice of dismissal at any time before the plaintiff rests; unless otherwise stated in

the notice, the dismissal is one without prejudice. If plaintiff takes a dismissal in an action timely begun, he may institute a new action based on the same claim within one year of the voluntary dismissal (or longer if the applicable statute of limitations allows). Rule 41(a)(1). The rule does not speak to the question of when a voluntary dismissal becomes a final adjudication except in those instances in which a party takes a second such dismissal. *Id.* In those instances, the second dismissal acts as a final adjudication, a fact that supports our holding that a voluntary dismissal without prejudice can act as a final adjudication under certain circumstances.

During the year following the filing of a voluntary dismissal without prejudice, such dismissal is not a final adjudication of the case. *See Hensley v. Henry*, 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980). We hold, however, that once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of Rule 60(b).

In the case before us, when plaintiffs filed their Rule 60(b) motion, a year had elapsed since the first notice was filed. In addition, the applicable statute of limitations had run. We believe that at that time the voluntary dismissal was a final adjudication for purposes of a Rule 60 motion.

A motion for relief from judgment under Rule 60 is addressed to the sound discretion of the trial court. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). There are several grounds for relief under a Rule 60(b) motion. Indeed, another panel of this Court has labeled Rule 60(b) as "a grand reservoir of equitable power." *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976). In the instant case, although we could speculate on grounds for relief, we cannot determine what the trial judge had in mind when he indicated that he would grant relief if he had the authority to do so.

We do know, however, that in so ruling, he failed to comprehend his authority under the law. Where a trial court, under a misapprehension of the law, has failed to exercise its discretion regarding a discretionary matter, that failure amounts to error which requires reversal and remand. *Lemons v. Old Hickory Council*, 322 N.C. 271, 277, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). In determining that it had no authority to act on plaintiffs' Rule 60 motion, the Forsyth County court

misapprehended the law, and its denial of plaintiffs' motion on that basis was error. Accordingly, we reverse the 30 August 1991, order and remand to Forsyth County Superior Court for proceedings consistent with this opinion. Before further action on its part, the Montgomery County court must await the Forsyth County court's determination of plaintiffs' Rule 60 motion.

Reversed and remanded.

Judges Eagles and Orr concur.

STATE OF NORTH CAROLINA v. WAYNE DEGREE

No. 9227SC22

(Filed 15 June 1993)

1. Criminal Law § 1054 (NCI4th)— delay in sentencing— jurisdiction of trial court to impose sentence at subsequent term

The trial court's failure to continue prayer for judgment from 3 June 1991 until a later specified time did not divest the trial court of jurisdiction to sentence defendant at a later session of court, since a trial court is authorized to continue the case to a subsequent date for sentencing; the continuance may be for a definite or indefinite period of time, but in any event the sentence must be entered within a reasonable time after the conviction or plea of guilty; in this case the record did not reveal any improper purpose for the delay or any prejudice to defendant because of the delay; the delay of sixty days between the guilty plea and sentencing was itself not unreasonable in length; defendant made no request for sentencing and thus gave his tantamount consent to a continuation of the sentencing hearing; and it was immaterial that a trial judge different from the judge who presided over the taking of the guilty plea entered the sentence.

Am Jur 2d, Criminal Law §§ 526, 856.

What constitutes "unreasonable delay" within meaning of Rule 32(a)(1) of Federal Rules of Criminal Procedure, providing that sentence shall be imposed without unreasonable delay. 52 ALR Fed. 477.

When does delay in imposing sentence violate speedy trial provision. 86 ALR4th 340.

Loss of jurisdiction by delay in imposing sentence. 98 ALR3d 605.

2. Criminal Law § 1092 (NCI4th) — finding of aggravating factor — no objection at trial — failure to preserve error for appellate review

In a prosecution of defendant for assault with a deadly weapon inflicting serious injury, defendant did not preserve for appellate review the alleged error by the trial court in finding as a nonstatutory aggravating factor that defendant intended to kill when he assaulted the victims.

Am Jur 2d, Appeal and Error §§ 553 et seq.

Appeal by defendant from judgment entered 16 July 1991 in Cleveland County Superior Court by Judge Loto Greenlee Caviness. Heard in the Court of Appeals 26 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for the State.

Brenda S. McLain for defendant-appellant.

GREENE, Judge.

Defendant Wayne Degree appeals from sentence entered after his pleas of guilty to two counts of assault with a deadly weapon inflicting serious injury pursuant to N.C.G.S. § 14-32(b).

The evidence shows that defendant, armed with a shotgun, went to the house where his mother-in-law and his estranged wife were staying. When defendant's wife looked out the glass door in the kitchen of the house, defendant shot her in the face. Defendant then broke the glass and entered the house. Defendant's mother-in-law, who had been standing in the kitchen, attempted to flee down the hall. Defendant shot her in the back. Both women were seriously injured. Defendant entered pleas of guilty to assaulting both women with a deadly weapon inflicting serious injury on 23 May 1991, and Judge John Mull Gardner conducted a sentencing hearing, during which he heard testimony from defendant. Judge Gardner then stated, "I'm going to consider one other potential mitigating factor overnight, and I'll sentence him tomorrow morn-

ing. I'll continue prayer for judgment until tomorrow morning [24 May 1991] at nine-thirty a.m." On 24 May 1991, prayer for judgment was continued until 31 May 1991. On 31 May 1991, prayer for judgment was continued until 3 June 1991. The clerk's minutes reveal that no action was taken on the case on 3 June 1991.

At some point the failure to act on the case was discovered, and defendant's sentencing hearing was rescheduled for 16 July 1991. On that date, Judge Loto Greenlee Caviness heard evidence from defendant and from the victims of the assaults, and found factors in aggravation and mitigation. Included among these was the nonstatutory aggravating factor that defendant had intended to kill when he shot the victims. Judge Caviness found that the factors in mitigation were outweighed by the factors in aggravation, and sentenced defendant to the maximum term of ten years in prison on each count, with the second sentence suspended and defendant placed on supervised probation for five years.

The issues are whether (I) the trial court's failure to continue prayer for judgment from 3 June 1991 until a later time divested the trial court of jurisdiction to sentence defendant at a later session of court; and, if not, (II) defendant has preserved for appellate review the alleged error by the trial court in finding as a nonstatutory aggravating factor that defendant intended to kill when he assaulted the victims.

I

[1] Defendant first argues that because he was not sentenced on 3 June 1991, the date set by the court, the court was without jurisdiction to enter sentence on 16 July 1991. We disagree.

The sentence of a criminal defendant "does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had." *State v. Graham*, 225 N.C. 217, 219, 34 S.E.2d 146, 147 (1945); *see also Miller v. Aderhold*, 288 U.S. 206, 211, 77 L. Ed. 702, 705-06 (1933) ("where verdict has been duly returned, the jurisdiction of the trial court . . . is not exhausted until sentence is pronounced, either at the same or succeeding term"). A trial court is authorized to continue the case to a subsequent date for sentencing. *Graham*, 225 N.C. at 219, 34 S.E.2d at 147; *Miller*, 288 U.S. at 211, 77 L. Ed. at 705-06. This continuance is frequently referred to as a "prayer for judgment continued."

A continuance of this type vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated. This procedure of delaying the imposition of judgment in criminal cases is recognized by our legislature, *see* N.C.G.S. § 15A-1334(a) (1988) (allowing "continuance of the sentencing hearing"); N.C.G.S. § 15A-1416(b)(1) (1988) (allowing state to move for imposition of sentence when prayer for judgment has been continued), and is an exception to the general rule that the court's jurisdiction expires with the expiration of the session of court in which the matter is adjudicated. *See State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). The continuance may be for a definite or indefinite period of time, but in any event the sentence must be entered "within a reasonable time" after the conviction or plea of guilty. 21 Am. Jur. 2d *Criminal Law* § 526, at 870 (1981) (unreasonable delay can deprive trial court of jurisdiction). If not so entered, the trial court loses jurisdiction. *Id.* Thus, although pursuant to N.C.G.S. § 15A-1416(b)(1), the State may "[a]t any time after verdict" move for the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted, the State's failure to do so within a reasonable time divests the trial court of jurisdiction to grant the motion. Deciding whether sentence has been entered within a "reasonable time" requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay. 21 Am. Jur. 2d *Criminal Law* § 561, at 924 (1981).

In this case, defendant pled guilty on 23 May 1991, prayer for judgment was continued for a definite period of time until 3 June 1991, and sentence was imposed by another judge on 16 July 1991. The record does not reveal any improper purpose for the delay in sentencing, and there is no evidence that defendant suffered any actual prejudice because his sentence was entered on 16 July 1991 rather than 3 June 1991. The delay of some sixty days between the plea of guilty and the imposition of sentence was itself not unreasonable in length. Furthermore, defendant at no time prior to 16 July 1991 asked that judgment be pronounced, *State v. Everitt*, 164 N.C. 399, 403, 79 S.E. 274, 276 (1913) (defendant, as well as the State, could have requested that the trial court pronounce judgment at any time), and defendant's failure to make such a request on 3 June 1991 is tantamount to his consent to

a continuation of the sentencing hearing beyond that date. *See Miller*, 288 U.S. at 210, 77 L. Ed. at 705 (defendant cannot complain of delay in sentencing if he made no request for entry of judgment); *see also Whedbee v. Powell*, 41 N.C. App. 250, 254, 254 S.E.2d 645, 648 (1979) (where defendant moved for continuance of sentencing hearing he could not complain that judgment was entered at later session of court); *see generally* W.A. Harrington, Annotation, *Loss of Jurisdiction By Delay In Imposing Sentence*, 98 A.L.R. 3d 605 (1980). Therefore, the sixty-day delay in sentencing defendant was not unreasonable, and did not divest the trial court of jurisdiction to sentence defendant.

Finally, it is not material that a trial judge different from the judge who presided over the taking of the guilty plea entered the sentence. *State v. Sauls*, 291 N.C. 253, 264, 230 S.E.2d 390, 396 (1976).

Accordingly, the trial court did not err in sentencing defendant on 16 July 1991.

II

[2] Defendant next argues that the trial court improperly found as a nonstatutory aggravating factor that defendant had the intent to kill when he assaulted the victims.

Defendant did not object to the finding of the nonstatutory aggravating factor at trial. It is the general rule that failure to object to an alleged error in the trial court waives the consideration of such error on appeal. N.C. R. App. P. 10(b)(1) (1993). When a defendant has failed to object to an alleged error, but contends that an exception "by rule or law was deemed preserved or taken without" an objection at trial, *id.*, it is the defendant's burden to establish his right to appellate review "by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error." *State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 705 (1986). Defendant may carry this burden by "alert[ing] the appellate court that no action was taken by counsel at trial and then establish[ing] his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court." *Id.* at 447-48, 340 S.E.2d at 705 (citation omitted). If defendant fails to comply with these requirements, his right to appellate review is waived. *Id.* at 448, 340 S.E.2d at 705.

Defendant failed to object at the sentencing hearing to the trial court's consideration of the nonstatutory aggravating factor. Defendant has failed to give this Court notice of his failure to object at trial, and has also failed to establish that any rule or law would preserve his assignment of error without an objection at trial. He does not argue that the trial court's consideration of the aggravating factor constituted plain error. His right to appellate review on this issue is, therefore, waived.

Accordingly, the sentencing order is

Affirmed.

Chief Judge ARNOLD and Judge McCRODDEN concur.

STATE OF NORTH CAROLINA v. GORDON McRAE

No. 9220SC697

(Filed 15 June 1993)

1. **Narcotics, Controlled Substances, and Paraphernalia § 124 (NCI4th) — carrying drugs from house to car — leaving premises by car — substantial movement — sufficiency of evidence of trafficking by transporting**

Where defendant removed drugs from a dwelling house and carried them to a car by which he left the premises, such movement was "substantial" and sufficient to sustain the charge of trafficking by transporting in violation of N.C.G.S. § 90-95(h)(3).

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

2. **Narcotics, Controlled Substances, and Paraphernalia § 34 (NCI4th) — trafficking by transporting and possession of same cocaine — two offenses**

A defendant can be convicted of and sentenced for trafficking by transporting and by possession as two separate crimes when the same cocaine is involved in both offenses.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27.13 et seq.

3. Narcotics, Controlled Substances, and Paraphernalia § 193 (NCI4th)— trafficking in cocaine by possession charged—insufficiency of evidence of lesser offense of felonious possession

Where the evidence tended to show that defendant purchased cocaine from a supplier with an undercover agent's money and then gave the cocaine to the agent, and defendant was charged with trafficking in cocaine by possession, the trial court did not err in refusing to submit to the jury the lesser-included offense of felonious possession since the evidence was insufficient to support it.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27.13 et seq.

Appeal by defendant from judgment entered 21 February 1992 in Moore County Superior Court by Judge William Z. Wood, Jr. Heard in the Court of Appeals 25 May 1993.

On 15 April 1991, defendant was indicted by a grand jury for one count of trafficking by sale or delivery of cocaine, one count of trafficking by transporting cocaine, one count of trafficking by possession of cocaine, one count of possession with intent to sell or deliver cocaine, and one count of sale or delivery of cocaine. The State's evidence at trial tended to establish the following facts and circumstances:

On 18 October 1990, State Bureau of Investigations (SBI) Agent Mark Francisco came to Moore County in an undercover capacity and was introduced to the defendant, Gordon McRae. Agent Francisco told the defendant he wanted to buy two ounces of cocaine for $2900.00. The defendant stated that he did not have any cocaine but knew where he could get some. The defendant and Agent Francisco then drove to the home of Larry Williams in Hoke County. Defendant took the agent's money into the dwelling and returned with the cocaine. The defendant then asked the agent for an extra $100.00 for his trouble and effort in obtaining the cocaine.

The defendant and Agent Francisco left Mr. Williams' residence to return to Moore County. The defendant, while still in Hoke County, then attempted to give the cocaine to Agent Francisco, but the agent asked the defendant to "[h]old onto the cocaine until we get back." Once they were in Moore County, Agent Francisco asked the defendant for the cocaine.

Another SBI agent, Randy Johnson, testified for the State. Agent Johnson indicated that on 24 October 1990, he met with the defendant in Moore County and told him he wanted to buy two ounces of cocaine for $2600.00. The defendant explained that he did not have any cocaine with him but that the agent could go with him to get some.

The two men drove to an apartment complex in Moore County. The defendant took the agent's money, went into a dwelling and returned to tell Agent Johnson that there would be a delay. Meanwhile, Agent Johnson observed a red pick-up truck leave the complex and return approximately 15 minutes later. The defendant then came back to the car with the cocaine and gave it to Agent Johnson.

At trial, the defendant was found guilty of all five counts. Defendant was sentenced to seven years imprisonment for his conviction on trafficking by sale or delivery of more than 28 grams of cocaine. Defendant's other two trafficking convictions were consolidated and defendant was sentenced to seven years for both offenses to run consecutively to the seven-year sentence on his first conviction. Defendant also received a three-year sentence for the last two convictions, to run at the expiration of the other two sentences. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends the trial court improperly denied defendant's motion to dismiss the charge of trafficking in cocaine by transporting. Specifically, defendant contends that on 18 October 1990, he immediately delivered the cocaine to the undercover officer when he returned from Mr. Williams' house, and from that point on, he was simply holding the cocaine under Agent Francisco's direction. We disagree.

We note initially that when reviewing the sufficiency of the State's evidence to overcome a motion to dismiss, the evidence must be viewed and considered in a light most favorable to the State. If there is substantial evidence that the crime charged was

committed and the defendant was the perpetrator, a motion to dismiss must be denied. *State v. Riddle*, 300 N.C. 744, 268 S.E.2d 80 (1980).

N.C. Gen. Stat. § 90-95(h)(3) provides in pertinent part that "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine.' " In *State v. Greenidge*, 102 N.C. App. 447, 402 S.E.2d 639 (1991), the Court stated that although the word "transport" has not been defined in the North Carolina Controlled Substances Act, G.S. § 90-86 *et seq.*, our courts have previously defined it as "any real carrying about or movement from one place to another." *Id.* (*quoting Cunard Steamship Company v. Mellon*, 262 U.S. 100, 43 S.Ct. 504, 67 L.Ed.2d 894 (1922)).

Our courts have determined that even a very slight movement may be "real" or "substantial" enough to constitute "transportation" depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved. *See Greenidge, supra.* For instance, in *State v. Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990), our Court concluded that the defendant was guilty of trafficking by transporting cocaine when he removed drugs from a dwelling, placed them in his truck parked in the driveway, and backed a minimal distance down his driveway. In *State v. Greenidge*, we determined that the simple act of tossing the drugs from a dwelling to a point outside the curtilage was "real" or "substantial" movement so as to constitute "transportation." *See Greenidge, supra.*

Here, defendant removed the drugs from a dwelling house and carried them to a car by which he left the premises. In keeping with prior case law, we find such movement to be "substantial" and sufficient to sustain the charge of trafficking by transporting in violation of G.S. § 90-95(h)(3).

[2] Defendant next contends that he cannot be convicted of both trafficking in cocaine by transporting and trafficking in cocaine by possessing because the two convictions involve one incident with the same cocaine and would subject him to double jeopardy. We disagree.

The North Carolina Supreme Court, in *State v. Steward*, 330 N.C. 607, 411 S.E.2d 376 (1992), squarely addressed this issue and determined that a defendant could be convicted of and sentenced for trafficking by transporting and possession as two separate crimes when the same cocaine was involved in both offenses. This assignment of error is therefore overruled.

[3] By his third assignment of error, defendant contends that the trial court erred in not submitting to the jury, in addition to the trafficking in cocaine by possessing charge, the lesser charge of felonious possession of cocaine. In his testimony about the events of 18 October 1990, the defendant stated that before he delivered the cocaine from the supplier to the undercover agent, he stopped in the bathroom and took a tiny amount of cocaine for himself. For the court to submit the charge of felonious possession of cocaine under G.S. § 90-95(d), there must be evidence that the defendant possessed more than one gram of cocaine. *See State v. Hyatt*, 98 N.C. App. 214, 390 S.E.2d 355 (1990). The evidence at trial tends to establish that defendant took less than a gram of cocaine for himself. The trial court may not submit the charge of felonious possession because the evidence was insufficient to support it. *See State v. Agubata*, 94 N.C. App. 710, 381 S.E.2d 191 (1989). When all the evidence tends to show that the accused committed the crime charged and there is no evidence of guilt of a lesser-included offense, a court is correct in refusing to charge on the lesser-included offense. *State v. Summitt*, 301 N.C. 591, 273 S.E.2d 425, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed.2d 349 (1981). We therefore overrule this assignment of error.

By his fourth assignment of error, defendant asserts that the trial court erred in refusing to dismiss the charges of trafficking by sale on 18 October 1990, and sale and possession with intent to sell and deliver on 24 October 1990 because the evidence was insufficient to support these charges. We find defendant's arguments unpersuasive. After reviewing the record and applying the *Riddle* standard as previously set forth, we are of the opinion that there was sufficient evidence of every essential element of the offenses charged. We find the denial of defendant's motion to dismiss to be proper.

By his final assignment of error, defendant claims that the trial court erred in refusing to dismiss the charge of trafficking. Defendant, however, presents no argument in support of this con-

tention, and therefore, this assignment of error is deemed abandoned. N.C.R. App. P. 28(a).

For the reasons set forth herein, we find the defendant received a fair trial free from prejudicial error.

No error.

Judges COZORT and JOHN concur.

EDITH B. RAGAN AND CALVIN P. RAGAN, PLAINTIFFS v. JAMES T. HILL, ADMINISTRATOR OF THE ESTATE OF JERRY WAYNE THOMAS AND JOHN K. WILLIFORD, DEFENDANTS

No. 9214SC161

(Filed 15 June 1993)

1. **Appeal and Error § 476 (NCI4th)— denial of summary judgment motion—no review on appeal from trial on the merits**

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Am Jur 2d, Appeal and Error §§ 793 et seq.

2. **Limitations, Repose, and Laches § 69 (NCI4th)— claim against decedent's estate—timeliness of claim—award for amount in excess of insurance carried by decedent barred**

Plaintiff's claim against defendant administrator, whose son's negligence caused the automobile accident in which plaintiff was severely injured, was barred as a matter of law by N.C.G.S. § 28A-19-3(b) except to the extent that the son was insured, since plaintiff did not file the claim within six months; furthermore, the court on appeal vacates that part of the judgment awarded to plaintiff which is greater than $25,000, the amount of liability insurance which decedent himself carried.

Am Jur 2d, Executors and Administrators §§ 633 et seq.

Appeal by defendant from judgment entered 13 September 1991 in Durham County Superior Court by Judge J. Milton Read, Jr. Heard in the Court of Appeals 13 January 1993.

On 23 March 1986, Edith B. Ragan was riding in an automobile owned by Ms. Mae White Womble. Ms. Ragan sustained serious permanent injuries when a vehicle driven by Jerry Wayne Thomas veered into the path of the Womble vehicle, causing a head on collision. Mr. Thomas died as a result of injuries suffered in the accident. It is undisputed that Mr. Thomas was negligent in the operation of his automobile and that his negligence resulted in serious personal injury to Ms. Ragan and a loss of consortium to Mr. Ragan. The collision also involved Dr. John K. Williford, as his vehicle collided into the rear of Ms. Ragan's vehicle. Although Dr. Williford was a defendant in this case at trial, the jury found no negligence on his part and he is not a party to this appeal.

On 8 July 1988, Mr. and Ms. Ragan filed their complaint. Integon Insurance Company, Mr. Thomas' liability carrier, elected not to file an answer on his behalf and admitted liability to the extent of its $25,000.00 policy limit. Nationwide Mutual Insurance Company, the underinsured carrier for the Womble vehicle (the vehicle Ms. Ragan was riding), filed an answer on behalf of Mr. Thomas. North Carolina Farm Bureau Insurance Company (NCFB), the underinsured carrier on an automobile owned by the Mr. and Mrs. Ragan, also filed an answer on behalf of defendant Hill.

Prior to trial, defendants Hill and NCFB filed motions for summary judgment, and Judge Donald W. Stephens denied defendants' summary judgment motions. The case came on for trial before Judge J. Milton Read, Jr. Defendant Hill moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. Judge Read denied both of defendant Hill's directed verdict motions. On 13 September 1991, the jury returned a verdict in favor of Ms. Ragan in the amount of $325,000.00 for her personal injuries and in favor of Mr. Ragan in the amount of $10,000.00 for loss of consortium. Defendant Hill then filed a motion for judgment notwithstanding the verdict, and Judge Read denied that motion and entered judgment on the jury's verdict. Defendants Hill and NCFB filed a timely notice of appeal.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., John R. Kincaid, and Robert E. Levin, for plaintiff-appellees.

Lee A. Patterson, II and Sanford W. Thompson, IV for defendant-appellants.

ARNOLD, Chief Judge.

In total, defendants raise three issues upon appeal. They are:

> (1) Did the trial court err in denying defendants' motions for summary judgment?
>
> (2) Did the trial court err in denying defendant Hill's motions for directed verdict and judgment notwithstanding the verdict?
>
> (3) Did the trial court err in entering judgment in an amount greater than $25,000.00, the amount of the deceased's liability insurance?

We will address each of these issues in order.

I. SUMMARY JUDGMENT

[1] First defendants assign error to the trial court's denial of his motion for summary judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985).

II. DIRECTED VERDICT and JNOV

[2] Next, defendants contend that it was error for the trial court to deny Defendant Hill's motions for directed verdict and JNOV, because N.C. Gen. Stat. § 28A-19-3(b) bars plaintiff's claim as a matter of law.

At the time this cause of action arose, G.S. § 28A-19-3(b) read, in pertinent part, as follows:

> (b) All claims against a decedent's estate which arise at or after the death of the decedent . . . founded on . . . tort . . . are forever barred against the estate . . . unless presented to the personal representative or collector as follows:
>
> * * * *
>
> (2) . . . within six months after the date on which the claim arises.
>
> * * * *

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent . . .

* * * *

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim . . . .

In *Brace v. Strother*, 90 N.C. App. 357, 368 S.E.2d 447, *rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), this Court considered the application of N.C. Gen. Stat. § 29-19-3 in a case similar to the case at bar. In *Brace*, plaintiff was a passenger in an automobile that was owned and operated by defendants' son. An accident occurred which killed defendants' son instantly and severely injured plaintiff. At the time of the accident, defendants' son had an automobile liability policy with $25,000 of coverage. Plaintiff carried underinsured motorist coverage of $100,000. More than six months, but less than two years, after the accident, plaintiff filed suit, alleging that defendants' son's negligence proximately caused plaintiff's injuries. The trial court granted partial summary judgment for the defendant and the plaintiff appealed.

Upon appeal, the *Brace* court held that N.C. Gen. Stat. § 28A-19-3 applied and held that the six month statute of limitations applied on plaintiff's cause of action. The Court went on to hold that, while G.S. § 28A-19-3 provided an exception to the six month statute of limitations on claims for which a decedent was insured, plaintiff could make no recovery under plaintiff's underinsured motorist policy because plaintiff had no claim against the decedent in any amount over that amount for which the decedent himself was insured.

Finding that the case at bar is not distinguishable from *Brace*, we reverse the trial court's denial of defendant's motion for a directed verdict.

III. JUDGMENT GREATER THAN $25,000.00

Following *Brace*, we must vacate that part of the judgment awarded to plaintiff which is greater than $25,000.00, the amount of liability insurance which the decedent himself carried. This case is remanded for entry of an appropriate judgment consistent with this opinion.

The trial court's judgment is

Reversed and remanded.

Judges COZORT and LEWIS concur.

SOUTHEASTERN HOSPITAL SUPPLY CORPORATION, PLAINTIFF/APPELLANT v. CLIFTON & SINGER, PARTNERSHIP, AND BENJAMIN CLIFTON, JR., DEFENDANT/APPELLEE

No. 9212SC258

(Filed 15 June 1993)

Limitations, Repose, and Laches § 26 (NCI4th)— attorney malpractice—accrual of cause of action—last act giving rise to cause of action—termination of attorney-client relationship

The trial court improperly dismissed a malpractice action against a law firm under N.C.G.S. § 1A-1, Rule 12(b)(6) based upon the three-year statute of limitations of N.C.G.S. § 1-15(c) where defendant represented plaintiff in a lawsuit against plaintiff, defendant failed to produce documents as ordered, plaintiff's answer was stricken and a default judgment entered against it, a verdict on damages was returned against plaintiff, and plaintiff brought this action alleging that defendant's negligent representation continued through 9 March 1988, the date defendant ceased its representation of plaintiff. Taking plaintiff's allegations as true, defendant's last wrongful act may have occurred as late as 9 March 1988; therefore, this action may not have accrued until that time and, having commenced on 25 February 1991, might not be barred by the three-year statute of limitations.

Am Jur 2d, Attorneys at Law §§ 219-221.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 12 December 1991 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 26 February 1993.

Plaintiff filed a complaint alleging legal negligence, and defendants moved to dismiss plaintiff's complaint for failure to state a claim. *See* N.C.R. Civ. P. 12(b)(6). The trial court granted defend-

ants' motion and dismissed plaintiff's action. From this order plaintiff appeals.

Senter, Hockman & Koenig, P.A., by William L. Senter, for plaintiff appellant.

Bailey & Dixon, by Gary S. Parsons and Renee C. Riggsbee, for defendant appellees.

ARNOLD, Chief Judge.

The test on a Rule 12(b)(6) motion is whether the complaint is legally sufficient. *Tennessee v. Environmental Management Comm'n*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). In ruling upon such motion, the trial court must view the allegations of the complaint as admitted and on that basis must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Id.*

Plaintiff Southeastern alleged the following in its complaint: Benjamin Clifton, Jr., a partner in the law firm Clifton and Singer, represented Southeastern in an action brought against it by Roane-Barker, Inc. During discovery, Roane-Barker requested production of certain documents. Clifton signed a consent order agreeing to produce the documents. However, Clifton did not produce the documents and ultimately Roane-Barker moved the trial court to compel discovery and for sanctions. On 21 August 1987, the trial court entered an order striking Southeastern's answer for failure to appropriately respond to discovery. Clifton filed notice of appeal from the order but he did not perfect the appeal.

Southeastern further alleged that, on 1 March 1988, Roane-Barker obtained an entry of default. The case was tried on the issue of damages and a verdict was returned for Roane-Barker. Clifton and the law firm of Clifton and Singer negligently represented Southeastern through 9 March 1988, the date Clifton ceased his representation of Southeastern. As a result of this negligence, Southeastern was precluded from presenting its meritorious defense to Roane-Barker's claim, and therefore, Southeastern did not prevail in the action and was required to pay damages.

The issue here is whether plaintiff's action for legal negligence is barred under N.C. Gen. Stat. § 1-15(c) (1983). A cause of action for legal malpractice accrues at the time of the occurrence of the last wrongful act of the defendant and an action must be com-

menced within three years of that accrual. *Nationwide Mut. Ins. Co. v. Winslow*, 95 N.C. App. 413, 415, 382 S.E.2d 872, 873 (1989); *see* N.C. Gen. Stat. § 1-15(c) (1983). Plaintiff alleged that defendants' negligent representation continued through 9 March 1988. Taking plaintiff's allegations as true, defendants' last wrongful act may have occurred as late as 9 March 1988. As a result, the cause of action may not have accrued until that time. Therefore, the action, which commenced on 25 February 1991, might not be barred by the three year statute of limitations under G.S. § 1-15(c), and was improperly dismissed pursuant to Rule 12(b)(6).

We have examined plaintiff's remaining argument and determine it to be without merit. The order of the trial court dismissing plaintiff's action is

Reversed.

Judge McCRODDEN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not read the complaint, as does the majority, to allege that defendants negligently represented plaintiff through 9 March 1988. The complaint alleges that the "defendants' representation of Southeastern continued up to and including March 9, 1988." However, the allegations of negligence relate to the conduct of defendants in failing to respond to discovery requests up to and including 21 August 1987, the date on which the trial court struck Southeastern's answer for failure to respond to discovery.

Because a claim for legal malpractice does not accrue upon the termination of the attorney-client relationship, but instead accrues, in this case, upon the occurrence of the "last act of the defendant giving rise to the cause of action," N.C.G.S. § 1-15(c) (1983); *see also Brantley v. Dunstan*, 10 N.C. App. 706, 708, 179 S.E.2d 878, 879 (1971); *Shelton v. Fairley*, 72 N.C. App. 1, 9, 323 S.E.2d 410, 416 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985), plaintiff's claim for relief accrued on 21 August 1987. Therefore, the claim is barred because it was filed on 14 March 1991, more than three years after its accrual. Accordingly, I would affirm the trial court's dismissal of the complaint.

SYLVIA BENFIELD STEGALL, PLAINTIFF-APPELLANT v. ERNEST WILLIAM STEGALL, DEFENDANT-APPELLEE

No. 9222DC422

(Filed 15 June 1993)

Divorce and Alimony § 172 (NCI4th)— claims for alimony and equitable distribution—voluntary dismissal—judgment of divorce—second claim for alimony and equitable distribution dismissed

The trial court properly dismissed claims for alimony and equitable distribution where plaintiff filed an action for alimony, equitable distribution, and absolute divorce, defendant filed a separate action for absolute divorce, judgment of absolute divorce was granted in defendant's action while the original claims were pending, plaintiff entered a voluntary dismissal without prejudice of her original claims, and plaintiff subsequently filed a second action for alimony and equitable distribution. Plaintiff's original claims for equitable distribution and alimony were pending when the judgment of divorce was entered and N.C.G.S. §§ 50-11(e) and 59-19(c) (repealed October 1991) preserved plaintiff's rights which were asserted in those claims. However, the claims now pursued are not the claims which were pending when judgment of divorce was entered. Those claims terminated and no suit was pending thereafter when plaintiff voluntarily dismissed the original claims.

Am Jur 2d, Divorce and Separation §§ 347 et seq., 950 et seq.

Appeal by plaintiff from order entered 21 February 1992 by Judge Samuel A. Cathey in Iredell County District Court. Heard in the Court of Appeals 31 March 1993.

On 9 January 1989, plaintiff filed an action for alimony, equitable distribution, and absolute divorce. On 2 February 1989, defendant filed a separate action for absolute divorce. Judgment of absolute divorce was granted in defendant's action on 13 March 1989 while plaintiff's original claims were pending.

Plaintiff entered a voluntary dismissal without prejudice of her claims for alimony, equitable distribution, and divorce on 8 October 1990. Subsequently, on 18 February 1991, plaintiff filed

a second action for alimony and equitable distribution. Defendant filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The court dismissed plaintiff's complaint, apparently because the claims for alimony and equitable distribution were asserted after the judgment of divorce. From this order plaintiff appeals.

Pressly & Thomas, P.A., by Gary W. Thomas, for plaintiff appellant.

Hicks, Hodge and Cranford, P.A., by Fred A. Hicks, and Pope, McMillan, Gourley, Kutteh and Simon, P.A., by Pamela H. Simon, for defendant appellee.

ARNOLD, Chief Judge.

The decisive question on appeal is were plaintiff's claims for alimony and equitable distribution barred by N.C. Gen. Stat. § 50-11(a) when plaintiff took a voluntary dismissal of those claims after judgment of divorce had been entered, but thereafter filed a second action for alimony and equitable distribution.

Subject to certain exceptions, "[a]fter a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . . ." N.C. Gen. Stat. § 50-11(a) (1987 & Cum. Supp. 1992). A spouse's right to equitable distribution and alimony are among the rights which are lost after divorce. N.C. Gen. Stat. § 50-11(e) (1987 & Cum. Supp. 1992); *Haynes v. Haynes*, 45 N.C. App. 376, 380, 263 S.E.2d 783, 786 (1980). However, a spouse may preserve the right to equitable distribution if "the right is asserted prior to judgment of absolute divorce," N.C. Gen. Stat. § 50-11(e) (1987 & Cum. Supp. 1992), and, at the time judgment of divorce was entered in this case, as long as the dependent spouse had a claim for alimony pending when the judgment of divorce was entered, N.C. Gen. Stat. § 50-19(c) preserved the right to receive alimony. N.C. Gen. Stat. § 50-19(c) (1987) (repealed, effective Oct. 1991). Plaintiff argues that because her original claims for alimony and equitable distribution were pending when judgment of divorce was entered, Rule 41(a) allows her one year to file a second action after dismissal even though that year is after entry of judgment of divorce. We disagree.

N.C.R. Civ. P. 41(a) allows a party one year to file a second action after a voluntary dismissal even if the second filing falls

outside the period of limitation. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 344 S.E.2d 302 (1986). However, the savings provision of Rule 41(a) is inapplicable where there is an absolute bar to the filing of a second action. *See Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). In *Banner*, this Court held that N.C.R. Civ. P. 41(a)(1) does not keep a claim for alimony alive when that claim is voluntarily dismissed before judgment of divorce is entered and subsequently reasserted after the divorce judgment. From *Banner* it is clear that G.S. § 50-11(a) operates as an absolute bar to any claim for alimony which is not pending when judgment of divorce is entered, and Rule 41(a) has no effect on that bar. The same reasoning leads us to conclude that any claim for equitable distribution which is not pending when judgment of divorce is entered is also barred by G.S. § 50-11(a).

Plaintiff's original claims for equitable distribution and alimony were pending when the judgment of divorce was entered, and therefore, G.S. §§ 50-11(e) and 59-19(c) preserved plaintiff's rights which were asserted in those claims. However, the claims which plaintiff pursues now are not the claims which were pending when judgment of divorce was entered. When plaintiff voluntarily dismissed the original claims, they terminated and no suit was pending thereafter in which the court could enter an order. *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

We read G.S. §§ 50-11(e) and 50-19(c) as preserving only the claims for equitable distribution and alimony which were actually pending when the judgment of divorce was entered. Because these second claims were not pending at the time judgment of divorce was entered they were not preserved by G.S. §§ 50-11(e) and 50-19(c) and are therefore barred by G.S. § 50-11(a).

We note that the equities weigh in favor of this decision. After divorce, if no claim for alimony or equitable distribution is pending, the monetary and property concerns of the divorce should be laid to rest. The parties should be able to freely dispose of property without the fear that one spouse may file another claim for equitable distribution. Confusion and danger surrounding property transactions with third parties is also minimized by this decision.

Affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JOHNNIE CARL BROWN

No. 923SC1288

(Filed 15 June 1993)

Criminal Law § 1039 (NCI4th) — prayer for judgment — conditions — final judgment

The trial court erred by imposing a sentence of six months imprisonment, suspended for five years under the supervision of a probation officer; where defendant was convicted of communicating threats, Judge Rountree entered a PJC on conditions that defendant pay costs, continue with any mental health treatment he was currently undergoing, and not contact his ex-wife, the prosecuting witness; the State moved to hold defendant in contempt in that he had contacted the prosecuting witness; and Judge Leech imposed the six month suspended sentence. The condition that defendant continue psychiatric treatment went beyond defendant's obligation to obey the law and was thus punishment, so that Judge Rountree's entry was a final judgment rather than a PJC. Violation of that judgment subjected defendant to criminal contempt of court, punishable by imprisonment up to 30 days, a fine not to exceed $500, or any combination of the two. N.C.G.S. §§ 5A-11(a)(3), 5A-12(a).

Am Jur 2d, Criminal Law § 534.

Appeal by defendant from judgment entered 10 August 1992 in Pitt County Superior Court by Judge Napoleon B. Barefoot. Heard in the Court of Appeals 10 May 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Public Defender Robert L. Shoffner, Jr., by Assistant Public Defender Edward G. Wells, III, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment sentencing him to six months, suspended for five years, entered 10 August 1992, upon his conviction of the misdemeanor of communicating threats.

Defendant was charged on 2 December 1991 with communicating threats. District Court Judge H. Horton Rountree found defendant guilty of the charge and entered a prayer for judgment continued (PJC) on conditions that defendant pay costs, that he continue with any mental health treatment he was currently undergoing, and that he not contact his ex-wife, the prosecuting witness. Defendant did not appeal. Several weeks later, the State moved to hold defendant in contempt of court for violating a condition of the PJC in that he had contacted the prosecuting witness. On 6 April 1992, District Court Judge David Leech entered a judgment imposing a six-month sentence, which he suspended upon placing defendant on supervised probation for five years. Defendant appealed Judge Leech's judgment to the superior court. The superior court, after conducting a non-jury hearing, determined that the defendant had in fact contacted the prosecuting witness in violation of Judge Rountree's entry and entered the same judgment as Judge Leech had entered.

The issue presented is whether the conditions Judge Rountree imposed upon the continuation of the entry of judgment converted the entry into a final judgment.

After a conviction or plea the trial court has the authority "(1) [t]o pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; [or] (3) to continue prayer for judgment." *State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 50 (1957). "When the prayer for judgment is continued there is no judgment—only a motion or prayer by the prosecuting officer for judgment." *Griffin*, 246 N.C. at 683, 100 S.E.2d at 51. When, however, the trial judge imposes conditions "amounting to punishment" on the continuation of the entry of judgment, the judgment loses its character as a PJC and becomes a final judgment. *Id.* Conditions "amounting to punishment" include fines and imprisonment. *Id.* Conditions not "amounting to punishment" include "requirements to obey the law," *State v. Cheek*, 31 N.C. App. 379, 382, 229 S.E.2d 227, 228 (1976), and a requirement to pay the costs of court. *State v. Crook*, 115 N.C. 760, 764 (1894);

N.C.G.S. § 15A-101(4a) (1988) ("[p]rayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment").

Without deciding whether the order that defendant not contact his wife was punishment, the condition that defendant continue with psychiatric treatment went beyond defendant's obligation to obey the law, and thus was punishment. Accordingly, Judge Rountree's statement that prayer for judgment was continued is inconsistent with the remaining portion of the entry and must be treated as surplusage. *See Griffin*, 246 N.C. at 683, 100 S.E.2d at 51. Therefore, Judge Rountree's entry was a final judgment, the violation of which subjected the defendant to criminal contempt of court, N.C.G.S. § 5A-11(a)(3) (1986), punishable by "imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the [two]." N.C.G.S. § 5A-12(a) (Supp. 1992). Thus the trial court erred when it imposed a term of imprisonment of six months, suspended for five years under the supervision of a probation officer. *See Griffin*, 246 N.C. at 683, 100 S.E.2d at 51 ("[p]unishment having been once inflicted, the court . . . cannot thereafter impose additional punishment"). This case, therefore, must be remanded for a hearing on contempt pursuant to N.C.G.S. § 5A-11(a)(3).

Reversed and remanded.

Chief Judge ARNOLD and Judge MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 JUNE 1993

BARKER v. FIRST OF GEORGIA INSURANCE No. 9227SC1308	Gaston (91CVS3383)	No Error
BIGGERS v. EMPLOYMENT SECURITY COMM. No. 9110SC1255	Wake (89CVS11416)	Affirmed
FAY v. N.C. DEPT. OF E.H.N.R. No. 9210SC722	Wake (91CVS3590)	Dismissed
FORK BAPTIST CHURCH v. TEMPLE CONSTR. CO. No. 9222SC410	Davie (91CVS299)	Affirmed
FRANKS v. FRANKS No. 924DC1218	Onslow (90CVD3048)	Affirmed in part, reversed in part & remanded
HALL v. NELSON No. 9223SC616	Wilkes (91CVS1770)	No Error
HUTCHINS v. HUTCHINS No. 9214DC624	Durham (92CVD00832)	Affirmed in part, reversed in part & remanded
IN RE ROMANO No. 9222DC476	Iredell (90J10)	Dismissed
IN RE WILL OF AUSLEY No. 9227SC319	Cleveland (89SP221)	Affirmed
IVERSON v. IVERSON No. 9214DC687	Durham (88CVD4073)	Affirmed
LEE BUILDER MART v. SOUTHEAST DEVELOPMENT & CONSTR. CO. No. 9211SC672	Lee (90CVS1029)	Appeal Dismissed
LUTHER v. GREENSBORO CITY BD. OF EDUC. No. 9218SC552	Guilford (91CVS9079)	Affirmed
O'CONNOR v. HARDEE No. 9210SC452	Wake (92CVS00599)	Affirmed

STATE v. ALSTON No. 9220SC216	Moore (91CRS745) (91CRS746) (91CRS756) (91CRS757) (91CRS758)	No error in part; vacated in part & remanded
STATE v. BRYANT No. 9218SC922	Guilford (91CRS37036) (91CRS37043) (91CRS37047) (91CRS37023) (91CRS37024)	No Error
STATE v. CALLOWAY No. 9219SC1324	Cabarrus (91CRS481)	No Error
STATE v. CARSON No. 9328SC88	Buncombe (91CRS65106)	No Error
STATE v. CLAGON No. 922SC1041	Washington (88CRS931)	Vacated & Remanded
STATE v. CLARK No. 9227SC1321	Cleveland (91CRS8052) (91CRS8053) (91CRS8054) (91CRS8055)	As to 91CRS8052 & 8053, No error; remanded for resentencing. As to 91CRS8054 & 8055, new trial.
STATE v. DAVIS No. 923SC443	Craven (91CRS1058)	New Trial
STATE v. GOURLEY No. 9315SC150	Alamance (92CRS14850)	Affirmed
STATE v. GREEN No. 9230SC1037	Haywood (92CRS2158)	Affirmed
STATE v. LEE No. 928SC832	Lenoir (91CRS2978)	No Error
STATE v. LEWIS No. 9210SC851	Wake (91CRS73495)	Affirmed
STATE v. MILLIKEN No. 9215SC128	Orange (90CRS3111)	Affirmed
STATE v. MITCHELL No. 924SC544	Sampson (89CRS6458)	No Error
STATE v. RANKIN No. 9219SC517	Cabarrus (90CRS12378)	Affirmed
STATE v. ROWELL No. 924SC565	Duplin (91CRS493)	Vacated

STATE v. SELLERS No. 9313SC119	Columbus (91CRS5357) (91CRS5358)	No Error
STATE v. TWITTY No. 9329SC24	Rutherford (92CRS000190) (92CRS000191) (92CRS000193)	No Error
SUNSCAPE HOMEOWNERS ASSN. v. SUNSCAPE ASSOC. No. 9210SC639	Wake (90CVS8387)	Vacated in part & remanded
WHITEHURST v. CITY OF ELIZABETH CITY No. 921SC388	Pasquotank (90CVS303)	Appeal Dismissed
WILLIAMSON v. GORE No. 9213SC1333	Brunswick (91CVS1045)	Affirmed in part, reversed in part & remanded
YUDIN v. WALKER No. 9214SC391	Durham (90CVS4641)	Affirmed

APAC-CAROLINA, INC. AND UNITED SPRINKLER, INC., PLAINTIFFS-APPELLANTS v. GREENSBORO-HIGH POINT AIRPORT AUTHORITY AND SOUTHERN MAPPING & ENGINEERING COMPANY, DEFENDANTS-APPELLEES

No. 9218SC29

(Filed 6 July 1993)

1. **Contracts § 114 (NCI4th); Public Works and Contracts § 57 (NCI4th)— airport taxiway extension—general contractor—no standing to assert claim for subcontractor**

The general contractor had no standing to assert a claim for additional payment against an airport authority on behalf of a grading subcontractor where the subcontractor had no claim against the authority because there was no privity of contract, the subcontractor was not a third-party beneficiary of the contract between the general contractor and the authority, the contract was not assigned to the subcontractor, no liens have been asserted by the subcontractor, and the contract provides that "the owner will not recognize any subcontractor on the work."

Am Jur 2d, Contracts §§ 294-297; Public Works and Contracts §§ 102-104.

2. **Contracts § 172 (NCI4th); Highways, Streets, and Roads § 46 (NCI4th)— undercut work not extra work**

Undercut work performed by plaintiff contractor in constructing an airport taxiway extension was not "extra work" under the contract with the airport authority where it is clear from the contract language that undercut work was to be treated as unclassified excavation and paid for as such. Thus, plaintiff was entitled to be paid for undercut at the same rate as for all unclassified excavation.

Am Jur 2d, Building and Construction Contracts §§ 76-86; Public Works and Contracts §§ 185-198.

3. **Contracts § 172 (NCI4th)— amount of unclassified excavation—issue of material fact**

Plaintiff contractor's evidence indicating potential errors in defendant airport authority's measurements of the amount of unclassified excavation in a taxiway extension project by using the average end area method specified in the contract

was sufficient to raise a genuine issue of material fact with respect to the amount of unclassified excavation and entitled plaintiff to present evidence of the measurements it obtained using the load count method.

Am Jur 2d, Building and Construction Contracts §§ 76-86.

4. Contracts § 172 (NCI4th); Highways, Streets, and Roads § 46 (NCI4th)— airport taxiway project—extra erosion control work—no recovery under breach of warranty theory

Plaintiff contractor was not entitled to recover for extra erosion control work it performed on an airport taxiway extension project under a breach of implied warranty theory based on its contention that the defendant airport authority's plans and specifications contained inadequate erosion control measures and were thus not suitable for the purpose for which they were intended where the contract required plaintiff to comply with environmental laws and regulations and placed the burden of compliance on plaintiff; although the plans and specifications set forth environmental requirements, the contract clearly stated that laws and regulations prevailed over contract provisions; the contract gave the airport authority the right to direct plaintiff to perform erosion control work not specified in the contract; and the contract did not entitle plaintiff to extra payment for erosion control work but contemplated that the cost of such work was to be included in the unit price for excavation.

Am Jur 2d, Building and Construction Contracts §§ 76-86; Public Works and Contracts §§ 185-198.

5. Contracts § 172 (NCI4th); Highways, Streets, and Roads § 47 (NCI4th)— airport taxiway project—unanticipated undercut and erosion control—wet weather—no-damages-for-delay clause

The no-damages-for-delay clause of an airport taxiway extension contract prohibited plaintiff contractor from recovering increased costs allegedly caused by delays from unanticipated undercut and erosion control work since (1) the airport authority did not order the delay, and (2) the delay was not due to "some unforeseen cause not provided for in the contract" because the undercut and erosion control work was provided for in the contract. Furthermore, delay due to wet weather was also precluded by the no-damages-for-delay clause.

Am Jur 2d, Building and Construction Contracts §§ 76-86; Public Works and Contracts §§ 161-169.

6. Damages § 60 (NCI4th)— validity of liquidated damages clause

A liquidated damages clause in an airport taxiway construction contract was valid and enforceable when undercut work did not constitute extra work and defendant airport authority thus did not contribute to a delay in the project by ordering such work to be performed, and plaintiff contractor presented no evidence that the damages were unreasonable or punitive in nature. However, plaintiff contractor was entitled under the contract to an increase in the contract time if undercut work exceeded the proposal estimate.

Am Jur 2d, Damages § 683.

7. Negligence § 102 (NCI4th)— airport runway extension project—amount of undercut—negligent misrepresentation—no justifiable reliance

Plaintiff contractor and plaintiff grading subcontractor were not entitled to recover from defendant engineering firm for negligent misrepresentation of the amount of necessary undercut work in the plans and specifications of an airport taxiway extension project because there was no justifiable reliance by plaintiffs where (1) the plans and specifications discussed the potential undercut work, the contract addressed undercut work, and plaintiffs did not fully inspect the available information, and (2) the contract clearly stated that any quantities mentioned therein were merely estimates.

Am Jur 2d, Negligence § 307 et seq.

Appeal by plaintiffs from judgment entered 16 August 1991 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 14 December 1992.

Patton, Boggs & Blow, by Robert G. McIver and C. Allen Foster, for plaintiffs-appellants.

Smith Helms Mulliss & Moore, by Stephen P. Millikin and James W. Barkley, and Cooke & Cooke, by Barden W. Cooke, for defendant-appellee Greensboro-High Point Airport Authority.

Frazier, Frazier & Mahler, by Harold C. Mahler and James D. McKinney, for defendant-appellee Southern Mapping & Engineering Company.

LEWIS, Judge.

APAC-Carolina, Inc. ("APAC"), a business engaged in paving highways and airports, served as general contractor for the extension of a runway and construction of a taxiway (the "Project") at the Greensboro-High Point Airport. United Sprinkler, Inc. ("Sprinkler") was a subcontractor on the Project. On 1 September 1989 APAC and Sprinkler filed a complaint against defendants Greensboro-High Point Airport Authority ("Authority") and Southern Mapping and Engineering Company ("Southern"), an engineering and surveying business which prepared plans, specifications and estimates for the project. Plaintiffs alleged, among other things, nonpayment of claims for undercut excavation work which was neither contemplated by the contract nor mentioned by defendants. Both defendants filed answers on 14 November 1989. On 3 August 1991 defendants filed motions for summary judgment, and on 14 August 1991 plaintiffs filed a cross-motion for partial summary judgment. On 16 August 1991 Judge Walker denied plaintiffs' motion and granted defendants' motions for summary judgment. Plaintiffs now appeal from this order.

In June 1986 APAC submitted a bid proposal for the Project to Authority. APAC's proposal included a contract price of $1.99 per cubic yard of unclassified excavation for an estimated 167,200 cubic yards. It did not include a price for undercut, replacement, or compaction work as such.

APAC, as the low bidder, was awarded the contract on 26 August 1986. The contract provided for completion in 120 calendar days. It also stated that all soil removal or undercutting would be included in the broader category of "unclassified excavation" for contract purposes, to be paid at the rate per cubic yard for that item. APAC had bid a price of $1.99 per cubic yard for all unclassified excavation.

APAC subcontracted with Sprinkler, a grading and excavation business, to do the grading work. Shortly after Sprinkler began work in September 1986, Southern directed APAC and Sprinkler to undercut the taxiway subgrade to "substantial depths." When it became apparent that a "substantial volume" of undercutting

would be required for the Project, Sprinkler protested that such work was not contemplated in the plans and specifications, was not a contract-pay item, and was more complicated, time-consuming and expensive than the work estimated to be $1.99 per cubic yard. In response to Sprinkler's indication that it would seek additional compensation for the work, Southern threatened to shut-down the job and impose liquidated damages of $1,000.00 a day. Plaintiffs performed the work under protest.

Sprinkler measured its excavation work using load counts, although the contract specified another method. Relying on the load counts, Sprinkler claims it performed more excavation than the amount recorded and paid for by Authority. Plaintiffs allege performance of this "extra" work caused delays resulting in suspension of their work until May 1987. Extra erosion control work, performed by Sprinkler, was also a factor in the delays, and Sprinkler advised APAC and Southern it would seek additional compensation for this work as well. Plaintiffs also claim they incurred duration-related costs because of the delays.

The Project was completed in July 1987. In June 1988 APAC, acting on behalf of itself and on behalf of Sprinkler, submitted claims to Southern for additional payment for undercut work, extra erosion control work, and increased costs caused by the delays. In July 1988 Authority made its last payment to APAC, but withheld a retainage of $29,800 as liquidated damages. Authority did not include payment for APAC's additional claims.

Plaintiffs filed suit on 1 September 1989, alleging breach of contract for failure to pay the claims based on extra work. APAC requested $74,000 on its own behalf, and $226,000 on behalf of Sprinkler, summarily explaining that "APAC-Carolina is entitled to recovery [sic] for the benefit of United Sprinkler." APAC also claimed damages for losses and expenses incurred in performing corrective erosion control work arising from defective specifications provided by Authority. Finally, APAC alleged Southern's plans and specifications failed to disclose any quantities of undercut, replacement or compaction work, and that Southern concealed this information in its failure to exercise reasonable care or competence. APAC asserted that it and Sprinkler reasonably and foreseeably relied on the misrepresentations and concealments in preparing and submitting their bids. APAC claimed they were each damaged in excess of $10,000 on this count.

In its motion for summary judgment, Authority asserted: (1) APAC could not present claims on behalf of Sprinkler; (2) plaintiffs' claims were barred by contractual provisions; (3) the undercut work was properly paid for as unclassified excavation; (4)&(5) the quantities of undercut and other excavation were accurately measured; (6) plaintiffs' delay and suspension claim was barred by the contract; (7) there was no warranty regarding erosion control; and (8)&(9) the amount of an environmental fine was properly withheld as well as the amount of liquidated damages. Southern moved for summary judgment on the negligent misrepresentation claim. Finding no genuine issues of material fact, the trial court granted summary judgment for defendants on all issues.

On appeal from the order of summary judgment in favor of defendants, plaintiffs assert: (1) APAC may present claims on behalf of Sprinkler; (2) questions of material fact exist concerning their claims against Authority; and (3) they have a cause of action against Southern for negligent misrepresentation.

At the outset, we note that summary judgment is only appropriate where there are no genuine issues of material fact. N.C.G.S. § 1A-1, Rule 56(c) (1990). After reviewing plaintiffs' arguments, we conclude that summary judgment was appropriately granted on several of the issues before us. However, we hold that summary judgment was improperly entered on the issue of the accuracy of the measurements of unclassified excavation. As discussed below, this issue affects the total amount owed to plaintiffs for their work, and may also affect the calculation of liquidated damages.

I. Standing of APAC to Assert Claims of Sprinkler

[1] In its first argument, APAC contends it has standing to assert claims on behalf of its subcontractor Sprinkler. It is undisputed that the subcontractor, Sprinkler, has no direct claim against Authority. There is no privity of contract, Sprinkler is not a third-party beneficiary of the contract between Authority and APAC, the contract was not assigned to Sprinkler, and no liens have been asserted by Sprinkler. Plaintiffs acknowledge the traditional rule that subcontractors have no action in their own right against owners due to the lack of privity between them. *See Warren Bros. Co. v. N.C. Dep't of Trans.*, 64 N.C. App. 598, 599, 307 S.E.2d 836, 838 (1983) (Court did not allow general contractor to bring claim on behalf of subcontractor when subcontractor itself could not bring

a claim against owner). However, plaintiffs assert that it is common practice for a contractor to present the claims of its subcontractor when suing another party to the contract. Plaintiffs cite the case of *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 380 S.E.2d 796, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 496 (1989) (hereafter *Bolton I*), as support for this proposition, stating that it allowed a contractor to recover from an owner its subcontractor's claim for services and costs. This is a misstatement of the holding of *Bolton I.*

Bolton I involved a multiple-prime contract to build a library at UNC-Chapel Hill. This type of contract is required by N.C.G.S. § 143-128 for public building projects with expected costs exceeding $50,000. N.C.G.S. § 143-128(a) (1990) (now $100,000). Section 143-128 makes each separate contractor directly liable to the State of North Carolina and to the other contractors. *Id.* The Court interpreted the statute to allow one prime contractor to sue another prime contractor for economic loss. Thus, Bolton, the heating and ventilating contractor, could sue Loving, the general contractor and "project expediter." 94 N.C. App. at 397, 380 S.E.2d at 800.

The Court also examined whether Bolton could introduce evidence of damages incurred by its subcontractor, Phillips. The Court noted that the contract makes each contractor responsible to other contractors for damages due to undue delay, and the contract makes each contractor responsible for the acts of its subcontractors. Thus, "one prime [contractor] on a multiple-prime project may sue another prime [contractor] for damages incurred by the first prime's subcontractor." *Id.* at 408, 380 S.E.2d at 806. This was the only relevant holding in that case. The *Bolton I* Court cited *Davidson & Jones v. N.C. Department of Administration*, 315 N.C. 144, 337 S.E.2d 463 (1985), but noted that the *Davidson* Court did not address the issue directly when it allowed a prime contractor to recover duration-related expenses *related to* work performed by a subcontractor. *Bolton I*, 94 N.C. App. at 408, 380 S.E.2d at 806. The Court in *Davidson* did not discuss standing, and there is nothing in that case indicating that the prime contractor was attempting to recover the expenses *on behalf of* the subcontractor.

Although not an issue in the case, the *Bolton I* Court commented in passing that several United States Supreme Court cases have allowed a contractor to recover from the owner its subcontrac-

tors' extra costs "when the subcontractor [was] not in privity with the owner and could not recover directly." 94 N.C. App. at 408, 380 S.E.2d at 806 (citing *United States v. Blair*, 321 U.S. 730, 737, 88 L. Ed. 1039, 1045 (1944), and *Hunt v. United States*, 257 U.S. 125, 128-29, 66 L. Ed. 163, 165 (1921)). We note that this part of the opinion was dicta, and other decisions of the North Carolina Court of Appeals indicate this is not the law in North Carolina. *See Bolton Corp. v. State of North Carolina*, 95 N.C. App. 596, 383 S.E.2d 671 (1989), *disc. rev. denied*, 326 N.C. 47, 389 S.E.2d 85 (1990) (hereafter *"Bolton II"*); *Warren Bros. Co. v. N.C. Dep't of Trans.*, 64 N.C. App. 598, 307 S.E.2d 836 (1983).

In *Bolton II*, the Court did directly address whether Bolton could assert claims of its subcontractor Phillips against the State, and concluded that it could not. The State's sovereign immunity had only been waived as to those persons and corporations which had actually contracted with the State. *See* N.C.G.S. § 143-135.3(c) (1990) (allows those who have contracted with the State to file a claim against the State). Since Phillips did not have a contractual relationship with the State, its claim was barred by sovereign immunity. Thus, "because Phillips has no claim, Bolton Corp. has no claim on Phillips' behalf." 95 N.C. App. at 599, 383 S.E.2d at 673.

Any reliance by plaintiffs on the *Bolton* cases, therefore, is misplaced, because they are clearly distinguishable from the matter at hand. The contractual relationship in those cases was established and governed by a specific statute, which does not apply to the case now before us.

We note that section 80-01 of the contract in the case at hand specifically states that "[t]he owner will not recognize any subcontractor on the work." Similarly, in *Warren* the contract specifically stated, "nor will the Sub-contractor have any claim against the Commission (now NCDOT) by reason of the approval of the subcontract." 64 N.C. App. at 600, 307 S.E.2d at 838. The Court concluded, "[t]he contract in the instant case provides that plaintiff's subcontractor may not assert a claim against the defendant. The subcontractor may not do indirectly through plaintiff what it could not do directly by suit against the defendant." *Id.*

We conclude that APAC did not have standing to assert any claims on behalf of Sprinkler. Sprinkler had no claim against defendants on its own behalf. In both *Warren* and *Bolton II* the Court clearly stated that a general contractor may not assert a claim

on behalf of a subcontractor if that subcontractor could not assert the claim itself. Thus, APAC may not bring its claim of $226,000 on behalf of Sprinkler. We will address APAC's remaining claims for compensation to the extent that APAC raises these claims on its own behalf.

II. APAC's Claims Against Authority

A. Claims Based on Undercut Work

[2] APAC claims that the undercut work constituted "extra work" under the contract, and that it should receive additional compensation for such work. APAC concedes that it did not comply with that portion of the contract, Section 50-16, requiring written notice before the performance of extra work, but contends that this requirement was waived through subsequent parol agreement or conduct. *See Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 315 S.E.2d 346, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). APAC relies on the fact that Authority, through Southern, was aware of the extra work and did not object to it. APAC agreed to perform the work at the direction of Southern, and informed Southern of its intention to seek additional compensation.

Authority asserts that the undercut work did not constitute "extra work" as defined in the contract. According to section 10-20 of the contract "extra work" is "[a]n item of work not provided for in the awarded contract . . . ." Section 40-04 states that "extra work" includes "an item of work for which no basis of payment has been provided . . . ."

As Authority points out, undercut work is clearly provided for in the contract. Item P-152, section 152-2.2(b), entitled "Undercutting," describes the materials included in this classification and sets forth the basis of payment for such work. According to that section, undercutting involves any "material unsatisfactory" for runway purposes. Such material must be excavated to "a minimum depth of 12 inches, or the depth specified by the Engineer, below the subgrade," and "[t]he excavated area shall be refilled with suitable material . . . and thoroughly compacted . . . ." Authority also references section 152-1.1 of the contract, which addresses unclassified excavation. According to that section unclassified excavation covers "excavation, disposal, placement, and compaction of all materials within the limits of the work required . . . ." Section 152-1.2 provides that "[u]nclassified excavation shall consist

of the excavation and disposal of all material, regardless of its nature." Authority points to page 4 of the construction plans, which contains the following:

> MATERIALS ENCOUNTERED DURING CONSTRUCTION THAT ARE DETERMINED BY THE ENGINEER TO BE UNSUITABLE FOR USE IN THE SUB-GRADE SHALL BE REMOVED BY THE CONTRACTOR AT THE DIRECTION OF THE ENGINEER. THE MATERIALS REMOVED WILL BE PAID FOR AT THE CONTRACT UNIT PRICE BID FOR 'UNCLASSIFIED EXCAVATION.' REPLACEMENT MATERIALS WILL BE CONSIDERED 'UNCLASSIFIED EXCAVATION' AND WILL BE PAID FOR AS SUCH.

Thus, the contract addresses undercut specifically and also treats it under the general heading of unclassified excavation.

Furthermore, the contract provides a basis of payment for undercut work. Section 152-2.2(b) states that "[t]his excavated material shall be paid for at the contract unit price per cubic yard for unclassified excavation."

We agree with Authority that the undercut work did not meet the definition of "extra work" under the contract. It is clear from the contract language that undercut work was to be treated as unclassified excavation and paid for as such. Thus, plaintiffs were entitled to $1.99 per cubic yard of undercut, the same rate as for all unclassified excavation. Because we find that the undercutting did not constitute extra work under the contract, we need not address the issue of plaintiff's compliance with Section 50-16 of the contract, the provision governing payment for extra work.

B. Differing Measurements

[3] APAC claims questions of material fact exist concerning the measurements of the amount of excavation work, including both undercut and non-undercut excavation, and that it is entitled to challenge the measurements under section 50-16 of the contract. Section 50-16 states that "[n]othing in this subsection shall be construed as a waiver of the contractor's right to dispute final payment based on differences in measurements or computations." One of the "key disputes," according to APAC, is the total amount of unclassified excavation. APAC estimates a total amount of over 183,000 cubic yards, but Authority contends the total was only about 164,000 cubic yards.

Authority points to section 152-3.4 of the contract, which stipulates that "[f]or payment specified by the cubic yard, measurement for all excavation shall be computed by the average end area method." Pursuant to this method, whenever an excavation hole was created in the undercut process, employees of APAC, Sprinkler, and the project engineer measured the length, width, and depth of the excavated areas. This information was then used to compute the quantity of material excavated. Authority maintains that these measurements were accurate. Brad Mills, Sprinkler's Vice President, stated he and Mr. Wayne Wilson, a project inspector for Southern, measured the excavation areas together. He stated he was not concerned about the accuracy of the final figures showed to him by Mr. Wilson, and that at the time everything seemed to be standard practice. He did point out, however, that Mr. Wilson did not always show him the figures being recorded. Mr. Mills understood that payment for the undercut work would be according to cross-section, the average end area method.

APAC, on the other hand, claims that Authority's measurements were inaccurate, thus rendering the average end area method of computation unreliable. Throughout the Project Sprinkler kept track of the amount of completed excavation using pan-load counts, and APAC now argues that a more accurate measurement would be obtained by using these load counts. In *W.E. Garrison Grading Co. v. Piracci Construction Co.*, 27 N.C. App. 725, 221 S.E.2d 512 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976), the Court allowed recovery based on pan-load counts, instead of the average end area method specified in the contract, due to errors in measurement. *Id.* at 730-31, 221 S.E.2d at 515-16. Accordingly, if APAC has presented evidence revealing errors in Authority's calculations, it should be able to present evidence of the measurements it obtained using the load count method.

We believe that APAC's evidence indicating potential errors in Authority's calculations is sufficient to raise a genuine issue of material fact regarding the measurements of the excavated material. Most significantly, APAC has produced an affidavit of an independent engineer and surveyor, Kenneth G. Simmons, analyzing the Project and methods of measurement used by Authority. In his report, submitted with accompanying exhibits and spanning 77 pages in the Record, Mr. Simmons carefully and extensively reviewed the measurements and concluded that many errors

existed. He felt that "several procedures and methods used by [Southern] cause apprehension and concern."

Mr. Simmons questioned, among other things, the small size of the scale used by Southern, its method of obtaining elevations, its use of benchmarks without establishing a control loop, and the elevation intervals used. The elevation problem itself "over the entire site would produce a huge volume of Excavation not paid to the grading contractor." Mr. Simmons concluded that "[i]n the absence of reliable cross-section data to measure quantities based on the average end-area method, it is practical to review the daily accounts of pan loads with an analysis of the average swell factor from cut to pan to arrive at cut volume for pay quantities."

We find that the information provided in Mr. Simmons' report was sufficient to create a genuine issue of material fact regarding the accuracy of Authority's measurements. We hold that summary judgment was inappropriately granted on this issue.

C. Measure of Damages

APAC argues the trial court erred in applying the contract price, $1.99 per cubic yard, to their claims based on additional excavation and undercut work. APAC, alleging breach of contract in Authority's failure to pay for the additional work, claims entitlement to damages based on value and actual costs incurred in performing that work. APAC also claims quantum meruit recovery is appropriate when extra work has been performed.

Neither breach of contract nor the performance of extra work entitles APAC to quantum meruit recovery here. As Authority correctly points out, "*[q]uantum meruit* is an appropriate measure of damages only for breach of an implied contract, and no contract will be implied where an express contract covers the same subject matter." *Industrial & Textile Piping, Inc. v. Industrial Rigging Servs., Inc.*, 69 N.C. App. 511, 515, 317 S.E.2d 47, 50, *disc. rev. denied*, 312 N.C. 83, 321 S.E.2d 895 (1984). Furthermore, we have already determined that the work performed did not constitute extra work under the contract. APAC is therefore entitled to $1.99 per cubic yard for the total amount of unclassified excavation. This amount will be calculated according to the measurement of the amount of unclassified excavation.

D. Erosion Control Work: Breach of Warranty

[4] APAC contends Authority breached an implied warranty by ordering APAC to perform extra erosion control work. APAC claims the State required the extra work as a result of Southern's failure to design adequate control measures. According to APAC, the plans and specifications furnished by Authority and Southern constituted warranties "that the work represented in the plans and specifications can be accomplished in the manner described." *See Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 363, 328 S.E.2d 849, 857, *disc. rev. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985) (if contractor has complied with plans and specifications prepared by owner, contractor not liable for consequences of defects in those plans and specifications); *Ray D. Lowder, Inc. v. N.C. State Highway Comm'n*, 26 N.C. App. 622, 638, 217 S.E.2d 682, 692, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975) (contracting agency furnishing inaccurate information as basis for bids may be liable on breach of warranty theory). APAC contends the performance of any additional work entitles it to compensation for such work based on the breach of warranty theory if the plans were not suitable for the purpose for which they were intended. *See Gilbert*, 74 N.C. App. at 363, 328 S.E.2d at 857. Thus, APAC claims issues of material fact exist regarding whether or not extra work was caused by a breach of implied warranty.

Authority points to various provisions in the contract addressing erosion control and requiring compliance with environmental laws and regulations. Authority claims compliance was mandatory, and the burden of compliance was on the contractor.

According to section 70-19 of the contract, "[t]he contractor shall comply with all Federal, State, and local laws and regulations controlling pollution of the environment." A section of the contract entitled "Control of Erosion, Siltation and Pollution" (hereafter "Item CESP") addresses more fully the responsibilities of the contractor. Item CESP 1.1A states that the contractor

> shall take whatever measures are necessary to minimize soil erosion and siltation . . . . The Contractor shall also comply with the applicable regulations of all legally constituted authorities relating to pollution prevention and control. The Contractor shall keep himself fully informed of all such regulations which in any way affect the conduct of the work, and shall at all times observe and comply with all such regulations.

Furthermore, that section provides that "[i]n the event of conflict between such regulations and the requirements of the specifications, the more restrictive requirements shall apply."

We find no breach of implied warranty here. We agree with Authority that the quoted provisions require the contractor to comply with environmental laws and regulations, and that the burden of compliance rested completely on the contractor. Although the plans and specifications may have set forth environmental requirements, the contract clearly states that laws and regulations prevail. Furthermore, Item CESP 1.1D states that "[t]emporary and permanent erosion control measures shall be provided as shown on the plans or as directed by the engineer." Thus, Authority, through Southern, had contractual authority to direct APAC and Sprinkler to perform erosion control work not specified in the plans. Finally, we note that Item CESP 1.1I provides that the contractor is not entitled to any extra payment for the erosion control work. Such work was considered "incidental to the grading, excavation and embankment operation," and the cost was to be included in the unit price bid for excavation.

E. Delay and Suspension Claim

The no-damages-for-delay clause, found in section 80-06 of the contract, states:

> No provision of this article shall be construed as entitling the contractor to compensation for delays due to inclement weather, for suspensions made at the request of the contractor, or for any other delay provided for in the contract, plans, or specifications.

That section also provides, however, that the contractor may be reimbursed for actual costs incurred if "the contractor is ordered by the engineer, in writing, to suspend work for some unforeseen cause not otherwise provided for in the contract and over which the contractor has no control . . . ."

[5] APAC seeks damages for costs incurred during the suspension of work from November 1986 until May 1987, claiming that the delay was caused by the "unanticipated" undercut work and extra erosion control work. While acknowledging the no-damages-for-delay clause in the contract, APAC argues such clauses have been found unfair and unenforceable in other jurisdictions when the delay was not within the contemplation of the parties to the contract. *See*

Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., 355 F. Supp. 376, 397 (S.D. Iowa 1973) (clause would be invalid if ambiguous, if delay not contemplated by parties, or if delay caused by bad faith or active interference); *M.D. Lundin Co. v. Board of Educ.*, 68 A.D.2d 881, 883, 414 N.Y.S.2d 34, 36 (1979). Thus, APAC urges that a jury should be instructed to consider whether or not to apply the clause in this case.

According to Authority, in December 1986 APAC requested a suspension of work beginning 8 November 1986 due to wet weather. Authority points out that no work had been done since 25 October 1986, and that work was in fact suspended until 14 May 1987 even though Authority did not formally grant the request. This delay does not fall within that portion of the contract allowing costs for unforeseen delays for two reasons. First, Authority did not order the delay, in writing or otherwise, and second, the delay was not due to "some unforeseen cause not otherwise provided for in the contract." Authority contends the undercut work was clearly provided for in the contract, and an inspection of the available information would have revealed the extent of necessary undercut work. Furthermore, delay due to wet weather is clearly precluded by the no-damages-for-delay clause.

We find the clause in the case at hand to be unambiguous and enforceable. APAC itself requested the suspension of work. Delays caused by wet weather were clearly foreseeable and not due to any action on the part of Authority.

F. Liquidated Damages

[6] The contract stipulates a contract time of 120 days, and specifically states that "[t]ime is important on this work and liquidated damages as specified will be enforced." Section 80-08 of the contract sets liquidated damages at $1,000 per day for failure to complete on time. APAC completed the project in 146 days, 26 days over the specified contract time, excluding the 180 days of suspension from November to March. Pursuant to this provision, Authority withheld $26,000 from its final payment to APAC.

APAC claims that liquidated damages cannot be assessed if the owner has contributed to the delay, *see Dickerson, Inc. v. Board of Transp.*, 26 N.C. App. 319, 321, 215 S.E.2d 870, 872 (1975), and that the amount assessed must be reasonable and non-punitive. *See First Value Homes, Inc. v. Morse*, 86 N.C. App. 613, 616,

359 S.E.2d 42, 43 (1987). According to APAC, Authority contributed to the delay by ordering extra work to be performed. Also, APAC claims extensions of time should be granted when unforeseen subsurface conditions are encountered as provided in section 80-07(a) of the contract. APAC claims genuine issues of material fact exist regarding the reasons for the delays and suspension in work.

We determined above that the undercut work did not constitute extra work under the contract. Thus, APAC did not contribute to the delay by ordering such work to be performed. Furthermore, Section 80-08 states that the "deducted sums shall not be deducted as a penalty but shall be considered as liquidation of a reasonable portion of damages that will be incurred by the owner should the contractor fail to complete the work in the time provided in his contract." APAC has not presented any evidence that the damages were unreasonable or punitive in nature. We find the liquidated damages clause to be valid and enforceable.

We cannot determine at this point, however, whether the actual amount of liquidated damages withheld was proper. Section 80-07(a) of the contract explains that the time for completion stated in the proposal is based on the originally estimated quantities. According to that section:

> "[s]hould the satisfactory completion of the contract require performance of work in greater quantities than those estimated in the proposal, the contract time shall be increased in the same proportion as the cost of the actually completed quantities bears to the cost of the originally estimated quantities in the proposal."

Thus, if the actual amount of unclassified excavation exceeded the proposal estimate, APAC would be entitled to a corresponding increase in contract time. We note that the proposal contained an estimate of over 167,000 cubic yards of unclassified excavation. APAC claims they removed over 183,000 cubic yards, but Authority claims that only about 164,000 cubic yards were excavated.

We have already determined to remand to the trial court on the issue of the measurement of excavation. Therefore, while we find the liquidated damages clause valid and enforceable, we must remand this issue as well since APAC may have been entitled to an increase in contract time.

III. Summary Judgment for Southern

[7] In their final argument plaintiffs contend the trial court erred in granting summary judgment for Southern on the issue of negligent misrepresentation. Plaintiffs allege that Southern failed to properly prepare plans, misrepresented the amount of necessary undercut work, and misled APAC and Sprinkler into believing that such work would not be significant. As plaintiffs point out, Sprinkler has standing to assert this claim, because privity is not necessary to bring an action for recovery in tort. *See Howell v. Fisher*, 49 N.C. App. 488, 494-95, 272 S.E.2d 19, 23-24 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

Justifiable reliance is an element of negligent misrepresentation in North Carolina. *See Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 597, 394 S.E.2d 643, 648 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). We conclude that any reliance by plaintiffs was not justifiable for several reasons. First, plaintiffs failed to adequately inspect available information. Second, the contract clearly stated that any quantities mentioned in the contract were merely estimates. Because an essential element of this tort is absent in this case, we find the trial court correctly granted summary judgment on this issue.

Plaintiffs claim Southern misrepresented the scope of the Project by failing to disclose any quantities of potential undercut, replacement and compaction work in the plans and specifications. Plaintiffs also point to Southern's responses to several inquiries about the extent of potential undercut work. According to the affidavit of I.B. Mills, Jr., President of Sprinkler, Mr. Mills inspected the Project site with Wayne Wilson of Southern either shortly before Sprinkler entered into the contract or shortly after 27 August 1986. In response to questions about the amount of potential undercutting, Mr. Wilson "created the clear impression that any undercutting on the project would be insignificant, not amounting to more than a couple of hundred cubic yards."

Southern responds that the plans clearly stated that any undercut would be treated as unclassified excavation. Since undercutting was included in the estimate for the total amount of unclassified excavation and was to be paid at the same price, Southern did not deem it necessary to list undercut separately. Furthermore, the boring logs and other subsurface investigation reports discussed the potential undercutting involved in the Project. Edward Stout,

a Southern employee, stated in his affidavit that reports prepared by Trigon Engineering Consultants, Inc., a soils testing consultant hired by Southern, revealed that some of the soil would be unsuitable and would need to be removed, replaced and compacted. The Engineer's Report prepared by Southern indicated that an area of the taxiway would have to be undercut and replaced, and that such work would be included in the category of unclassified excavation. Mr. Stout concluded that "a competent grading contractor would have and should have known that there would be undercut on this project had it reviewed all the documentation expressly made available to it and listed in the contract."

We note that section 20-06 of the contract places the burden of inspection upon the contractor. That section states that:

> [t]he bidder is expected to carefully examine the site of the proposed work, the proposal, plans, specifications, and contract forms. He shall satisfy himself as to the character, quality, and quantities of work to be performed, materials to be furnished, and as to the requirements of the proposed contract. The submission of a proposal shall be prima facie evidence that the bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the proposed contract, plans, and specifications.

Southern claims plaintiffs were negligent in not inspecting the available information, and that this contributory negligence bars their claim of negligent misrepresentation. *See Stanford v. Owens*, 76 N.C. App. 284, 287-88, 332 S.E.2d 730, 732-33, *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985) (in reviewing directed verdict for defendants on issue of negligent misrepresentation, Court, viewing evidence in light most favorable to plaintiffs, declined to find plaintiffs contributorily negligent and decided that jury should determine the issue of negligent misrepresentation); *Calloway v. Wyatt*, 246 N.C. 129, 134-35, 97 S.E.2d 881, 885-86 (1957) (one cannot rely on representations if given the opportunity to inspect and failed to do so). The contract placed upon plaintiffs the burden of fully inspecting all of the available information, and the evidence indicates that this information would have revealed the necessity of undercut work. We find it unnecessary to determine whether plaintiffs were contributorily negligent since this evidence also shows

a lack of justifiable reliance, thereby defeating the claim of negligent misrepresentation.

The contract clearly states that any quantities therein are merely estimates. In *Thompson-Arthur Paving Co. v. N.C. Department of Transportation*, 97 N.C. App. 92, 387 S.E.2d 72, *disc. rev. denied*, 327 N.C. 145, 394 S.E.2d 186 (1990), this Court noted that quantities in bid proposals, which were clearly identified as estimates in contractual provisions, could not form a basis for a breach of warranty claim. *Id.* at 95, 387 S.E.2d at 74. Similarly, section 20-05 of the contract at hand states that:

> [t]he owner does not expressly or by implication agree that the actual quantities involved will correspond exactly therewith; nor shall the bidder plead misunderstanding or deception because of such estimates of quantities, or of the character, location, or other conditions pertaining to the work.

Following the reasoning of the Court in *Thompson-Arthur*, we find that the estimated quantities may not form a basis for a claim of negligent misrepresentation.

We conclude any reliance by plaintiffs was not justifiable in light of evidence that the plans and specifications discussed the potential undercut work, the contract addressed undercut work, plaintiffs did not fully inspect the available information, and the quantities stated in the contract were merely estimates. Furthermore, as Southern points out, APAC is a "multi-million dollar contractor," and it has performed other grading work at the airport in question. All of Southern's work for airport projects has been prepared in the same manner with regard to undercut, unclassified excavation, measurements, and method of payment. Thus, in the absence of justifiable reliance, plaintiffs may not assert their claim of negligent misrepresentation. The trial court correctly granted summary judgment on this issue.

We conclude that the trial court correctly granted summary judgment for defendants Authority and Southern on all issues except the accuracy of the measurements of the amount of excavation performed. Resolution of this issue will affect the total amount owed to APAC for excavation work, and as explained above, may affect the amount of liquidated damages Authority was permitted to retain.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Judges WELLS and EAGLES concur.

IN THE MATTER OF: DISMISSAL PROCEEDINGS AGAINST DR. BARNEY K. HUANG, PROFESSOR, NORTH CAROLINA STATE UNIVERSITY

No. 9210SC27

(Filed 6 July 1993)

1. **Administrative Law and Procedure § 67 (NCI4th)— dismissal of professor by university—standard of judicial review—whole record test**

In an action arising from the dismissal of an NCSU professor, the Court of Appeals considered the whole record to determine whether the superior court judge was correct as a matter of law in holding that a decision by the Faculty Hearings Committee was not supported by the evidence. When an appellate court reviews the decision of a lower court (as opposed to reviewing an administrative agency's decision on direct appeal), the scope of review under Section 150B-52 of the Administrative Procedure Act is the same as it is for other civil cases. The Court of Appeals review of the superior court's determination under N.C.G.S. § 150B-52 is limited to whether the superior court made any errors in law in light of the record as a whole.

Am Jur 2d, Administrative Law § 730.

2. **Administrative Law and Procedure § 69 (NCI4th)— discharge of university professor as unfit—evidence not sufficient to support finding**

The evidence in the record did not substantiate a finding that a university professor, Dr. Huang, was unfit to continue as a member of the faculty at NCSU where the Faculty Hearings Committee, in supporting their findings, used incidents that either did not involve an assault by Dr. Huang, were

not initiated by Dr. Huang, were not reported, or did not result in a reprimand at the time of the incident.

Am Jur 2d, Administrative Law §§ 678 et seq.

3. **Administrative Law and Procedure § 68 (NCI4th)— discharge of university professor—arbitrary and capricious**

A proceeding against a university professor for assaultive behavior from 1973 through 1985 which resulted in his discharge was patently in bad faith, arbitrary and capricious. The length of time between the misconduct complained of and the disciplinary action taken in connection with that misconduct is indicative of the lack of sound judgment used by NCSU and UNC in their attempt to rid themselves of the professor.

Am Jur 2d, Administrative Law §§ 671-674.

4. **Constitutional Law § 101 (NCI4th)— discharge of university professor—arbitrary and capricious—substantive due process violated**

The substantive due process rights of an NCSU professor were violated where the findings supporting his termination were arbitrary and capricious.

Am Jur 2d, Constitutional Law § 816.

Judge ORR dissenting.

Appeal by respondents from order entered 4 June 1991 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 9 December 1992.

Pursuant to North Carolina General Statutes § 7A-27(b) (1989) and § 150B-52 (1991), this case is before the Court on respondents' appeal from a final judgment on judicial review entered by Judge George R. Greene, Superior Court Judge, presiding over 24 August 1990 session of Wake County Superior Court, in which he reversed the final administrative decisions of the Board of Governors of the University of North Carolina (UNC) and North Carolina State University (NCSU) to discharge Dr. Barney K. Huang from his position on the NCSU faculty and ordered respondents to reinstate Dr. Barney K. Huang to his former position with full backpay and benefits.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Thomas J. Ziko, for respondents-appellants.

Berman & Shangler, by Dean Shangler, for petitioner-appellee.

JOHNSON, Judge.

On 14 July 1988 NCSU Chancellor Bruce R. Poulton, pursuant to § 603 of the *Code* of the Board of Governors, notified Dr. Huang that he intended to discharge Dr. Huang from his position on the NCSU faculty on grounds that Dr. Huang was unfit to continue as a member of the faculty because he had engaged in verbal and physical assaults on several individuals associated with the University, to wit: Dr. Dallas Chen in 1973, Dr. Henry Y. R. Chen in 1980, Dr. Francis Hassler in April 1980, Professor James W. Dickens in 1985 and Mrs. Grace Wang in June of 1988. Following Dr. Huang's request for a hearing, a five member Faculty Hearings Committee (FHC) was selected to hear evidence and make a recommendation on the Chancellor's charges.

The FHC found that Dr. Huang had been guilty of misconduct of such a nature as to render him unfit to be a faculty member at NCSU. On 7 February 1989, Dr. Poulton informed Dr. Huang and the FHC that he had adopted the FHC's findings and had decided to discharge Dr. Huang. The NCSU Board of Trustees and the UNC Board of Governors subsequently affirmed Chancellor Poulton's decision.

Dr. Huang filed a motion for stay in the matter on 2 August 1990. The matter came before Judge George R. Greene in Wake County Superior Court on 5 September 1990. Judge Greene reversed the decision of the Board of Governors of UNC and NCSU. Respondents' filed notice of appeal.

STANDARD OF REVIEW

[1] Chapter 150B of the North Carolina General Statutes governs review of an agency decision. North Carolina General Statutes § 150B-51(b) (1991) states:

> Standard of Review.— After making the determination, 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 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.

In reviewing an administrative decision to determine whether the decision is supported by substantial evidence, the appellate court must apply the whole record test. *Leiphart v. N. C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). "In applying the whole record test, the court must consider all of the evidence, including that which supports the findings and contradictory evidence." *Mt. Olive Home Health Care Agency, Inc. v. N.C. Dept. of Human Resources*, 78 N.C. App. 224, 228, 336 S.E.2d 625, 627 (1985). The reviewing Court is required to examine all of the competent evidence, pleadings, etc., which comprise the "whole record" to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *Savings & Loan Assoc. v. Savings & Loan Commn.*, 43 N.C. App. 493, 259 S.E.2d 373 (1979); *Henderson v. N. C. Dept. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

When an appellate court reviews the decision of a lower court, however (as opposed to when it reviews an administrative agency's decision on direct appeal), the scope of review to be applied by the appellate court under Section 150B-52 of the Administrative Procedure Act is the same as it is for other civil cases. *See* North Carolina General Statutes § 7A-27(b); N.C.R. App. P. 10(a); *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, 651, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983).

The Court of Appeals' review of the superior court's determination under North Carolina General Statutes § 150B-52, is limited to whether the superior court made any errors in law in light of

the record as a whole. *Scroggs v. North Carolina Criminal Justice Standards Comm.*, 101 N.C. App. 699, 400 S.E.2d 742 (1991). To accomplish our task though, we must consider the "whole record" so that we may determine whether the superior court judge was correct as a matter of law in holding that the FHC decision was not substantiated by the evidence.

[2] By respondents' first assignment of error, respondents contend that the trial court erred when it held that the University's decision to discharge Dr. Huang for misconduct rendering him unfit to continue as a member of the faculty was unsupported by substantial evidence in the record. We disagree.

Respondents argue that there were five incidents of misconduct which led to the dismissal of Dr. Huang. The evidence in the record tended to show the following:

Altercation with Dallas Chen

Dr. Dallas Chen was a former graduate student of Dr. Huang. Dr. Huang was Dr. Chen's Masters thesis advisor. While working under Dr. Huang, Dr. Chen and Dr. Huang had several personal conflicts. As a result of the conflicts, Dr. Chen selected another faculty member to advise him on his Ph.D. research and dissertation.

After attaining his Ph.D., Dr. Chen left NCSU for a brief period of time. When he returned, he became friends with Dr. Huang's new research associate Dr. Chou. During 1973, a dispute arose between Dr. Chou and Dr. Huang over a report Dr. Chou had been writing for Dr. Huang's project. In an attempt to settle the dispute, a meeting was called. Dr. Chen was not invited to the meeting but heard about the meeting from Dr. Chou.

On the night of the meeting, Dr. Chen went to the meeting out of curiosity. Dr. Chen was aware that his presence at the meeting would cause tension. When Dr. Chen entered the meeting, Dr. Huang ordered him to leave. Thereafter, an altercation erupted between Dr. Chen and Dr. Huang.

According to Dr. Dallas Chen, Dr. Huang attacked him when Dr. Chen opened the door to the meeting room. Before Dr. Chen could respond to Dr. Huang's assault, the other people in the meeting intervened and convinced him to leave the building.

According to Dr. Huang's testimony, Dr. Chen was the aggressor in the incident. He testified that he ordered Dr. Chen to leave the meeting, but Dr. Chen insisted that he was not going to leave. Dr. Chen then rushed at him and tried to kick him but was stopped by the other people in the room. Dr. Huang further testified that Dr. Chen never hit him and that he never kicked Dr. Chen.

The record does not contain any evidence which indicates this incident was made the topic of an investigation, departmental discussion or even documented until twelve years later. No formal action was taken on this incident until 1988 when the University sought to dismiss Dr. Huang for misconduct.

Altercation with Dr. Henry Y. R. Chen

Dr. Henry Y. R. Chen was another former graduate student of Dr. Huang. Dr. Chen initially had some difficulties completing his Ph.D. under Dr. Huang. In fact, Dr. Chen at one time contemplated giving up on completion of his Ph.D. thesis. Once Dr. Henry Bowen learned of this, he talked to Dr. Chen and encouraged him to continue. He was later assigned as co-chairman along with Dr. Huang of Dr. Chen's Ph.D. thesis.

While Dr. Huang was out of the country and without his approval, Dr. Chen completed and defended his dissertation before the Ph.D. review committee. Upon completion of Dr. Chen's dissertation, all of the faculty members approved Dr. Chen's dissertation save Dr. Huang who was still out of the country. When Dr. Huang returned from his sabbatical in April 1980, he was given a copy of Dr. Chen's dissertation. He did not approve the dissertation nor did he return the dissertation to Dr. Chen for correction.

Dr. Chen, along with his wife and child, went to Dr. Huang's office to speak to him about the dissertation. Dr. Chen asked Dr. Huang for his copy of the dissertation which Dr. Huang refused to return to him. When Dr. Chen insisted a second time that Dr. Huang return his dissertation, an altercation ensued.

Dr. Chen testified that Dr. Huang pushed him outside the office and he became upset because his wife and child were left alone in Dr. Huang's office. In an attempt to protect his wife and child, he kicked Dr. Huang.

Dr. Huang testified that he did have an argument with Dr. Chen about his dissertation but denied shoving Dr. Chen out of his office. He also testified that when he tried to close the door to his office, Dr. Chen kicked him on the legs. Dr. Huang denied the presence of Dr. Chen's wife and child in his office. According to Dr. Huang, no blows were exchanged during the altercation.

In a memorandum dated 26 May 1980, a committee consisting of Dr. Dickens, Dr. Humphries, Dr. Wiser and Dr. Humenik investigated the matter and determined that "both parties bear responsibility for inappropriate and regrettable personal and professional actions." No other action was taken in reprimand for Dr. Huang's actions.

Altercation with Professor Hassler

Dr. Hassler was the head of the Biological and Agricultural Engineering (BAE) Department and Dr. Huang's supervisor. Prior to leaving on a sabbatical, Dr. Huang submitted two technical papers in lieu of a final report due on a project supported by the North Carolina Energy Institute (NCEI). During Dr. Huang's absence, the NCEI refused to accept the papers submitted by Dr. Huang and refused to pay NCSU the full contract price.

Upon Dr. Huang's return in April 1980, Dr. Hassler called him into his office and discussed NCEI's refusal to accept the papers Dr. Huang had submitted. Dr. Hassler also told Dr. Huang that BAE would not endorse the papers and that he would have to make corrections before they could be resubmitted to NCEI.

According to Dr. Huang, Dr. Hassler then began to accuse him of submitting false vouchers for reimbursements for travel expenses. Dr. Huang denied the charges.

Ms. Lib Nordan, Dr. Hassler's administrative secretary, testified that she heard Dr. Huang shout obscenities at Dr. Hassler and saw him assault Dr. Hassler. When Ms. Nordan heard the argument, she testified that she went into the office to try and stop it. Upon entering the office, she saw Dr. Huang standing directly over Dr. Hassler who was seated in a chair. Ms. Nordan then intervened and told Dr. Huang to stop at which time he moved away from Dr. Hassler's chair and Dr. Hassler was able to stand up. She further testified that Dr. Huang tried to get Dr. Hassler to go to the Provost's Office but Dr. Hassler refused to go. Dr. Huang placed a few calls and left the office shouting obscenities.

It is important to note that Dr. Hassler did not lodge a complaint about the incident that transpired. It was not until 1985 when the "Huang matter" was compiled that an investigation of the Hassler incident was initiated.

Altercation with Professor Dickens

Professor James William Dickens was a colleague of Dr. Huang's in the BAE Department. During January of 1985, Professor Dickens along with Dr. Bowen served on the committee responsible for assigning lab space in the North Laboratory Section of Weaver Laboratories. In December of 1984 or January of 1985, some lab space that Dr. Huang was using to store junk was assigned to another professor, Dr. Mohapatra. Dr. Mohapatra needed the space to conduct a study which involved tissue cultures.

Professor Dickens typed a memorandum to Dr. Huang which informed him of the temporary assignment and asked him to remove the supplies and equipment he had stored in the area. Professor Dickens hand delivered the memorandum to Dr. Huang, which was improper procedure, and told him about the reassignment of lab space. Dr. Huang protested the assignment and claimed that the space was University space over which Professor Dickens had no control. Professor Dickens explained that he had been given authority to assign the space by the University.

According to Professor Dickens, Dr. Huang became mad and agitated. He shoved Professor Dickens up against the open door of Dr. Huang's office and told Professor Dickens to get out of his office. Professor Dickens alleged that Dr. Huang continued to kick and shove him. Professor Dickens purportedly called to another BAE colleague who was standing in the hallway for assistance.

Dr. Suggs testified that as he walked down the hall he saw Professor Dickens being kicked on the shins by Dr. Huang. He also saw Professor Dickens push Dr. Huang.

Dr. Huang testified that he did not assault Professor Dickens; that during the incident with Professor Dickens, he asked Professor Dickens to leave his office; that after he made the request and without provocation, Professor Dickens turned around and struck him in the chest and nearly knocked him down; that Professor Dickens then called for Dr. Suggs to come as a witness while Professor Dickens tried to strike him again; that Dr. Huang caught the blow and they began kicking at each other; and that after

they kicked each other a few times, Professor Dickens left the office with Dr. Suggs.

When the BAE Department learned of the Dickens incident, an investigation ensued but the investigation was not limited in scope to the Dickens incident. Instead, the entire "Huang matter" was made the subject of a report. This report documented all incidents or altercations which had involved Dr. Huang. The report went back twelve years to discuss the Dallas Chen incident that occurred in 1973, and both the Henry Chen and Dr. Hassler incidents that occurred in 1980. After this investigation had been completed, no action was taken against Dr. Huang until three years later.

Altercation with Grace Wang

From the record, we find that at the time the incident occurred between Grace Wang and Dr. Huang, June 1988, she was not associated with the University in any capacity. As such, we find this incident should not have been a consideration in the dismissal of Dr. Huang based on misconduct in his capacity as a faculty member of the University.

The FHC in supporting their findings to dismiss Dr. Huang used incidents that either: (1) did not involve an assault by Dr. Huang; (2) were not initiated by Dr. Huang; (3) were not reported; or (4) no reprimand was made at the time of the incident. We find the evidence contained in the record did not substantiate a finding that Dr. Huang was unfit to continue as a member of the faculty at NCSU.

[3] By respondents' second assignment of error, respondents contend that the trial court erred when it held that the University acted arbitrarily or capriciously when it decided to discharge Dr. Huang. We disagree.

When an aggrieved person contends that an administrative decision is arbitrary and capricious, the court, pursuant to North Carolina General Statutes § 150B-51(6), must apply the "whole record" test. *Rector v. N.C. Sheriff's Educ. and Training Standards Comm.*, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

In reviewing the record, we find the evidence in the case *sub judice* showed the following: that NCSU did not proceed against Dr. Huang in regard to the 1973 Dallas Chen incident and 1980

Hassler and Henry Chen incidents until 1988; that in January 1985, NCSU Chancellor Bruce Poulton requested an investigation of the "Huang matter" after an altercation between Dr. Dickens and Dr. Huang; that this investigation apprised Chancellor Poulton of the Dallas Chen, Henry Chen and Dr. Hassler incidents; that even after the report was compiled, Chancellor Poulton did not initiate any discharge proceeding based upon assaultive conduct until three and one-half years later; that Chancellor Poulton attempted to have Dr. Huang transferred after the Huang matter was investigated, but Dr. Huang resisted and filed a grievance with the Faculty Mediation Committee (FMC); that the FMC found that Dr. Huang's transfer was in the best interest of both Dr. Huang and BAE, and that Dr. Huang was praised as an innovative researcher and a proven effective teacher with great potential to contribute to NCSU; that FMC's report mentioned nothing about Dr. Huang's assaultive misconduct; that Dr. Huang was subsequently transferred to another department, but his performance in that department was found inadequate; that on 7 April 1988, Dr. Huang was notified that dismissal proceedings had been initiated against him for neglect of duty; that Dr. Huang requested a dismissal hearing in regard to this neglect of duty charge but NCSU never proceeded with the matter; and that on 14 July 1988, Dr. Huang was informed of Chancellor Poulton's intent to dismiss Dr. Huang on the grounds of misconduct involving the incidents that took place in 1973, 1980, and 1985.

From the evidence, we find that Dr. Huang's dismissal for misconduct was arbitrary in the sense that the University failed to indicate sound reasoning in their decision to dismiss Dr. Huang. The FHC cited the Dallas Chen incident in 1973, the Dr. Hassler incident in 1980, the Henry Chen incident in 1980 and the Dickens incident in 1985, as the reason Dr. Huang was dismissed for misconduct. However, the record indicates that in 1986 all of the incidents were thoroughly investigated by the FMC and no proceeding to dismiss Dr. Huang for misconduct was initiated. Instead, the FMC transferred Dr. Huang to another department. On 7 April 1988, Dr. Huang was informed that NCSU intended to discharge him for neglect of duty. Subsequently, the dismissal proceeding for neglect of duty was dropped without explanation. Then, in July of 1988, Chancellor Poulton informed Dr. Huang that he was being dismissed because of misconduct.

The length of time between the misconduct complained of and the disciplinary action taken in connection with that misconduct, respectively fifteen, eight and three years later, is indicative of the lack of sound judgment used by NCSU and UNC in their attempt to rid themselves of Dr. Huang. Accordingly, we find NCSU's and UNC's proceeding against Dr. Huang for assaultive behavior from 1973 through 1985 was patently in bad faith, arbitrary and capricious. "Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'failed to indicate' any 'courses of reasoning and exercise of judgment.' " *Id.* at 532, 406 S.E.2d at 617.

[4] By respondents' last assignment of error, respondents contend that the trial court erred when it found that the respondents had violated Dr. Huang's due process rights. We disagree.

> The assertion of a violation of substantive due process rests on the alleged want of a rational basis for the conclusions reached by the committee and the Board of visitors. It is conceded that the scope of judicial review in this instance extends only to determining whether there is substantial evidence to sustain those administrative conclusions.

Kowtoniuk v. Quarles, 528 F.2d 1161, 1165 (4th Cir. 1975).

As we have already made a determination that the board's findings were not supported by the evidence and were arbitrary and capricious, we find the substantive due process rights of Dr. Huang were violated. Accordingly, the trial court properly concluded that the respondents violated Dr. Huang's substantive due process rights.

The decision of the trial court is affirmed.

Chief Judge ARNOLD concurs.

Judge ORR dissents by separate opinion.

Judge ORR dissenting.

I respectfully dissent based upon our limited scope of review in this action which is governed by Chapter 150B of the North Carolina General Statutes.

Under N.C. Gen. Stat. § 150B-51(b), a court may "reverse or modify [an] agency's decision if the substantial rights of the petitioners may have been prejudiced." Only two bases for finding petitioner's rights were prejudiced by the University's decision could apply to the case *sub judice*: (1) that the University's decision was unsupported by substantial evidence in view of the entire record as submitted, or (2) that the University's decision was arbitrary or capricious.

As recognized by the majority, "[a] review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied, writ of supersedeas denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). "The 'whole record' test does not[, however,] allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, ..." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted). "We merely 'determine whether an administrative decision has a rational basis in the evidence.' " *North Carolina Dep't of Correction v. Hodge*, 99 N.C. App. 602, 610, 394 S.E.2d 285, 289 (1990) (citation omitted).

Further, as this Court stated in *Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989):

> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," . . . or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

In my opinion, the evidence before us does not indicate a "lack of fair and careful consideration" or "bad faith" on the part of the University. In addition, I believe a careful review of the record shows that the University's decision is supported by substantial evidence. It is not the duty of this Court to reverse the University's decision and replace its judgment, even though the University could justifiably have reached a different result. This matter is not before us *de novo*, and we are bound by our limited scope of review.

In addition, I do not agree with the majority in its decision that the University should not have considered the incident which occurred between Dr. Huang and Grace Wang in its decision to dismiss Dr. Huang. Under Chapter 126 of the North Carolina General Statutes, "[a] permanent State employee may be dismissed for (1) inadequate performance of duties or, (2) personal conduct detrimental to State service." *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 343, 342 S.E.2d 914, 918, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

In the "incident" between Dr. Huang and Grace Wang, Dr. Huang was accused of assaulting Grace Wang. I believe that the acts Dr. Huang was accused of in this assault would constitute personal conduct that could be detrimental to his service as a faculty member of the University. Accordingly, I do not agree with the majority's holding that the University should not have considered this assault as evidence in support of Dr. Huang's dismissal and would reverse the trial court's decision and affirm the University's action.

STATE OF NORTH CAROLINA v. SOLOMON DUKES

No. 9212SC518

(Filed 6 July 1993)

1. Evidence and Witnesses § 1239 (NCI4th)— murder—statement by defendant in his home—custodial interrogation

A murder defendant was in custody when he made a statement to an officer where defendant was escorted to his trailer by an officer, who remained with him for some time; another officer arrived and was instructed in defendant's presence to stay in the trailer with defendant and not to permit defendant to change or wash his clothing; and that officer remained in the trailer with defendant and accompanied defendant to the bathroom. A reasonable person, knowing that his wife had just been killed, kept under constant police supervision, told not to wash or change his clothing, and never

informed that he was free to leave his own home would not feel free to go and would feel compelled to stay.

Am Jur 2d, Criminal Law § 788; Evidence § 554.

2. **Evidence and Witnesses § 1235 (NCI4th)— murder—inquiry into what happened—interrogation**

A murder defendant was subject to interrogation where an officer was told to stay with defendant and ensure that defendant did not wash or change his clothes and the officer asked defendant if he knew what was happening. Although the question may not knowingly have been designed to elicit an incriminating response from defendant, the facts indicate that the officer had enough information to at least question whether defendant was a suspect in a crime and, under these circumstances, it cannot be said that the officer should not have known that his question was reasonably likely to elicit an incriminating response from defendant.

Am Jur 2d, Criminal Law §§ 788, 793; Evidence §§ 555, 614.

3. **Evidence and Witnesses § 732 (NCI4th)— murder—defendant's statement—not inculpatory—admission not prejudicial**

A murder defendant's reply to an officer's question was not inculpatory where the officer asked defendant if he knew what was happening and defendant replied that his wife had been hurt and was being taken to the hospital and that the police believed he was responsible. This statement merely represented defendant's opinion as to the suspicions of the police and was not an admission of guilt or a statement from which guilt would necessarily be inferred. Moreover, even if the trial court erred in admitting the statement, other competent evidence pointed overwhelmingly to his culpability.

Am Jur 2d, Appeal and Error §§ 797, 798, 803.

4. **Evidence and Witnesses § 1298 (NCI4th)— murder—statement of defendant—waiver of rights—defendant distraught**

A murder defendant's statement to an investigator at a law enforcement center was voluntary where defendant was calm when arrested at 7:27 a.m.; he was placed in an interview room at 7:49 a.m. after being transported to the Law Enforcement Center; he had his head down and was crying and calling his baby's name; an investigator observed defendant lift his

head and say "I stabbed her" while the investigator was advising defendant of his rights; defendant then asked for a cigarette; there were no tears at that time; the investigator stepped out to get matches; the investigator tried to calm defendant at 7:57 a.m. but defendant did not respond; defendant was observed to be asleep at 8:06; the investigator awoke defendant at 8:53 a.m.; defendant was allowed to use the restroom; defendant made a statement at 10:11 a.m.; and the investigator was of the opinion that defendant was playing on his sympathy. The evidence showed that the officer had not asked defendant any questions and was trying to read defendant his rights, as well as calm him down, when defendant confessed.

Am Jur 2d, Evidence § 575.

5. Evidence and Witnesses § 2093 (NCI4th)— murder—testimony that defendant feigning distress—admissible

The trial judge did not err in a murder prosecution by allowing the State's witnesses to testify that defendant was faking his distress at the scene of his wife's death, in route to the Law Enforcement Center, or at the Law Enforcement Center where each of the witnesses was required to provide foundation testimony which showed that their opinion was based upon their own perception of the defendant's behavior. Furthermore, the testimony was helpful to the jury in characterizing the defendant's behavior immediately following the death of his wife.

Am Jur 2d, Expert and Opinion Evidence §§ 359, 360.

Appeal by defendant from judgment entered 22 November 1991 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 27 April 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jeffrey P. Gray, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Teresa A. McHugh and Janine M. Crawley, for defendant-appellant.

WYNN, Judge.

Defendant, Solomon Dukes, was indicted on 26 March 1990 for second degree murder. Defendant made two pretrial motions

to suppress inculpatory statements made to police officers. Both motions were denied. The case was tried to a jury and the jury returned a verdict of guilty. The trial judge entered judgment on the verdict and sentenced defendant to fifteen years imprisonment.

The State presented the following pertinent evidence at the pretrial hearing on defendant's motions to suppress. Agent Felton Moore, Jr. of the City/County Bureau of Narcotics testified that on 14 January 1990 at around 4:30 a.m., he was dispatched to the Parkwood Circle Trailer Park in Fayetteville, North Carolina to investigate a death. Upon arrival, Agent Moore saw defendant, whom he recognized from previous encounters. Defendant was pacing in circles outside Audrea Dukes' trailer, holding an infant very tightly, and screaming "Oh my baby, Oh my baby." In addition, defendant kept bumping into a parked car and falling to the ground. Several officers were attempting to calm defendant and take the baby from him. Both defendant and the baby had blood on their clothing. After being briefed by Sergeant Robert Belcher, Agent Moore went back outside and spoke to defendant. Defendant recognized Agent Moore and stated that he wanted to go home. Agent Moore accompanied defendant and the infant to defendant's trailer. Agent Moore remained at the defendant's trailer for some period of time during which defendant made a telephone call. Agent Moore asked defendant what happened and defendant stated that he and his friends had just returned from Raeford; that he went to check on his wife and baby; that the lights were off in her trailer when he opened the door; that he heard his baby crying and turned on the lights; and that he found his wife lying on the floor and the baby sitting on the bed. Agent Moore called another officer to come to the trailer and watch the defendant so that Moore could return to the crime scene. Officer James Thompson arrived and Agent Moore told him not to let the defendant leave the trailer and not to allow defendant to wash nor change his, or the baby's clothing.

Officer Thompson testified that after arriving at the victim's trailer, he was immediately instructed to report to Agent Moore at defendant's trailer. He was instructed by Moore to guard the defendant; not to allow defendant to leave the trailer; not to allow any other person to enter the trailer; and not to allow the defendant to wash or change clothes. Officer Thompson stated that defendant moaned and rocked the baby but never cried. Defendant made several telephone calls after obtaining permission to do so from

Officer Thompson. Officer Thompson accompanied defendant to the bathroom to ensure that defendant did not wash or change clothes. Officer Thompson testified that he asked defendant if he knew what was going on and defendant responded that his "girlfriend had been hurt and she was going to the hospital. They were taking the baby from him . . . and that the police [thought] he did it." At that time, Officer Thompson did not know what was going on and did not know that the defendant was a suspect.

In addition to the evidence presented at the suppression hearing, the State's evidence presented at trial tended to show the following. Between 2:30 and 3:00 a.m. on the morning of 14 January 1990, defendant, Marcus Virgil and Audrey Sanders returned from a night club in Raeford, North Carolina to defendant's mobile home located in Parkwood Circle Trailer Park. Defendant told Virgil and Sanders that he was going to his wife's trailer, located one street over, to borrow a heater and to get his wife. According to Audrey Sanders' testimony, defendant returned approximately fifteen to twenty minutes later carrying a baby and yelling, "somebody just stabbed my wife." Defendant and the baby had blood on them. Ms. Sanders testified that the defendant was "crying and carrying on," but that she did not see tears. In her opinion, the defendant's actions in falling down and crying were "putting on."

Sergeant Michael Koszulinski of the Fayetteville Police Department was the first officer dispatched to Audrea Dukes' trailer. When he arrived, rescue squad medics were present and defendant was coming down the front steps of Ms. Dukes' trailer carrying a baby. Defendant stated that "she'd been stabbed" and started screaming that "it was his child." Sergeant Koszulinski testified that he knew the defendant because he had been called to Ms. Dukes' trailer four or five times over the past four to five months in reference to domestic disputes involving defendant and Ms. Dukes. Defendant began moaning or howling; fell against a car with the child in his arms and then lowered himself slowly to the ground and rolled over. Fearing for the child's safety, Sergeant Koszulinski and Sergeant Belcher forcibly took the child from defendant and gave him to Deborah Davis. Sergeant Koszulinski stated that in his opinion the defendant's moaning, howling and falling was an act to draw the officers' attention to him. Sergeant Belcher stated that in his opinion, the actions of defendant moaning, bending his knees and stooping to the ground were attempts by defendant to fake passing out.

Deborah Davis, a neighbor and friend of the victim, testified that on the night in question, she went to Audrea Dukes' trailer between 1:00 and 1:30 a.m. to ask if the defendant would drive her and her daughter to the hospital. Audrea Dukes told Davis that the defendant was not there, but that he was at his own trailer playing cards. Ms. Davis watched Audrea Dukes' son while Audrea went to defendant's trailer to ask him to take Ms. Davis and her daughter to the hospital. According to Ms. Davis, Audrea Dukes returned from defendant's trailer "disappointed and hurt" that the defendant was not at home. Ms. Davis' boyfriend returned at that point and took her and her child to the hospital.

Ms. Davis and her boyfriend returned from the hospital between 3:30 and 4:00 a.m. Ms. Davis saw defendant's car parked at his trailer and Audrea Dukes' lights were not on. Ms. Davis testified that she put her child to bed and she and her boyfriend went to bed. About ten minutes later, she heard Audrea Dukes scream, "Somebody help me." Ms. Davis went out the front door of her trailer and saw defendant coming off the front steps of Audrea Dukes' trailer, carrying his and Audrea Dukes' infant son. She met defendant in the middle of the street and asked what was wrong. Defendant did not reply. Ms. Davis continued to Audrea Dukes' trailer, looked in the open front door, and saw Ms. Dukes lying on her back on the floor. The defendant told Ms. Davis ". . . don't touch her. Don't mess with her." Ms. Davis and her boyfriend went to a nearby convenience store and called an ambulance. Upon returning to Audrea Dukes' trailer, they saw defendant kiss the victim and apologize for "doing it." Ms. Davis stated that she thought the defendant was "faking" his behavior by hollering, moaning, staggering and pretending to cry.

Defendant was arrested at his trailer and brought to the Law Enforcement Center for questioning. He was placed in an interview room with Investigator Jeffrey Stafford of the Fayetteville Police Department, who began reading defendant his *Miranda* rights from a standard printed form. While in the interview room with defendant, Investigator Stafford observed the defendant crying and carrying on. Investigator Stafford attempted twice to read the defendant his *Miranda* rights but stopped part way through both times to calm defendant. During the second attempt to read defendant his rights, the defendant raised his head and stuttered "I . . . I stabbed her." The defendant then requested a cigarette. He was given a cigarette and allowed to take a brief nap. Approximately one

hour later, Investigator Stafford read defendant his *Miranda* rights and the defendant initialed a waiver form. After signing the waiver, defendant told Investigator Stafford that he came home from Raeford; went to Audrea Dukes' trailer; knocked on the door and no one answered; he opened the door; turned on the lights and found her on the floor.

The victim died of a single stab wound to the left chest area. The wound was consistent with the type and shape of knife found with blood on it near the kitchen sink in the victim's trailer.

Defendant testified in his own behalf. According to defendant's testimony, on the night of 13 January 1990, he got off of work early (approximately 10:00 p.m.). He and a co-worker, Marcus Virgil, went to his trailer. Defendant went to his wife's, Audrea Dukes' trailer to borrow a heater. Ms. Dukes wasn't feeling well and asked defendant to take their child to his house. He told her that he would warm up his house and then come back and get their baby. He stated further that he was going to stay at home that evening and play cards. Instead, he and Virgil went to a nightclub in Raeford, North Carolina. Virgil met Audrey Sanders at the club and she returned with them to defendant's trailer at approximately 3:00 a.m. Defendant left Virgil and Sanders at his trailer and drove to Audrea Dukes' trailer. When he arrived at Ms. Dukes' trailer he found his wife angry for his failure to return for the child. He went inside and said that he was going to bed. According to defendant's testimony, he sat down on the bed and began to remove his shoes. When he looked up, Audrea Dukes was standing before him with a knife in her hand. They began "tussling" over the knife and he was tossed onto the bed injuring his back. When he looked up again, Audrea Dukes had been stabbed in the heart. Defendant called his wife's name and she responded, "[I]t will be alright—just get help." She ran out of the room yelling, "Somebody help me." Defendant ran to his car and opened the passenger's side door, then returned to the trailer to help Ms. Dukes to the car, but she had collapsed and he could not lift her. He grabbed the baby and ran to the neighbor's trailer for help. At some point, defendant picked up the knife, wiped it with a washcloth and tossed it into the sink. Defendant returned to the trailer, kissed his wife and said that he was "sorry," "meaning that he was sorry for going to the nightclub."

Defendant moved to dismiss the charges at the close of the State's evidence and at the close of all of the evidence. Both motions were denied. From denial of defendant's motions to suppress, entry of judgment on the verdict and sentencing, defendant appeals.

I.

[1] Defendant-appellant first argues that the trial court erred by denying his motion to suppress the statement to Officer Thompson. Specifically, defendant contends that Officer Thompson's inquiry as to what had happened, amounted to custodial interrogation and as a result, the defendant should have been advised of his *Miranda* rights prior to that inquiry. Defendant contends that admission of his response that his girlfriend had been hurt, that they were taking her to the hospital and that the police believed that he was responsible, was prejudicial because 1) it was directly inculpatory and 2) it played into the State's theory that defendant was "feigning" his physical and emotional incapacity during the hours following his wife's death.

The Fifth Amendment to the United States Constitution requires a criminal suspect to be informed of his rights prior to a custodial interrogation by law enforcement officers. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). The test for whether a person is "in custody" for *Miranda* purposes is "whether a reasonable person in the suspect's position would feel free to leave or compelled to stay." *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24-25 (1992) (citations omitted). This test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances. *Id.*

In this case, the following facts are undisputed: Defendant was escorted to his trailer by Officer Moore and Officer Moore remained with him for some period of time. When Officer Thompson arrived, Officer Moore instructed Officer Thompson, in the defendant's presence, to stay in the trailer with defendant, and not to permit defendant to change or wash his clothing. In accordance with these instructions, Officer Thompson remained in the trailer with defendant and accompanied defendant to the bathroom.

We believe that a reasonable person, knowing that his wife had just been killed, kept under constant police supervision, told not to wash or change his clothing and never informed that he was free to leave albeit his own home, would not feel free to

get up and go. On the contrary, a reasonable person in defendant's position would feel compelled to stay. We hold therefore that the defendant was "in custody" when he made the statement at issue to Officer Thompson.

[2] The next issue then is whether Officer Thompson's inquiry, "do you know what happened?" amounted to interrogation. The State contends that it did not. "Interrogation" for the purpose of *Miranda* includes "not only express questioning" of a suspect by police, but also "words or actions on the part of the police . . . that the police should [know] are reasonably likely to elicit an incriminating response from the suspect." *State v. Smith*, 317 N.C. 100, 106-07, 343 S.E.2d 518, 521-22 (1986) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed.2d 297, 308 (1980)); *State v. Nations*, 319 N.C. 329, 330, 354 S.E.2d 516, 517 (1987).

In this case, Officer Thompson was told to stay with the defendant and ensure that defendant did not wash or change his clothes. While with defendant, Officer Thompson asked defendant if he knew what was happening. The State argues that Officer Thompson did not know any details of the incident under investigation and did not know that the defendant was a suspect. Officer Thompson's question may not have been knowingly designed to elicit an incriminating response from defendant, however, the facts indicate that Officer Thompson did have enough information to at least question whether the defendant was a suspect in a crime. Under these circumstances, we cannot say that Officer Thompson should not have known that his question was "reasonably likely to elicit an incriminating response" from defendant and therefore assume that defendant was in fact subject to interrogation.

[3] Having determined that defendant was in custody and subject to interrogation by Officer Thompson, we next address the issue of whether defendant's reply to Officer Thompson amounted to an inculpatory statement which should have been suppressed by the trial court. When Officer Thompson asked the defendant what had happened, defendant responded that his wife had been hurt, they were taking her to the hospital and the police believed that defendant was responsible. This statement merely represented defendant's opinion as to the suspicions of the police. While this statement may have solidified any prior suspicions that Officer Thompson had regarding the fact that the police believed defendant to be a suspect in a crime, defendant's statement was not an admis-

sion of guilt nor a statement from which guilt would necessarily be inferred. As a result, the statement was not inculpatory. *See State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991) (where defendant's statement merely gave differing versions of his whereabouts and activities on the day in question, it was not inculpatory).

Even assuming *arguendo* that the statement was inculpatory and thereby admitted in violation of defendant's rights under the United States Constitution, we are persuaded that the statement "was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless . . . beyond a reasonable doubt." *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 288 (1987) (quoting *State v. Gardner*, 315 N.C. 444, 449, 340 S.E.2d 701, 706 (1986)). *See* N.C.G.S. § 15A-1443(b). In addition to largely circumstantial evidence which was ample to show that the defendant had the motive, opportunity and means to kill his wife, the State presented evidence of defendant's own confession which we discuss below. Thus, even if the trial court erred in admitting evidence of defendant's statement that his girlfriend had been hurt, they were taking her to the hospital and the police believed that he did it, other competent evidence pointed overwhelmingly to his culpability and the admission of this statement "did not contribute to his conviction and therefore . . . was harmless . . . beyond a reasonable doubt." *Hooper*, 318 N.C. at 682, 351 S.E.2d at 288.

II.

[4] Defendant next assigns as error the trial court's denial of his motion to suppress his inculpatory statement to Investigator Stafford at the Law Enforcement Center. Defendant contends that he was too distraught to waive his *Miranda* rights and that Investigator Stafford therefore should have terminated the interrogation.

A statement given freely and voluntarily without any compelling influences is not barred by the Fifth Amendment and is completely admissible. *Miranda*, 384 U.S. 436, 16 L.Ed.2d 694. The test of admissibility for any inculpatory statement given subsequent to *Miranda* warnings is whether the statement was in fact voluntarily and understandingly made. *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). "Voluntariness" is determined by looking at the totality of the circumstances. *Id.*

Based upon evidence submitted at the suppression hearing, the trial court made the following pertinent finding of fact.

> 9. . . . that at 7:27 a.m. the Defendant was arrested; that at that time the Defendant was very calm, not emotional, and very cooperative; that the Defendant after being transported to the Law Enforcement Center was placed in an interview room at 7:49 a.m.; that the Defendant had his head down, crying, calling his baby's name and continued to cry and carry on; that Investigator Stafford, during the advising of the Defendant of his rights at 7:54 a.m., observed the Defendant lift his head up and say, "I stabbed her" then asked for a cigarette; that no tears were observed at that time; that at 7:54 a.m. Investigator Stafford stepped out to get matches and stepped back in at 7:55 a.m.; that at 7:57 a.m. Investigator Stafford tried to calm the Defendant but he did not respond; at 8:06 a.m. the Defendant was observed to be asleep; that at 8:33 a.m. the Defendant was observed to be asleep; that at 8:53 a.m. Stafford awoke the Defendant and the Defendant was allowed to use the restroom; . . . that thereafter at 10:11 a.m. the Defendant made a statement to Investigator Stafford; that in the opinion of Investigator Stafford, the Defendant's behavior was playing on his sympathy.

The trial court's findings of fact concerning the admissibility of the confession are conclusive and binding on appeal when supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985). Our review of the record indicates that these findings were supported by competent evidence. Those findings in turn support the trial court's conclusion that the defendant's confession was "voluntary and not a product of custodial interrogation." The evidence shows that Officer Moore had not asked defendant any questions. Rather, Moore was attempting to read defendant his *Miranda* rights, as well as calm him down. While doing so, the defendant confessed. We agree and concur in the trial court's conclusion that defendant's statement was voluntary and find that the admission of the defendant's confession into evidence was free of prejudicial error.

III.

[5] Defendant's final argument contends that the trial court erred by allowing the State's witnesses to testify to their opinions that the defendant was "feigning" mental illness. Defendant made a

motion *in limine* prior to trial to prohibit law enforcement officers from stating their opinions that defendant was faking his distress either at the scene of his wife's death, in route to the Law Enforcement Center, or at the Law Enforcement Center. The trial court denied the motion and permitted the witnesses to give opinion testimony so long as their opinions were based on their observations of defendant's behavior and not on interpretations of defendant's statements.

Pursuant to the North Carolina Rules of Evidence, a lay witness may give testimony in the form of an opinion if that opinion is "a) rationally based on the perception of the witness and b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. If based on first-hand knowledge and helpful to the jury, this rule permits lay opinions regarding a defendant's insanity, *State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987); *State v. Davis*, 321 N.C. 52, 361 S.E.2d 724 (1987); intoxication, *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988); and common emotions. *See, e.g., State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984) (lay witness permitted to testify that tone of voice indicated victim was scared).

In this case, each of the witnesses were required to provide foundation testimony which showed that their opinion was based upon their own perception of the defendant's behavior. In addition, where the testimony was helpful to the jury in characterizing the defendant's behavior immediately following the death of his wife, it was not error for the trial judge to permit the testimony.

For the foregoing reasons, the defendant received a fair trial free of prejudicial error, and we find

No Error.

Judges WELLS and GREENE concur.

VICTOR HAMILTON MESSICK v. CATAWBA COUNTY, NORTH CAROLINA; DAVID HUFFMAN, INDIVIDUALLY AND AS SHERIFF OF CATAWBA COUNTY; LAVERNE BOLICK, INDIVIDUALLY AND AS AN OFFICER OF THE CATAWBA COUNTY SHERIFF'S DEPARTMENT; K. B. CROUSE, INDIVIDUALLY AND AS AN OFFICER IN THE CATAWBA COUNTY SHERIFF'S DEPARTMENT; RICHARD HARWELL, ACTING AS CHAIRMAN OF THE BOARD OF COMMISSIONERS OF CATAWBA COUNTY; ROBERT HIBBITTS, AS COMMISSIONER OF CATAWBA COUNTY; GRETCHEN PEED, AS COMMISSIONER OF CATAWBA COUNTY; EDDIE HUFFMAN, AS COMMISSIONER OF CATAWBA COUNTY; DAVID L. STEWART, AS COMMISSIONER OF CATAWBA COUNTY; THOMAS LUNDY, AS COMMISSIONER OF CATAWBA COUNTY

No. 9225SC597

(Filed 6 July 1993)

1. **Constitutional Law § 86 (NCI4th)— § 1983 claim—day care owner arrested for sexual abuse—action against county officials in official capacities**

Summary judgment was appropriate on a claim under 42 U.S.C. § 1983 against Catawba County, its Commissioners, the sheriff, and law enforcement officers in their official capacities where plaintiff was arrested for sexually abusing children at his day care centers, a jury returned a not guilty verdict on all counts at the first trial and the district attorney's office dropped the remaining charges, and plaintiff filed a complaint including a § 1983 claim for money damages. Plaintiff is not entitled to relief pursuant to § 1983 against the County, the Commissioners, or the sheriff and the officers sued in their official capacity because he sought monetary damages.

Am Jur 2d, Civil Rights §§ 3, 4, 16, 19.

2. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—plaintiff arrested for sexual abuse of children—County and Commissioners immune**

Summary judgment was properly granted for defendant Catawba County and its Commissioners in their official capacities on a claim for intentional infliction of emotional distress arising from plaintiff's arrest for sexually abusing children at his day care centers. Police services are ordinarily considered governmental functions, the performance of which does not subject a municipality to liability and plaintiff does not contend and the record does not indicate that Catawba County has purchased liability insurance or otherwise consented to suit against it. Additionally, when public officials are sued in their official

capacities, the action is against the state for purposes of applying the sovereign immunity doctrine.

Am Jur 2d, Constitutional Law § 282; Fright, Shock, and Mental Disturbance §§ 1, 2, 4.

3. **Sheriffs and Constables § 4 (NCI4th)— plaintiff arrested for sexually abusing child—sheriff not immune—surety not joined as party**

A sheriff and other officers sued in their official capacities after plaintiff was arrested, tried, and acquitted for sexually molesting children in his day care centers were not immune because the statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity where the surety is joined as a party to the action. The fact that the surety was not named as a party in this action would be corrected easily by amendment to the complaint; however, such a correction is not necessary here because summary judgment for the officers was properly granted on the facts.

Am Jur 2d, Sheriffs, Police, and Constables §§ 158, 159, 181-183, 185, 187, 188.

4. **Sheriffs and Constables § 4 (NCI3d)— plaintiff arrested for sexually abusing children—negligence action against sheriff and officers—summary judgment for defendants**

The trial court properly granted summary judgment for defendants in their official capacities where plaintiff was arrested, tried, and acquitted for sexually molesting children in his day care centers and brought an action which included a claim for negligent investigation. The evidence in depositions demonstrates that the officers proceeded with the arrest as they were trained to do and were in no way negligent in carrying out their duties.

Am Jur 2d, Sheriffs, Police, and Constables § 90.

5. **Malicious Prosecution § 19 (NCI4th)— arrest for sexually abusing children—probable cause—summary judgment for defendants**

The trial court properly granted summary judgment for defendant officers in their official capacities on a malicious prosecution claim where plaintiff was arrested, tried, and ac-

quitted for sexually abusing children at his day care centers and, based upon facts illustrated by the deposition testimony, probable cause did exist to arrest plaintiff.

Am Jur 2d, Malicious Prosecution §§ 159, 161, 169.

6. Trespass § 2 (NCI3d)— arrest for sexually abusing children— intentional infliction of emotional distress—summary judgment for defendants

The trial court properly granted summary judgment for defendant officers in their official capacities on an intentional infliction of emotional distress claim where plaintiff was arrested, tried, and acquitted for sexually abusing children in his day care centers. Nothing in the deposition testimony indicates that there was anything extreme or outrageous about the officers' conduct during the course of the investigation, nor is there anything to suggest that the officers intended to inflict severe emotional distress upon plaintiff.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 1, 2, 4.

7. Constitutional Law § 86 (NCI4th)— § 1983 claim—arrest for sexually abusing children—claims against sheriff and officers in individual capacities—summary judgment for defendants

The trial court properly granted summary judgment for a sheriff and officers in their individual capacities on a § 1983 claim arising from plaintiff's arrest for sexually abusing children in his day care centers where plaintiff contended that the sheriff's department notifies the media when a well known citizen is arrested, but the deposition testimony of the officers illustrates that while both of them were aware that the news media used police scanners to monitor the activity of the sheriff's department, as well as the activity of such other entities as the rescue squad, neither officer was aware of anyone directly contacting the media to be present when plaintiff was brought to the police station on the day of his arrest. Plaintiff's unsupported allegations to the contrary cannot work to create a genuine issue of material fact as to the policy, practice and custom in the Catawba County Sheriff's Office.

Am Jur 2d, Civil Rights §§ 3, 4, 16, 20.

8. Sheriffs and Constables § 4 (NCI3d)— individual capacity of sheriff—public officer—immunity from suit

A sheriff was immune from suit in his individual capacity on plaintiff's causes of action for negligence and negligent infliction of emotional distress arising from plaintiff's arrest for sexually abusing children in his day care centers. Public officers are immune from suit for mere negligence and our case law recognizes the position of sheriff as being that of a public officer who exercises discretionary power in the performance of his duties.

Am Jur 2d, Sheriffs, Police, and Constables §§ 158, 159.

9. Sheriffs and Constables § 2 (NCI3d)— deputies—public officers—immune from suit in their individual capacities

The two deputies who arrested plaintiff for sexually abusing children in his day care centers were performing discretionary duties and are public officers entitled to immunity from negligence claims.

Am Jur 2d, Sheriffs, Police, and Constables §§ 158, 159.

Appeal by plaintiff from Order entered 27 February 1992 by Judge Forrest A. Ferrell in Catawba County Superior Court. Heard in the Court of Appeals 11 May 1993.

Metcalf, Vrsecky & Beal, by Christopher L. Beal, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Dewey W. Wells and Nathanael K. Pendley, for defendants-appellees.

WYNN, Judge.

On 3 June 1988, the Catawba County Sheriff's Department received information from the parents of C.M., a five-year-old child who regularly attended one of the plaintiff's seven day-care centers, regarding the possible sexual abuse of C.M. by the plaintiff. The investigation of these allegations was assigned to Detective Laverne Bolick, who had received a week of special training regarding dealing with juveniles and had recently completed a special one week Advanced Master's course in Child Sexual Abuse investigation. Later, Detective K.B. Crouse was also assigned to the investigation.

On the day the abuse was reported, Detective Bolick interviewed C.M. outside the presence of her parents using techniques learned in a Child Sexual Abuse investigation course. A second interview was conducted approximately two days later. Present at the second interview were Detectives Bolick and Crouse, the child's mother, Assistant District Attorney Jay Myer, and Mary Jane Francois, also from the District Attorney's office.

Based on the two interviews and consultations with Assistant District Attorney Jay Myer, Detectives Bolick and Crouse sought a warrant for the plaintiff's arrest. That warrant was issued by Magistrate Grace M. Killian on 28 April 1988, and on 8 June 1988 the plaintiff was arrested and charged with taking sexual liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1 and first degree sexual offense of a minor child pursuant to N.C. Gen. Stat. § 14-27.4. The news media had gained knowledge of the plaintiff's arrest before his arrival at the police station and, consequently, numerous television cameras and reporters were present when the plaintiff arrived. The plaintiff spent one night in jail before he was able to post bond.

On 12 June 1988, the Sheriff's office received information regarding D.D., a second minor child approximately three years old, who had allegedly been sexually abused by the plaintiff. D.D. was interviewed on 13 June 1988 by Judy Vaughn of the Department of Social Services in the presence of Detectives Bolick and Crouse, the child's mother, and Assistant District Attorney Jay Myer.

On 16 June 1988, a second warrant was issued for the plaintiff's arrest in connection with the second allegation of abuse charging him with taking indecent liberties with a minor pursuant to N.C. Gen. Stat. § 14-202.1, first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4, and first degree kidnapping pursuant to N.C. Gen. Stat. § 14-39.

True bills of indictment were returned by a Catawba County grand jury on 7 July 1988 against the plaintiff in connection with the C.M. case on three counts of first degree sexual abuse and one count of taking indecent liberties with a minor. That same grand jury also returned true bills of indictment charging the plaintiff in connection with the abuse of D.D.

The case involving C.M. proceeded to trial in Watauga County, where it was removed due to the degree of publicity the case

had received in Catawba County. On 15 March 1989 the jury returned a verdict of "not guilty" on all counts of sexual abuse regarding the minor child C.M. On 30 August 1989, the District Attorney's office dropped all charges against the defendant pertaining to the minor child D.D.

The plaintiff filed a Complaint against the defendants on 26 February 1991 alleging a cause of action for the violation of his civil rights under 42 U.S.C. § 1983, as well as causes of action pursuant to state law alleging malicious prosecution, negligence in investigation, negligent infliction of emotional distress, and intentional infliction of emotional distress. The defendants moved for summary judgment and, following a hearing on the motion in Catawba County Superior Court, an Order of summary judgment was entered in favor of the defendants on 21 February 1992. From that Order, the plaintiff appeals.

By his sole assignment of error, the plaintiff alleges that the trial court erred in entering summary judgment in favor of the defendants. In support of this contention the plaintiff argues that there are genuine issues of material fact with regard to both his federal and state claims. We disagree.

It is well-established that summary judgment is proper where there is no genuine issue of material fact so that one party is entitled to judgment as a matter of law. Moreover, summary judgment is appropriate if one party cannot overcome an affirmative defense which would work to bar his claim. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). The burden of establishing that there is no genuine issue of material fact lies with the movant, who can meet the burden in one of two ways: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor sufficient to surmount an affirmative defense to his claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 342 (1992) (citing, *inter alia, Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)); *see also Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) ("in order to overcome defendant's motion for summary judgment, plaintiff must have forecast sufficient evidence of all essential elements"). Once the moving party meets its burden,

the nonmovant must challenge the motion by producing a forecast of evidence illustrating that a *prima facie* case can be made out at trial. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. Where the party moving for summary judgment supports his motion "by competent evidentiary matter showing the facts to be contrary to that alleged in the pleadings," the non-moving party cannot rely on "[u]nsupported allegations in the pleadings . . . to create a genuine issue as to a material fact." *Gudger v. Transitional Furniture, Inc.*, 30 N.C. App. 387, 389, 226 S.E.2d 835, 837 (1976). *See also Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

We examine each of the plaintiff's claims below and determine that summary judgment was appropriate on all claims as against all of the defendants.

I. The Claims Against the County, the Commissioners, and the Sheriff and Officers Sued in Their Official Capacities

A. Federal Claim: 42 U.S.C. § 1983

[1] The plaintiff argues that his civil rights were violated pursuant to 42 U.S.C. § 1983 and he, therefore, is entitled to recover monetary damages from the defendants. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983 (1981). Our Supreme Court has declared, however, that "when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacity, neither a State nor its officials acting in their official capacities are 'persons' under section 1983 when the remedy sought is monetary damages." *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992). *See also Faulkenbury v. Teachers and State Employees Retirement System*, 108 N.C. App. 357, 366, 424 S.E.2d 420, 424 (1993) (when the defendants in a 1983 action are the state and its officers, they are not "persons" pursuant to the statute and cannot be sued where the remedy sought is monetary damages). Because the plaintiff in the instant case seeks monetary damages, he is not entitled to relief pursuant

to section 1983 against the County, the Commissioners, or the sheriff and the officers sued in their official capacity.

B. The State Claims: Negligence, Negligent Infliction of Emotional Distress, Malicious Prosecution, and Intentional Infliction of Emotional Distress

[2] As a general rule, the doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity. *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143-44 (1993); *EEE-ZZZ Lay Drain Co. v. North Carolina Dep't Hum. Res.*, 108 N.C. App. 24, 27, 422 S.E.2d 338, 340 (1992); *Robinson v. Nash County*, 43 N.C. App. 33, 35, 257 S.E.2d 679, 680 (1979). This doctrine applies where the entity sued is being sued for the performance of a governmental, rather than a proprietary, function. *Robinson*, 43 N.C. App. at 35, 257 S.E.2d at 680. It is inapplicable, however, where the state has consented to suit or has waived its immunity through the purchase of liability insurance. *EEE-ZZZ Lay Drain*, 108 N.C. App. at 27, 422 S.E.2d at 340. Absent consent or waiver, the immunity provided by the doctrine is absolute and unqualified. *See* 72 Am. Jur. 2d *States, Territories and Dependencies* § 100 (1974) (scope of immunity generally).

Police services are ordinarily considered governmental functions, the performance of which does not subject a municipality to liability. *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *appeal after remand*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. rev. denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). Moreover plaintiff does not contend, nor does anything in the record indicate, that Catawba County has purchased liability insurance or otherwise consented to suit against it. Therefore, the plaintiff's action against the county is barred by governmental immunity. Additionally, when public officials are sued in their official capacities, "the action is one against the state for the purposes of applying the doctrine of sovereign immunity." *Whitaker*, 109 N.C. App. at 381, 427 S.E.2d at 143-44 (citing *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)). Clearly, the Commissioners, as sued in their official capacities, are immune from the plaintiff's suit. Summary judgment, thus, was proper with respect to the County and the Commissioners.

[3] Governmental immunity, however, does not preclude an action against the sheriff and the officers sued in their official capacities. The legislature, to whom the courts of this state defer in determining when a state or its agents may be sued, *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993), has provided that a suit may be maintained against a sheriff and other officers.

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State, without any assignment thereof . . . .

N.C. Gen. Stat. § 58-76-5 (1991). The statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity, but only where the surety is joined as a party to the action. (*See Slade*, 110 N.C. App. at 429-30, 429 S.E.2d at 748 (Greene, J., concurring).) The fact that the surety is not named as a party in the present action, however, is easily corrected by amendment to the complaint. Such a correction, however, is not necessary in the present case because we find that, even if the sheriff and the officers are not entitled to governmental immunity, summary judgment on the state law claims in their favor is still proper.

[4] The depositions submitted by the defendants in support of their summary judgment motion convey the course of events surrounding the investigation of the charges and the ultimate arrest of Mr. Messick from the point of view of the two officers who were present throughout the process. Their testimony indicates that they interviewed the children involved, that Detective Bolick had taken courses regarding interviewing children, and that they had consulted with people in the District Attorney's office, reinterviewed C.M. in the presence of an assistant district attorney, and only then sought a warrant for Mr. Messick's arrest. The evidence in the depositions demonstrates that the officers proceeded with the arrest as they were trained to do and were in no way negligent in carrying out their duties. The plaintiff has presented no forecast of evidence to the contrary, and cannot rely on the unverified allegations contained in his complaint alleging that Detective Bolick was not properly trained and that the officers conducted an inadequate investigation.

[5] Likewise, the plaintiff has presented no forecast of evidence that the officers acted with malice and without probable cause to arrest the plaintiff and, therefore, summary judgment was proper on the charge of malicious prosecution. In order to prevail on a charge of malicious prosecution, "the plaintiff must show: 1) that the defendant initiated earlier proceedings; 2) that he did so maliciously and without probable cause; and 3) that the plaintiff prevailed in the earlier proceedings." *Fowler v. Valencourt*, 108 N.C. App. 106, 111, 423 S.E.2d 785, 788 (1992), *disc. rev. allowed*, 333 N.C. 344, 426 S.E.2d 705 (1993). The first and third elements are unquestionably present, and, because malice is inferred from the lack of probable cause, the only issue which must be resolved in terms of the summary judgment standard is probable cause. *See id.* In causes of action for malicious prosecution, probable cause is determined by examining whether the facts and circumstances known to the defendants are such that they would induce a reasonable man to commence prosecution. *Fowler*, 108 N.C. App. at 112, 423 S.E.2d at 788. We have examined the deposition testimony of the two officers and determine that, based on the facts illustrated by their testimony, probable cause did exist to arrest Mr. Messick. Because the plaintiff has presented no forecast of evidence to the contrary, summary judgment on the malicious prosecution claim was proper.

[6] Finally, with respect to the claim for intentional infliction of emotional distress, the plaintiff has also failed to present a sufficient forecast of evidence to illustrate the necessary elements. The three elements constituting intentional infliction of emotional distress are "1) extreme and outrageous conduct by the defendant, 2) which is intended to and does in fact cause 3) severe emotional distress." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). Nothing in the deposition testimony indicates that there was anything extreme or outrageous about the officers' conduct during the course of the investigation, nor is there anything to suggest that the officers intended to inflict severe emotional distress upon the plaintiff.

The plaintiff having failed to present a forecast of the evidence with respect to the elements of the state law claims sufficient to make out a *prima facie* case for trial, summary judgment was properly granted in favor of the defendants.

II. Claims Against the Sheriff and the Officers Sued in Their Individual Capacities

A. Federal Claim: 42 U.S.C. § 1983

[7] Without addressing whether the sheriff and the officers, in their individual capacities, are entitled to any immunity from a suit based on 42 U.S.C. § 1983, we find that summary judgment on that claim was properly granted in their favor. The plaintiff's theory in bringing this federal claim appears to be that the sheriff's department practices a custom of notifying the media when a well-known citizen is arrested in order for the department to receive wide publicity coverage, and that such a custom violates his constitutional rights. The deposition testimony of the two officers illustrates that while both of them were aware that the news media used police scanners to monitor the activity of the sheriff's department, as well as the activity of such other entities as the rescue squad, neither officer was aware of anybody directly contacting the media to be present when Mr. Messick was brought to the police station on the day of his arrest. The plaintiff's unsupported allegations in the complaint to the contrary cannot work to create a genuine issue of material fact as to the policy, practice and custom in the Catawba County Sheriff's Office with which the plaintiff takes issue.

B. The State Claims: Negligence, Negligent Infliction of Emotional Distress, Malicious Prosecution, and Intentional Infliction of Emotional Distress

[8] Generally, the doctrine of public officer immunity precludes public officers from being sued in their individual capacity for mere negligence. "When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 236, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). Public officers are immune from suit for mere negligence, but public employees are entitled to no such immunity. *Id.* at 700, 394 S.E.2d at 236.

A public officer is one whose position is created by either the state constitution or statutes. *Id.* Public officers are usually required to take an oath of office and are vested with discretionary power, which entails exercising "some portion of sovereign power" to carry out their duties. *EEE-ZZZ Lay Drain*, 108 N.C. App.

at 29, 422 S.E.2d at 341; *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. By contrast, public employees are responsible for executing ministerial duties. While discretionary duties involve "personal deliberation, decision and judgment," ministerial duties are those which are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. Prior case law recognizes the position of sheriff as being that of a public officer who exercises discretionary power in the performance of his duties. *See, e.g., State ex rel. Williams v. Adams*, 25 N.C. App. 475, 213 S.E.2d 584, *remanded*, 288 N.C. 501, 219 S.E.2d 198 (1975); *State v. Wright*, 1 N.C. App. 479, 480, 162 S.E.2d 56, 57, *aff'd*, 274 N.C. 380, 163 S.E.2d 897 (1968). The office of sheriff is provided for by the North Carolina Constitution and the duties and obligations of the office are enumerated in the statutes. N.C. Const. art. VII, § 2; N.C. Gen. Stat. §§ 162-13—162-25 (1987 & Cum. Supp. 1992). Clearly, the sheriff in the instant case is immune from suit in his individual capacity from the plaintiff's causes of action in negligence and negligent infliction of emotional distress.

[9] The statutes also provide that the sheriff will appoint deputies, who have been recognized as public officers by our courts. *See, e.g., Blake v. Allen*, 221 N.C. 445, 449, 20 S.E.2d 552, 554 (1942); *State v. Jones*, 41 N.C. App. 189, 190, 254 S.E.2d 234, 235 (1979); *Cline v. Brown*, 24 N.C. App. 209, 215, 210 S.E.2d 446, 449 (1974), *cert denied*, 286 N.C. 412, 211 S.E.2d 793 (1975). Case law seems to indicate, however, that at least traditionally, deputies were deemed to perform ministerial duties and had no authority to perform discretionary duties. *See, e.g., Blake*, 221 N.C. at 449, 20 S.E.2d at 554 ("the position of a deputy sheriff is a public office, the appointment to which delegates to the deputy authority to perform only ministerial duties imposed upon the sheriff"). Yet, the more modern view of a deputy's work appears to be that he or she is vested with discretionary power much like the sheriff. *See, e.g., Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (grouping the sheriff and the jailer together for the purpose of determining whether the two are subject to public official immunity). We conclude, therefore, that, at least as pertains to the investigation of charges and the arrest of Mr. Messick, Officers Bolick and Crouse were performing discretionary duties and are public officers entitled to immunity from the negligence claims as contemplated by the doctrine of public official immunity.

With regard to the other state law claims, we find that the sheriff and the officers are entitled to summary judgment in their individual capacities for the same reasons they are entitled to summary judgment in their official capacities.

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

Affirmed.

Judges JOHNSON and GREENE concur.

SPIVEY AND SELF, INC. v. HIGHVIEW FARMS, INC., HARRY WELCH, BARBARA WELCH, CHARLES WELCH AND HIGHVIEW FARMS GOLF CLUB, INC.

No. 9219SC325

(Filed 6 July 1993)

1. **Contractors § 11 (NCI4th)— construction of golf course—breach of contract action—plaintiff's lack of contractor's license—directed verdict for defendant denied**

The trial court properly denied defendants' motion for a directed verdict on the ground that plaintiff lacked a general contractor's license in an action arising from defendants' failure to pay plaintiff for work performed in building a golf course. Although defendants contend that the work performed by plaintiff was "grading" as that term is used in N.C.G.S. § 87-1 and required "special skill" as used in N.C.G.S. § 87-10 so that a general contractor's license is required, the grading of the land was only one of many types of work necessary in the construction of the golf course and it would be incorrect to classify the entire construction as grading. However, assuming that construction of a golf course is "building and construction" as contemplated by *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, 311 N.C. 170, plaintiff was required to have a general contractor's license if the cost of the grading work was $45,000 or more because the grading was an integral part of the golf course construction. There was no evidence in this case as to the portion of the $1,100,000 contract which was for grading and, because the record does

not reflect that the grading had a cost of at least $45,000, the trial court correctly determined that plaintiff did not violate N.C.G.S. § 87-1 and was not precluded from suing defendants.

Am Jur 2d, Building and Construction Contracts § 130; Licenses and Permits §§ 63-68.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases. 44 ALR4th 271.

2. Contracts § 77 (NCI4th)— golf course construction—payment not made—substantial performance—directed verdict for plaintiff—erroneous

The trial court erred by directing a verdict for plaintiff in an action to collect amounts owed for construction work on a golf course where it was not disputed that plaintiff stopped work and that the golf course was not completed at that time. The contract is silent as to the date plaintiff was to perform and there remains the question of whether plaintiff had substantially performed its promises under the contract as of June 5, the due date of the payment which was not made.

Am Jur 2d, Building and Construction Contracts §§ 41-43.

3. Rules of Civil Procedure § 59 (NCI3d)— motion to amend judgment—plaintiff not registered to do business in N.C.—denial not an abuse of discretion

The trial court did not abuse its discretion in an action to collect monies due for construction of a golf course by denying defendants' motion to amend the judgment under N.C.G.S. § 1A-1, Rule 59 to delete the award to plaintiff where defendants failed to raise the issue in a motion prior to trial. Although defendants contended that plaintiff was ineligible to recover in the courts of North Carolina because it was not registered in North Carolina and that defendants had been misled about plaintiff's status, maintaining an action in the courts of North Carolina requires a certificate of authority rather than registration. Defendants did not ask in their interrogatories whether plaintiff possessed a certificate of authority to transact business in the state and plaintiff answered negatively the only question in the interrogatories (whether it was registered) which might have misled defendants. The answers to questions concerning

plaintiff's tax return and whether it was registered in South Carolina had nothing to do with whether plaintiff had obtained a certificate of authority in North Carolina. N.C.G.S. § 55-15-02(a); N.C.G.S. § 55-15-03(c).

Am Jur 2d, Judgments §§ 739-750.

4. Appeal and Error §§ 10, 422 (NCI4th)— no proof of service of notice of appeal—appeal dismissed

An appeal from a directed verdict for defendants on their counterclaim was dismissed where there was no proof of service of the notice of appeal on the other parties to the appeal as required by the Rules of Appellate Procedure. Moreover, the arguments made by plaintiff in support of its contentions are not properly presented as "cross-assignments of error" because they do not present "an alternate basis in law for supporting the judgment" from which defendant appealed. N.C. R. App. P. 10(d); N.C. R. App. P. 26(b), (d).

Am Jur 2d, Appeal and Error §§ 316 et seq., 691 et seq.

Appeal by plaintiff and defendants from judgment entered 3 October 1991 and order entered 20 December 1991 in Rowan County Superior Court by Judge Judson D. DeRamus, Jr. Heard in the Court of Appeals 9 March 1993.

Robert Lee Saunders for plaintiff-appellee/appellant.

Kluttz, Reamer, Blankenship & Hayes, by Richard R. Reamer, for defendant-appellants/appellees.

GREENE, Judge.

Highview Farms, Inc., Harry Welch, Barbara Welch, Charles Welch, and Highview Farms Golf Club, Inc. (defendants), appeal from the trial court's order granting Spivey and Self, Inc.'s (plaintiff) motion for a directed verdict on portions of plaintiff's breach of contract claim and from the trial court's order denying defendants' Rule 59 motion to alter or amend the judgment. Plaintiff appeals from the trial court's order granting defendants' motion for a directed verdict on portions of plaintiff's breach of contract claim and from the trial court's denial of plaintiff's motion for directed verdict on portions of defendants' counterclaim for breach of contract.

Plaintiff, a South Carolina corporation, and defendants entered into a contract 6 November 1989, under which plaintiff would construct an eighteen-hole golf course on land belonging to defendants. Work began on the project in November, 1989. Plaintiff left the job on 28 June 1990, and on 19 July 1990, filed a complaint against defendants, alleging defendants breached the contract in that they failed to make timely payments under the contract and seeking damages in the amount of $226,000.00.

A copy of the contract was attached to the complaint, and reflected an agreement that required plaintiff, for the sum of $1,100,000.00, to provide all labor, materials, and equipment for construction of the course according to plans and specifications drawn by defendants' architect.

The contract called for payment to be made in ten installments as follows:

$55,000.00— When construction starts
$125,000.00— Dec. 5, 1989
$100,000.00— Jan. 5, 1990
$125,000.00— Feb. 5, 1990
$135,000.00— Mar. 5, 1990
$125,000.00— Apr. 5, 1990
$150,000.00— May 5, 1990
$150,000.00— June 5, 1990
$91,000.00— July 5, 1990

Leaving a balance of $135,000.00 which is to be paid when the sand traps are excavated and greens are planted.

A hand-written modification to the contract stated "Less 10%" and was followed by the initials of plaintiff's president Hoyt Spivey (Spivey). In addition, the contract stated that plaintiff was required to implement erosion control measures.

Plaintiff's complaint alleged that defendants had failed to make the 5 June 1990 payment, which amounted to $135,000.00 after the deduction of ten percent, and that the 5 July 1990 payment of $91,000.00 was money retained by defendants which was also due plaintiff.

Defendants answered, alleging that the June payment was withheld because plaintiff had fallen behind in its work. Defendants also counterclaimed for breach of contract, alleging that plaintiff's failure to continue work had prevented it from completing the course prior to the 1991 growing season. Defendants claimed damages of at least $340,000.00.

Prior to trial, defendants served interrogatories on plaintiff, which were answered. Defendants also took the deposition of Spivey.

At trial, Spivey testified for plaintiff that the initial payment of $55,000.00 was made. Payments continued through May, with the last two being made late, and plaintiff continued to work on the job. The 5 June 1990 payment was never made, and should have amounted to $135,000.00 pursuant to the hand-written modification of the contract calling for defendants to retain ten percent of each payment. Spivey further testified that defendants also owed plaintiff $91,000.00, which consisted of the total amount of retainage called for in the hand-written modification of the contract. The hand-written modification of the contract was made, according to Spivey, to correct an error he had made in the original contract, in that

> I normally hold or allow the owners to hold a 10% retainage for security to make sure I am going to do my work so I made a notation on the contract that 10% was to be deducted each month and held until July 5th as retainage. . . . [T]he $91,000.00 on July 5th in the schedule in the contract was always suppose[d] to be retainage.

Spivey also testified that Charles Welch told him prior to the time the June payment was due that defendants had run out of money and did not have funds to make the June payment. Spivey stated that plaintiff was responsible for implementing an erosion control plan pursuant to detailed engineering drawings provided by defendants. He also admitted that plaintiff was "not licensed or registered in North Carolina and . . . does not have a North Carolina [general] contractor's license." At the end of plaintiff's evidence, defendants moved for a directed verdict on the grounds that plaintiff rather than defendants had breached the contract by failing to perform the work as scheduled, and that plaintiff was not entitled to recover because it was not a licensed general contractor. The motion was denied.

Defendants' evidence included testimony by Charles Welch that he did not tell Spivey that the June payment would not be made, and that he talked with Spivey several times about defendants' concerns that work on the course was not progressing rapidly enough to meet the planting schedule and allow the course to open on time. He also testified that defendants had the money to pay plaintiff in June but did not because the work was behind schedule. Welch stated that he had negotiated the contract with Spivey, and it was his understanding that the "Less 10%" notation indicated that "if we paid him by the due date, we would be entitled to a discount of ten percent." An employee of Rowan County Department of Environmental Services testified that he inspected the erosion control efforts at the course while plaintiff was still working, and that many of the erosion controls called for in the erosion plan were not in place. Other witnesses testified that the golf course was nowhere near completion at the time plaintiff left the job, and that it would not have been possible to plant in time for the course to open in the following year.

Upon close of all evidence, plaintiff made a motion for a directed verdict for the $135,000.00 for the June payment and the $91,000.00 for retainage pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, on the ground that all the evidence showed that plaintiff did not abandon the job without excuse but rather for non-payment, and for a directed verdict on defendants' counterclaims. The trial court allowed the motion for a directed verdict on plaintiff's claim for $135,000.00, but denied the motion as to the $91,000.00 in retainage and for defendants' counterclaims. Also at the close of all evidence, defendants made a motion for a directed verdict on the question of plaintiff's claim for $91,000.00 in retainage, which was allowed. Defendants made a second motion for a directed verdict on all of plaintiff's remaining claims on the ground that plaintiff was an unlicensed general contractor and therefore not entitled to any recovery. The trial court denied the motion.

The remaining issues were submitted to the jury, which returned a verdict in favor of defendants on defendants' counterclaim for plaintiff's failure to install erosion controls, awarding damages of $47,000.00. The court entered its judgment on 3 October 1991, and defendants moved pursuant to Rule 59 of the North Carolina Rules of Civil Procedure for an order amending the judgment, claiming that newly discovered evidence showed that plaintiff had

no authority to transact business in North Carolina. The motion was denied.

The issues presented are whether (I) plaintiff is required by N.C.G.S. § 87-1 to be licensed as a general contractor; (II) plaintiff's substantial performance under the contract should have been submitted to the jury; (III) plaintiff misled defendants as to plaintiff's authority to transact business in this State, thereby excusing defendants' failure to assert such lack of authority prior to trial; and (IV) plaintiff has preserved for appellate review the issue of the propriety of the trial court's grant of defendants' motion for a directed verdict on their counterclaim.

I

[1] Defendants first argue that they were entitled to a directed verdict on plaintiff's claims on the ground that plaintiff did not have a license as required by N.C.G.S. § 87-1 and N.C.G.S. § 87-10, and was thus precluded from recovery. We disagree.

A contractor not licensed by the State of North Carolina pursuant to N.C.G.S. § 87-10 is, with certain exceptions not here material, prohibited from bidding upon, constructing or undertaking to superintend or manage "the construction of any building, highway, public utilities, *grading* or any improvement or structure where the cost of the undertaking is forty-five thousand dollars ($45,000) or more." N.C.G.S. § 87-1 (1989) (emphasis added) (amended in 1992 to reduce the amount to $30,000.00, N.C.G.S. § 87-1 (Supp. 1992)). A contractor in violation of this statute subjects himself to criminal penalties, N.C.G.S. § 87-13 (1989), and is precluded from suing the owner for breach of contract or in *quantum meruit*. *Brady v. Fulghum*, 309 N.C. 580, 582, 308 S.E.2d 327, 329 (1983).

Defendants argue that the work performed by plaintiff was "grading" as that term is used in N.C.G.S. § 87-1, and required "special skill" as that term is used in N.C.G.S. § 87-10. N.C.G.S. § 87-10(4) (1989). Therefore, defendants contend, plaintiff was required to have a general contractor's license. Because we do not read N.C.G.S. § 87-10 as expanding the definition of a general contractor beyond that as set forth in N.C.G.S. § 87-1, we address only the question of whether plaintiff was a general contractor under N.C.G.S. § 87-1. N.C.G.S. § 87-10 merely authorizes the State Licensing Board for General Contractors to classify the licenses

issued, pursuant to N.C.G.S. § 87-1, into one of five classifications, including a "[s]pecialty contractor." N.C.G.S. § 87-10(4).

It is not disputed that some leveling and smoothing of the land was necessary in the construction of the golf course. Therefore, some grading, as that term is used in N.C.G.S. § 87-1, was required. *American Heritage Dictionary* 570 (2d college ed. 1985) (to "grade" defined as "to level or smooth"). Construction of the golf course, however, involved much more than grading. The property required "clearing and grubbing"; "digging ponds"; construction of tee boxes, greens, and a driving range; the placement of drain tile; erosion control; seeding of grass; and piping of creeks. Thus, the grading of the land was only one of many types of work necessary in the construction of the golf course. It would, therefore, be incorrect to classify the entire construction of the golf course as grading.

In *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, our Supreme Court held that if "grading" is an integral "part of . . . work properly termed 'building and construction,'" a license is required to perform the grading work. *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, 311 N.C. 170, 180, 316 S.E.2d 298, 304 (1984). Assuming, therefore, without deciding, that construction of a golf course is "building and construction" as contemplated by *Walker*, because the grading was an integral "part of" the golf course construction, *see id.*, plaintiff was required to have a general contractor's license if the cost of the grading work was $45,000.00 or more.

In this case, there is no evidence as to what portion of the $1,100,000.00 contract was for the grading of the project, and to assign any value would require raw speculation. Because the record does not reflect that the grading had a cost of at least $45,000.00, the trial court correctly determined that plaintiff did not violate N.C.G.S. § 87-1 and was not therefore precluded from suing defendants.

Accordingly, plaintiff's lack of a general contractor's license was not a basis for denying its claim against defendants and the trial court was correct in denying defendants' motion for directed verdict on this ground.

II

[2] Defendants next argue that the trial court erred in allowing plaintiffs' motion for directed verdict, at the close of all the evidence,

on plaintiff's claim for $135,000.00, representing the 5 June 1990 payment of $150,000.00, less a ten percent retainage. Defendants argue that plaintiff was behind in construction and they therefore had no obligation to make the 5 June 1990 payment. Defendants further argue that because there existed evidence that plaintiff was behind in construction, which could show that plaintiff had not substantially performed its portion of the contract, the question of substantial performance should have been submitted to the jury. We agree.

"The first and simplest rule is that unless otherwise indicated by the agreement, a party who is to perform work over an extended period of time must substantially perform before he becomes entitled to payment." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11-17 (3d ed. 1987) (footnotes omitted) [hereinafter *Calamari & Perillo*]. That is, "performance of the work is a constructive condition precedent to the duty to pay." *Id.* Whether there has been substantial performance of the contract is "ordinarily a question of fact." *Calamari & Perillo* at § 11-18(b) (footnote omitted).

In this case, it is not disputed that plaintiff stopped work on 28 June 1990, and that the golf course was not completed at that time. Although the contract is silent as to the date when plaintiff was to perform, there remains the question of whether plaintiff had substantially performed its promises under the contract as of 5 June 1990. There was evidence that the parties had agreed that the fairways would be seeded in June, 1990, and they were not. *See Calamari & Perillo* at § 11-18(a) (intent of parties to be gathered from instrument and the "surrounding circumstances"). Therefore, a jury question was presented on this issue, and entry of directed verdict for the plaintiff was error.

III

[3] Defendants contend that the trial court erred in denying their Rule 59 motion to alter or amend the judgment. The basis of the motion was that plaintiff was not registered to do business in North Carolina, as required by N.C.G.S. § 55-15-02(a), thereby making plaintiff ineligible to recover in the courts of this State. Defendants further argue that their failure to bring this information to the trial court's attention prior to trial should be excused because plaintiff misled defendants about its registration status, and accord-

ingly the trial court should have deleted the $135,000.00 award to plaintiff.

Motions to amend judgments pursuant to N.C.G.S. § 1A-1, Rule 59 are addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion. *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988).

We note initially that both defendants and plaintiff in their respective briefs address the issue of whether N.C.G.S. § 55-15-02(a) should be applicable to this dispute in terms of whether plaintiff is "registered" in this State. N.C.G.S. § 55-15-02(a) provides that

> [n]o foreign corporation transacting business in this State without permission obtained through a *certificate of authority* . . . shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; . . .
>
> An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

N.C.G.S. § 55-15-02(a) (1990) (emphasis added). It is true that the application for a certificate of authority is the mechanism whereby the foreign corporation must set forth the name of its registered agent and the address and county of its registered office, N.C.G.S. § 55-15-03(a)(5) (Supp. 1992), and that a certificate of authority will not be issued unless this requirement is complied with. N.C.G.S. § 55-15-03(c) (Supp. 1992). However, it is not registration which is required in order to maintain an action in the courts of this State, but permission to do business in this State, which must be evidenced by a certificate of authority. N.C.G.S. § 55-15-02(a). Defendants admit that they did not raise the issue of whether plaintiff had a certificate of authority prior to trial, but contend that they were prevented from doing so because plaintiff misinformed defendants by claiming that it did have authority to transact business in this State when in fact it did not.

The record reveals that defendants served interrogatories on plaintiff prior to trial, which plaintiff answered. Nowhere in these interrogatories do defendants ask whether plaintiff possessed a certificate of authority to transact business in the State. Among those interrogatories was the following:

(e) If and when the corporation was registered to do business in the State of North Carolina;

ANSWER: Not registered in North Carolina.

Thus, plaintiff never answered any question concerning whether or not it possessed a certificate of authority. In addition, plaintiff answered negatively the only question in the interrogatories for which a positive response might have tended to mislead defendants into believing that plaintiff was authorized to do business in North Carolina.

Defendants argue that the answers to other questions posed to plaintiff in interrogatories and in the deposition of Spivey were designed to mislead them, specifically plaintiff's claim that it filed a "Multi State Corporate Franchise and Income Tax Return" in North Carolina and paid the franchise taxes that resulted. Even assuming *arguendo* that these responses were false, they have nothing to do with whether plaintiff had obtained the proper certificate of authority to transact business in North Carolina. Defendants further argue that plaintiff's responses to interrogatories and deposition questions stating that plaintiff was registered to do business in South Carolina were also false, and misled defendants. Again, assuming *arguendo* that the responses were false, we can see no connection between plaintiff's corporate status in South Carolina and the requirement that it be properly authorized to do business in North Carolina pursuant to N.C.G.S. § 55-15-02(a). Defendants were therefore not misled by plaintiff about its possession of a certificate of authority, and defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by N.C.G.S. § 55-15-02(a), precludes it from doing so in a motion after trial. Therefore, the trial court did not abuse its discretion when it denied defendants' Rule 59 motion to amend the judgment.

IV

[4] Plaintiff timely filed notice of appeal as to the granting of directed verdict for defendants on their counterclaim for $91,000. Plaintiff's appeal must be dismissed, however, because there is no proof of service of the notice of appeal on the other parties to the appeal, as is required by our Rules of Appellate Procedure. N.C. R. App. P. 26(b), (d) (1993); *Shaw v. Hudson*, 49 N.C. App. 457, 459, 271 S.E.2d 560, 561 (1980) (proof of service must appear

on or affixed to the notice of appeal); *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979), *disc. rev. denied*, 299 N.C. 122, 262 S.E.2d 6 (1980) (requirement that record show timely service of notice of appeal is jurisdictional). Furthermore, the arguments made by plaintiff in support of its contentions are not properly presented as "cross-assignments of error" because they do not present "an alternative basis in law for supporting the judgment" from which defendants appealed. N.C. R. App. P. 10(d) (1993).

In summary: the judgment of the trial court decreeing that plaintiff have and recover of defendants the sum of $135,000.00, together with interest, is reversed and remanded for trial; the directed verdict for defendants on plaintiff's claim for $91,000.00 is affirmed; the denial of directed verdict for defendants on the ground that plaintiff did not have a general contractor's license is affirmed; and there is no error in the jury verdict for the defendants in the amount of $47,000.00.

Affirmed in part, reversed in part and remanded.

Chief Judge ARNOLD and Judge McCRODDEN concur.

GLENDA DAVIS, APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, O'BERRY CENTER, APPELLEE

No. 928SC372

(Filed 6 July 1993)

1. State § 12 (NCI3d)— State employee—excessive mileage on van—misuse of State property

The State Personnel Commission did not commit an error of law by holding that appellant's excessive mileage was a misuse of State property which constituted just cause for dismissal where appellant was employed at the O'Berry Center in Goldsboro; appellant was assigned in 1988 to drive three of the Center's residents on a lunch trip to a nearby Burger King to enhance their interactive and social skills; appellant improperly included a fourth resident; one of the residents acted in a disruptive manner on the way to lunch; appellant

and the teacher accompanying her decided to cancel the lunch excursion and had the residents eat their lunch in the van; appellant then decided to take the residents sightseeing and drove toward Kinston; appellant contended that she turned around at a particular restaurant; the mileage on the van when appellant returned was 58 miles; the teacher stated that appellant had driven the van to a mobile home sales lot where she talked with a sales representative for approximately ten minutes; and O'Berry managers investigated and determined that the odometer reading to and from the mobile home lot would be almost exactly 58 miles while the mileage to and from the restaurant would have been significantly less. There is no doubt that appellant's act of driving the State van 46 miles out of the way to conduct personal business at a mobile home sales lot falls within the purview of misusing State property and evidence was presented that appellant planned to visit the mobile home park even before the trip began, so that the abuse was knowingly committed. There was also no error in characterizing the conduct as personal, which can result in immediate dismissal, even though appellant asserts that there are no written guidelines concerning deviations during field trips and that no one had been disciplined for other deviations. N.C.G.S. § 126-35.

Am Jur 2d, Civil Service § 61; Public Officers and Employees § 247.

2. Administrative Law and Procedure § 69 (NCI4th) — dismissal of State employee — State Personnel Commission — sufficiency of evidence

Substantial evidence existed in the record to justify the State Personnel Commission's decision to reject the administrative law judge's opinion and dismiss a State employee who used a State van for personal business while taking O'Berry Center residents on a field trip. Even though the administrative law judge had already made findings of fact and conclusions of law, the Personnel Commission had the ability to make its own findings and conclusions if it chose to do so, and this is exactly what the Commission chose to do when it added an additional conclusion of law finding one witness's rendition of the facts to be more consistent with the other evidence. Even though this statement should have been characterized

a finding rather than a conclusion, it was clearly within the power of the Commission.

Am Jur 2d, Administrative Law §§ 678 et seq.

Judge JOHNSON dissenting.

Appeal by appellant from judgment and order signed 31 December 1991 by Judge J. R. Strickland in Wayne County Superior Court. Heard in the Court of Appeals 11 March 1993.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Geraldine Sumter, for appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane L. Oliver, for the State.

LEWIS, Judge.

The main issue presented by this appeal is whether the trial court erred in upholding the State Personnel Commission's dismissal of Glenda Davis (hereafter "appellant"). On the facts before us, we hold that substantial evidence was presented in the record to warrant appellant's dismissal for personal misconduct and we affirm the decision of the trial court.

The evidence presented below tended to show that appellant was employed at the O'Berry Center in Goldsboro, as a Health Care Technician II. Appellant had worked at the O'Berry Center for three and a half years and had not received any prior disciplinary action. However, on 21 January 1988, appellant and Kim Middleton ("Middleton"), a teacher at the O'Berry Center, were assigned to drive three of the Center's residents in a State owned van on a lunch trip to a nearby Burger King. The purpose of such trip was to enhance the residents' interactive and social skills by allowing them to purchase their own food and to eat in a restaurant. Without permission, appellant improperly included a fourth resident on the trip. On the way to lunch, one of the residents acted in a disruptive manner that frustrated the purpose of the trip. As a result appellant and Middleton decided to cancel the lunch excursion to the Burger King and instead had the residents eat their lunch in the van. Since the lunch trip had been cut short, appellant decided to take the residents sightseeing. According to appellant, she then proceeded to drive the State van toward Kinston, where she turned around at the Sandpiper Restaurant and returned

to the O'Berry Center. When appellant returned to the O'Berry Center, the odometer in the van revealed that she had driven 58 miles, whereas the trip to the Burger King should have only covered 12 miles.

Upon returning to the Center, Middleton was late for a 1:00 class. This was communicated to Valnolia Cox, an administrator at the Center, who inquired of Middleton as to the reason for her tardiness. Middleton told Cox that appellant had driven the van to a mobile homes sales lot where she talked to a sales representative for approximately ten minutes before returning to the Center. Cox undertook her own investigation into the matter and had the route retraced. Managers from the O'Berry Center concluded that if appellant had turned around at the Sandpiper Restaurant, then her total mileage would have been significantly less than 58 miles. In contrast, however, had appellant driven to the mobile home sales lot and returned, then the total mileage would have been almost exactly 58 miles.

On the basis of this investigation, Cox concluded that appellant had knowingly misused State property in violation of the Personal Conduct section of the State Personnel Manual. Appellant was dismissed without warning effective 9 January 1988 for her misconduct.

Following established procedures, appellant then filed a petition with the Office of Administrative Hearings to have her case reviewed. Although, the State contends that appellant's petition was not timely filed because it lacked a verification, the administrative law judge disagreed and conducted a full hearing on the merits. The administrative law judge issued her Recommended Decision on 18 August 1989 with findings of fact and conclusions of law that appellant had used poor judgment in logging the excessive mileage. The administrative law judge also concluded that the testimony of Middleton and appellant was inconsistent, but perceived appellant to be more credible. However, since the evidence was in such conflict, the administrative law judge ultimately concluded that the State had failed in its burden of proof and that appellant should be reinstated with back pay.

This case came before the Full State Personnel Commission on 20 June 1990. The Personnel Commission adopted all of the findings of fact made by the administrative law judge as well as the majority of the administrative law judge's conclusions of law.

However the Personnel Commission specifically declined to accept the administrative law judge's recommended decision and ordered that appellant's dismissal be upheld.

A Petition for Judicial Review was filed in the Superior Court of Wayne County on 26 July 1990. The Superior Court upheld the decision of the State Personnel Commission, concluding that substantial evidence existed in the record to support appellant's termination. Appellant has appealed to this Court.

When reviewing the decision of a Superior Court judge in his review of an administrative decision, this Court must determine "whether the trial court failed to properly apply the review standard articulated in N.C. Gen. Stat. § 150B-51." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353, *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1990). In addition, this Court's review is further limited to those errors and exceptions which have been assigned to the superior court's order. *Id.* N.C.G.S. § 150B-51 (1991) provides:

> (b) Standard of Review.— 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 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.

If it is alleged that an error of law occurred, then the proper standard of review is *de novo*. *Walker*, 100 N.C. App. at 502, 397 S.E.2d at 354. If however, the decision is challenged as being con-

trary to the evidence, or arbitrary or capricious, then the whole record test is used. *Id.* It is not clear whether appellant has challenged the sufficiency of the evidence to support the Personnel Commission's decision or whether she has alleged that the Personnel Commission committed an error of law. Therefore, in our discretion, we have undertaken both a *de novo* review of the Personnel Commission's conclusions of law, as well as a review of the whole record to determine whether sufficient evidence existed to support appellant's termination for just cause.

A.

[1] The only possible error of law which appellant could have challenged is the Personnel Commission's conclusion that appellant's excessive mileage was a misuse of State property and constituted just cause for dismissal. Pursuant to N.C.G.S. § 126-35 (1991), a permanent state employee, subject to the State Personnel Act, may not be dismissed for disciplinary reasons except for just cause. To aid in the disciplinary process, the State Personnel Manual divides conduct into two categories: 1) inadequate performance of duties (job performance); and 2) personal conduct detrimental to State service (personal conduct). *See Jones v. Dep't of Human Resources*, 300 N.C. 687, 268 S.E.2d 500 (1980). The advantage of having conduct classified as job performance is that an individual is entitled to three warnings before being terminated. In order to help agencies in the classification of action and behavior for disciplinary purposes, the State Personnel Manual includes several examples of job performance and personal conduct. Under personal conduct it states that: "An employee who steals State Property or funds, or who knowingly misuses State Property may be dismissed without warning under the Personal Conduct disciplinary process."

We perceive no ambiguity in the interpretation of this part of the Personnel Manual. There is no doubt that appellant's act of driving the State van 46 miles out of the way to conduct personal business at a mobile home sales lot falls within the purview of misusing State property. However, it is not enough that appellant misused State property; the misuse must have been knowingly committed. Evidence was presented to show that appellant planned to visit the mobile home park even before the trip began. During the Center's own investigation, it was revealed that appellant had told a co-worker that she planned to drive to Kinston. This com-

pletely contradicted appellant's explanation that she did not decide to take the sightseeing expedition until one of the residents acted in a disruptive manner. Therefore, we feel that it was proper for the Commission to hold that appellant misused State property and that she did so knowingly.

Appellant has attempted to blur the distinction between personal conduct and job performance by stating that there were no written guidelines concerning deviations during off-campus field trips. Further, appellant asserts that many deviations had taken place on other field trips and that no one else had been disciplined for excessive mileage. It is important to note, however, that of the other cases of excessive mileage, none exceeded eleven miles and all were accounted for by reasonable explanations. If we were to accept appellant's argument that her actions were related to job performance and not personal conduct, then any individual who misused State property while performing a work related activity could never be terminated for misuse of State property. The State Personnel Manual recognizes that there may be some gray areas between personal conduct and job performance. Even if this is the case, appellant's personal journey was such that her actions and behavior crossed the line of being job related and into the realm of personal conduct. The fact that she had residents in the van and was supposed to take them on a field trip was only tangentially related to her true and improper purpose. We therefore hold that no error of law occurred in characterizing appellant's conduct as personal.

B.

[2] We have also undertaken an examination of the whole record to determine whether substantial evidence exists in the record to support the Commission's ruling. Substantial evidence has been defined as that which a reasonable mind would accept as adequately supporting a particular conclusion. *Walker*, 100 N.C. App. at 503, 397 S.E.2d at 354. In examining the whole record, even the evidence that detracts from the agency's decision must be considered. *Id.* The whole record test is not to be a tool of judicial intrusion. *Floyd v. North Carolina Dep't of Commerce*, 99 N.C. App. 125, 392 S.E.2d 660, *disc. rev. denied*, 327 N.C. 482, 397 S.E.2d 217 (1990). Even though a different result could be justified, the reviewing court is not permitted to substitute its judgment for that of the agency, as between two reasonably conflicting views of the

evidence. *Id.* We have conducted our own review of the record and conclude that substantial evidence exists to support the Personnel Commission's decision.

In this case, the Personnel Commission adopted all the findings of fact made by the administrative law judge and most of the administrative law judge's conclusions of law. However, the Personnel Commission rejected the administrative law judge's recommended decision. It is well established that an agency has the ability to reject the recommended decision of an administrative law judge. *See Webb v. North Carolina Dep't of Environmental Health and Natural Resources*, 102 N.C. App. 767, 404 S.E.2d 29 (1991). However, to do so the Personnel Commission was required to state its reasons for rejecting the administrative law judge's decision. *See* N.C.G.S. § 150B-51(a). The trial court specifically found that the Personnel Commission justified its reasons and after reviewing the record, we agree.

The prerogative to determine the weight of the evidence and the credibility of the witnesses, and to determine the facts therefrom, rested with the State Personnel Commission. *See Webb*, 102 N.C. App. at 769, 404 S.E.2d at 31. In refusing to accept the administrative law judge's recommended decision, the Personnel Commission was merely exercising its prerogative to weigh the evidence and to determine the credibility of the witnesses. Even though the administrative law judge had already made findings of fact and conclusions of law, the Personnel Commission had the ability to make its own findings of fact and conclusions of law if it chose to do so. *See Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 400 S.E.2d 66 (1991). This is exactly what the Personnel Commission chose to do when it added an additional conclusion of law, finding Middleton's rendition of the facts to be more consistent with the other evidence. This is evidenced by the language in the Commission's conclusion that at "the Calgary Mobile Home lot, identified by Ms. Middleton as the place [appellant] visited, the odometer read 29 miles (the halfway point of a 58 mile roundtrip) and was more consistent with Ms. Middleton's explanation of the trip. . . ." Although this statement about credibility should have been characterized as a finding of fact instead of a conclusion of law, it was clearly within the power of the Personnel Commission to make its own determination about the credibility of the witnesses.

Even though we find the result in this case to be unfortunate, we cannot say that the Personnel Commission erred in concluding that appellant was dismissed for just cause. We hold that substantial evidence existed in the record to justify the Personnel Commission's decision. As a result, the judgment of the superior court is affirmed. Having resolved this matter in favor of the State, we see no need to address the State's cross assignment of error.

Affirmed.

Judge JOHN concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

The majority opinion holds that "appellant's act of driving the State van 46 miles out of the way to conduct personal business at a mobile home sales lot falls within the purview of misusing State property" and is related to job conduct which does not entitle appellant to three warnings which are allowed in instances of job performance. I, however, disagree with the majority opinion, and would hold that the appellant did not steal or knowingly misuse State property and was improperly discharged without warnings and without just cause.

The record clearly shows that many deviations had taken place on other field trips and no one else had been disciplined for excessive mileage. The majority points out "that of the other cases of excessive mileage, none exceeded eleven miles and all were accounted for by reasonable explanations." Because, however, there were no written guidelines concerning deviations during off-campus field trips and no one else had been disciplined for excessive mileage, I find it unfair and unjust to discipline appellant in the instant case. But for this incident, appellant had an irreproachable work record. Accordingly, I would hold that this incident falls within the purview of job performance; therefore, appellant was entitled to three warnings before dismissal. I would further hold that the State is estopped from disciplining appellant since other instances of excessive mileage were undisciplined and there were no written guidelines on field trip deviations.

RALPH E. AMMONS AND WIFE, DORIS C. AMMONS; HOWARD M. COBLE AND WIFE, GLADYS C. COBLE; TERESA L. DANIEL; EVA HARRIS; PAT H. HENARD AND WIFE, RUTH HENARD; LARRY W. HICKS AND WIFE, LOUVINE I. HICKS; RUTH MILLER; JOAN CAROL PEGRAM; CLAUDE M. SHROPSHIRE AND WIFE, COLEAN M. SHROPSHIRE; A. J. SMITHEY AND WIFE, MARGARET B. SMITHEY; RALPH E. SMITHEY AND WIFE, RACHEL I. SMITHEY; GARY K. STALEY AND WIFE, DONNA S. STALEY; AND DON MICHAEL VARNER, APPELLANTS v. WYSONG & MILES COMPANY, APPELLEE

No. 9218SC861

(Filed 6 July 1993)

Waters and Watercourses § 3.2 (NCI3d); Trespass § 3 (NCI3d)—contamination of well water—source of pollution—summary judgment for defendant—no error

The trial court properly granted summary judgment for defendant in an action for negligence, nuisance, trespass, and strict liability under N.C.G.S. § 143-215.75 arising from contamination of plaintiffs' wells where defendant discovered that an underground pipeline at its facility was leaking TCA, informed the proper authorities, hired a company to assess the leakage and perform remedial work, and the engineer in charge concluded from the hydrogeology of the area that defendant could not have been responsible for the contamination of plaintiffs' wells. Causation is a common element in each claim asserted by the appellants and plaintiffs failed to show that the potential sources of contamination from Wysong's property caused them damage. Affidavits which plaintiffs contend rebut the conclusions of defendant's engineer do not state that Wysong was responsible for the contamination, were not inconsistent with the conclusion of defendant's engineer, or did not address the wells at issue in this case. Furthermore, the contention that plaintiffs suffered damages in addition to contamination of their wells because they were assessed for water and sewer line installation in their neighborhood was without merit.

Am Jur 2d, Pollution Control §§ 479, 513, 515, 520, 565.

Liability for pollution of subterranean waters. 38 ALR2d 1265.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste. 39 ALR3d 910.

Appeal by plaintiffs from judgment signed 11 May 1992 by Judge Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 18 June 1993.

Appellants live on or own real property in the Lacey Allred Farms Subdivision (Lacey Subdivision) in Guilford County, North Carolina. Wysong & Miles Company (Wysong), the appellee, owns and operates a manufacturing facility located northeast of and adjacent to Lacey Subdivision.

On 16 October 1990 appellants filed a complaint against Wysong in which they alleged that Wysong (1) stored "1,1,1-trichloroethane" (TCA) and "various other hazardous substances" in storage tanks; (2) that in October 1987 Wysong discovered that an underground pipe carrying TCA was leaking; (3) and that as a result of the discharge of "TCA and other substances into the ground water" the appellants' wells and septic systems have become contaminated. Appellants alleged four different theories of liability: violation of the Oil Pollution and Hazardous Substances Control Act, G.S. § 143-215.75; negligence; nuisance and trespass. On 21 November 1990 Wysong filed an answer generally denying that it had contaminated appellants' wells.

On 15 April 1992 Wysong filed a motion for summary judgment which came on for hearing at the 11 May 1992 session of Guilford County Superior Court. A summary of the evidence presented at the hearing follows:

Wysong presented the affidavit of Gary M. Wisniewski, a professional registered engineer. Mr. Wisniewski testified that in 1987 Wysong discovered that an underground pipeline, which ran from an aboveground storage tank, was leaking 1,1,1-trichloroethane (TCA). The leakage was reported to the proper governmental authorities, and Wysong hired HDR Infrastructure, Inc. (HDR) to assess the leakage and perform necessary remedial work. At that time Mr. Wisniewski, an employee of HDR, was named Project Manager. Mr. Wisniewski "was responsible for conducting the actual assessment work and interpreting the assessment data in order to develop a plan of remediation." In 1988 Mr. Wisniewski left HDR to join Delta Environmental Consultants, Inc. (Delta) as Senior Environmental Engineer. Mr. Wisniewski continued coordination of the Wysong project through Delta.

Mr. Wisniewski's assessment revealed the following information, illustrated by the ground water table evaluation contour map (7/30/90) (Attachment B) in the appendix to our opinion:

6. Two potential sources of contamination have been identified at the Wysong site. The first is the leaking line from the TCA tank, located on the north side of the Wysong building. The second source is a basin, located on the south side of the Wysong building, which was used to dispose of waste coolant oils that contained some concentrations of TCA.

7. The Lacey Allred Subdivision is located to the southwest of the Wysong site.

8. Based on the data that has been developed by Delta and otherwise made available for our review, the hydrogeology of the Wysong site and the surrounding area is such that the sources of contamination at the Wysong site could not be responsible for the contamination that has been discovered in the wells of homes located in the Subdivision that are represented in the lawsuit.

9. Specifically, the data that has led to this conclusion is as follows:

a. A map of the ground water potentiometric surface constructed from water level measurements from monitoring wells screened across the water table in the area shows a significant hydraulic gradient illustrating that the ground water flows in a northeasterly direction, flowing from the Subdivision toward the Wysong site. This map is attached as Attachment B.

b. The contamination of shallow wells in the subdivision, specifically MW-3 and the shallow supply well at 5829 Carla Lane, could only have been contaminated by a source at or upgradient of the well locations. The nearest contamination source on the Wysong site is over 600 feet downgradient from MW-3 and the shallow supply well at 5829 Carla Lane.

c. The contaminant concentration gradients are inconsistent with a conclusion that the source originated on the Wysong site. The highest contaminant levels off of the Wysong site were found in the shallow supply well at 5829 Carla Lane. There are two shallow monitoring wells on the Wysong property, MW-8 and MW-2, which are situated directly between the

shallow supply well at 5829 Carla Lane and the nearest Wysong source. MW-8 originally showed only very trace levels of contamination and MW-2, which is located immediately upgradient of the Wysong source, originally showed no contamination.

d. Since the start-up of a recovery and remediation system on the Wysong site, the contaminant levels in MW-8 and MW-2 have steadily increased. This data, combined with the fact that contaminant levels remain elevated in the MW-3 and the well at 5829 Carla Lane, leads to the conclusion that contamination is now being drawn onto the Wysong site from the area of the subdivision.

e. There are inconsistencies in the analytical data from all of the wells in the area that suggest an additional source(s) other than the documented Wysong sources. Specifically, compounds have been detected in wells in the Subdivision that have not consistently or routinely been detected in the wells located on the Wysong site.

f. Recent chemical analyses of a surface water sample from a stream valley located southwest of the Wysong source revealed the presence of one type of contaminant. Past chemical analyses of a monitoring well sample (MW-6), located between the stream valley and the Wysong source did not contain the specific type of contaminant. As a result, the contaminant type detected in the stream valley surface water sample is interpreted to have originated from an upgradient source. The Subdivision is located upgradient of the stream valley.

This above-referenced data supports the conclusion that an off-site source of contamination exists and is migrating onto the Wysong site from the Subdivision area. This off-site source is the most likely source of the contamination detected in the Subdivision wells represented in the above-referenced lawsuit.

Wysong also presented an affidavit of Alan Barry Nelson, Vice President and Senior Hydrogeologist at the firm of Bain, Palmer & Associates, Inc. Through his affidavit Mr. Nelson testified that he had prepared an earlier affidavit in 1991, which was submitted in this litigation by the appellants, concerning his study of contamination of the Mahaffey well, a deep well located in the Lacey Subdivision. In the earlier affidavit, Mr. Nelson testified that he did not have any evidence from which to determine the "directional

orientation" of fracture traces between the Texaco well and the Mahaffey well. He also testified that under certain "pumping conditions" a cone of depression could develop which would extend from the Mahaffey's well to the Wysong property and pull contaminants back to the Mahaffey's well. Dr. Nelson concluded that "there is no data that would indicate that the Texaco site is a more likely source of contamination of the Mahaffey property on Anita Lane than other area sources." The affidavit submitted by Mr. Nelson for the present litigation stated:

> 3. In reviewing information for the preparation of [the earlier] affidavit, I reviewed information as it might be related to the Mahaffey well, located in the Lacey Allred Subdivision. The Mahaffey well is a deep well, located on the border of the Wysong property, at a point in the Subdivision that is in closest proximity to the basin area on the Wysong property.
>
> 4. I did not intend to express an opinion regarding the source of contamination in those wells that are the subject of this lawsuit. I also have not reviewed any data generated regarding the Wysong site since the time of my [earlier] affidavit. I have not expressed an opinion or given testimony with regard to shallow wells located upgradient of the Mahaffey well.

Wysong's partial summary of proceedings, included in the record on appeal, states that the parties stipulated that the Mahaffey well is downgradient and closer to the Wysong property than the wells at issue before us.

Appellants also submitted the affidavits of Mr. A.J. Smithey, Jr., an appellant, and Dr. Nicholas L. Bogen, Director of Groundwater Services at Trigon Engineering Consultants, Inc. Through his affidavit Mr. Smithey testified that to his knowledge the property located at 5829 Carla Lane and immediately surrounding 5829 Carla Lane, "has never been exposed to the chemical TCA." Mr. Smithey further testified that in his opinion that that property "could not be the source of the TCA contamination in the wells at the Lacey Allred Farms Subdivision."

Dr. Bogen testified in part:

> 3. That 1,1,1-trichloroethane (TCA) has a specific gravity greater that water (1.34 sp.g.) and thus would sink through

the groundwater by any available pathway, including fractures in the bedrock.

4. That subsurface geologic data generated by Delta Environmental Consultants, Inc. indicates that fractures do exist in the bedrock under the subject properties. See attached Exhibits 1 through 5. In addition, said data indicated that U.S. Highway 29 runs along a ridge crest which is probably a groundwater divide. Therefore, there is only a limited potential source area for the contamination in the Plaintiff's neighborhood.

5. That it is possible that the relatively low concentration of TCA in monitoring well 2 is due to some local subsurface geologic anomaly.

On 11 May 1992 Judge DeRamus filed an order allowing defendant's motion for summary judgment on all claims asserted by appellants.

Egerton, Quinn & David, by Nancy P. Quinn, for the plaintiff-appellants.

Smith, Helms, Mulliss & Moore, by Stephen W. Earp and Ramona J. Cunningham, for the defendant-appellee.

EAGLES, Judge.

Appellants contend that the trial court erred by entering summary judgment in favor of the defendant on each of their claims, *i.e.*, strict liability under the Oil Pollution and Hazardous Substances Control Act (G.S. § 143-215.75), negligence, nuisance and trespass. We disagree and affirm.

Summary judgment is granted in favor of the moving party where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102 (1981). A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential elements of his claim or cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Carpenter v. Merrill Lynch Realty Operating Partnership, L.P., 108 N.C. App. 555, 558, 424 S.E.2d 178, 179 (1993) (quoting *Little*

v. National Service Industries, Inc., 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986).

Here, causation is a common element necessary in each claim asserted by the appellants. G.S. § 143-215.93 of the Oil Pollution and Hazardous Substances Control Act provides that "[a]ny person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, *caused by such entry*, subject to the exceptions enumerated in G.S. 143-215.83(b)." (Emphasis added). In order to sustain a claim of actionable negligence a plaintiff must show that the defendant's breach of duty proximately caused plaintiff's injury. *Westbrook v. Cobb*, 105 N.C. App. 64, 411 S.E.2d 651 (1992). "A trespass to real property requires three elements: 1. Possession by the plaintiff when the trespass was committed, 2. An unauthorized entry by the defendant, and 3. *Damage to the plaintiff from the trespass.*" *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983) (citing *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) (emphasis added). Finally, in order to sustain an action for nuisance, a plaintiff must show that defendant's actions caused him substantial damage. *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977).

Here, we hold that appellants have failed to show that the potential sources of contamination from Wysong's property caused them damage. In reaching our decision we rely on our Supreme Court's recent opinion in *Wilson v. McLeod Oil Co., Inc.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). In *Wilson*, defendants argued that they were not responsible for contamination of the Hills' and Paguras' (plaintiffs) wells because the forecast of evidence indicated that the defendants' site was downgradient from the plaintiffs' wells. However, the plaintiffs argued *inter alia* that:

> there could be a lower aquifer below the upper aquifer with a different flow direction from that of the upper aquifer . . . [and] that the depositions of the experts do not foreclose the possibility of the existence of this lower aquifer whose flow direction might bring the contamination to the Hill and Pagura properties from the Mini-Mart property . . . which is "downhill" from the Hill and Pagura properties.

Id. at 521, 398 S.E.2d at 602. An expert with the North Carolina Department of Natural Resources and Community Development (NRCD) testified by deposition that it was possible that a lower aquifer could run in a different direction. Our Supreme Court held that plaintiffs failed to present a sufficient forecast of evidence and said:

> Without more data in support of it, the answer, "that's possible," when asked if the flow direction could be different below the level where the NRCD had tested, is a slender reed upon which to base causation. It is not a sufficient forecast of evidence to survive the summary judgment motion . . . . To allow a jury to consider the question of whether there is a lower aquifer flowing in a different direction, when the only expert testifying on this matter refuses to answer that very question based on the data collected, is improper.

Id. at 522, 398 S.E.2d at 602-03.

Here, appellants argue that "the affidavits of Dr. Bogen, Mr. Nelson, and Mr. Smithey clearly rebut the conclusions reached by Mr. Wisniewski regarding Appellee's responsibility for the contamination of the Appellants' wells." We disagree.

Dr. Bogen testified that TCA can sink through groundwater "by any available pathway, including fractures in the bedrock." He also testified "[t]hat subsurface geologic data generated by Delta Environmental Consultants, Inc. indicates that fractures do exist in the bedrock under the subject properties." However, Dr. Bogen did not testify in his deposition that TCA actually travelled to the Lacey Subdivision property by fractures in the bedrock or that any existing fractures have such a configuration that TCA would travel from the Wysong property to the Lacey Subdivision property. Moreover, his opinion that there is a limited potential source area for the contamination of Lacey Subdivision is not inconsistent with Mr. Wisniewski's opinion that Wysong was not responsible for the contamination of appellants' wells.

Mr. Smithey's affidavit also fails to state that Wysong was responsible for the contamination. Rather, Mr. Smithey merely testified that, as far as he knew, the property located at 5829 Carla Lane "has never been exposed to the chemical TCA" and "could not be the source of the TCA contamination in the wells at the Lacey Allred Farms Subdivision." Moreover, appellants inap-

propriately rely on the early affidavit of Dr. Nelson. Dr. Nelson's subsequent affidavit, submitted by Wysong, makes clear that the early affidavit did not address the wells at issue in the instant case and that he did not intend to express any opinion in regard to those wells. Accordingly, we hold that appellants have failed to present a sufficient forecast of the evidence to withstand Wysong's motion for summary judgment.

Appellants also argue that they have suffered damages in addition to those resulting from contamination of their wells.

> The contamination of the wells is only one cause of the damages Appellants have suffered. We would contend that but for the release of TCA by Appellee, Appellants would not have been assessed for the water and sewer line installation in the neighborhood.

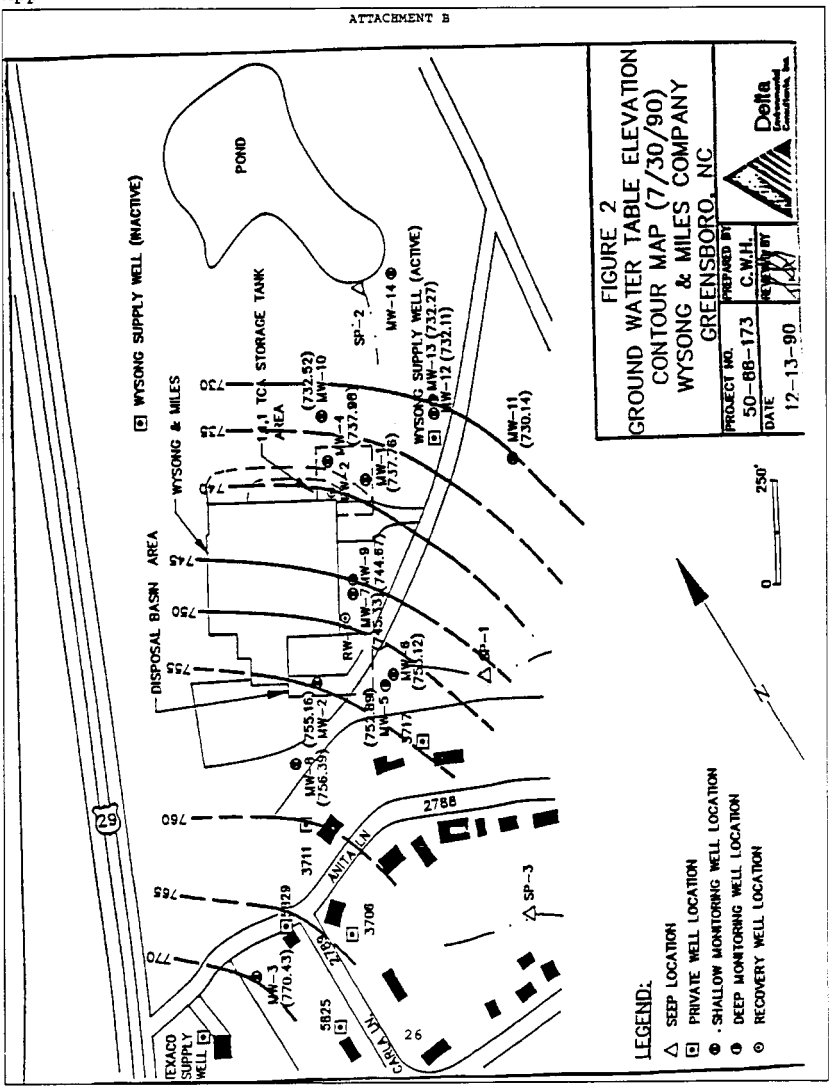
We have carefully examined this contention and find it to be without merit. Accordingly, it is overruled.

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

Affirmed.

Judges GREENE and LEWIS concur.

Appendix:


ATTACHEMENT B
FIGURE 2
GROUND WATER TABLE ELEVATION
CONTOUR MAP (7/30/90)
WYSONG & MILES COMPANY
GREENSBORO, NC
PROJECT NO. 50-88-173
PREPARED BY C.W.H.
DATE 12-13-90
REVIEWED BY
Delta Environmental Consultants, Inc.
LEGEND:
SEEP LOCATION
PRIVATE WELL LOCATION
SHALLOW MONITORING WELL LOCATION
DEEP MONITORING WELL LOCATION
RECOVERY WELL LOCATION
WYSONG SUPPLY WELL (INACTIVE)
WYSONG & MILES
DISPOSAL BASIN AREA
14.1 TCA STORAGE TANK AREA
POND
WYSONG SUPPLY WELL (ACTIVE)
TEXACO SUPPLY WELL
MW-1 (730.14)
MW-2 (755.16)
MW-3 (770.43)
MW-4 (737.98)
MW-5 (752.89)
MW-6 (733.12)
MW-7 (745.33)
MW-8 (756.39)
MW-9 (744.67)
MW-10 (732.52)
MW-11 (730.14)
MW-12 (732.11)
MW-13 (732.27)
MW-14
RW-1
SP-1
SP-2
SP-3
ANITA LN.
CRYSTAL LN.
29
0
250'

STATE OF NORTH CAROLINA v. BARRY ALLEN PEATEN

No. 914SC880

(Filed 6 July 1993)

Searches and Seizures § 11 (NCI3d)— inventory search of vehicle— impropriety—failure to suppress seized items—error

It was impermissible for officers to inventory, impound, or tow defendant's car, and items seized from the car during an inventory search should have been suppressed, since the vehicle was not obstructing traffic, was not a disabled or damaged vehicle, and did not threaten the public safety by some other means; the car was parked in the lot of a club which officers searched to determine whether taxpaid liquor was being sold; defendant was not present to make a disposition about the car which was presenting no traffic hazard; towing the car was in no way necessary to an arrest; the officer decided to tow the car so that it would not be vandalized; and there was no evidence which would establish that a sufficient period of time had elapsed before the police determined that the automobile was abandoned.

Am Jur 2d, Evidence §§ 408, 412.

Appeal by defendant from judgment entered 23 April 1991 by Judge Herbert Small in Sampson County Superior Court. Heard in the Court of Appeals 20 October 1992.

Defendant Barry Peaten was indicted on 2 January 1991 for felonious possession of a stolen firearm in violation of G.S. 14-71.1 on 15 September 1990. Prior to trial, defendant moved to suppress certain evidence seized during this search. The trial court denied the motion. On 23 April 1991, a jury found defendant guilty. He received a three-year sentence. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State.

MacRae, Perry, Pechmann & Williford, by James C. MacRae, Jr., for defendant-appellant.

ORR, Judge.

Evidence for the State tended to show the following: On 14 September 1990, Agent Jessie Pull and Agent Bill Simmons, both working with the Harnett County Interagency Drug Task Force, along with other officers obtained a search warrant authorizing a search of Club 41, located on Highway 41, for taxpaid alcoholic beverages.

After receiving the search warrant, Agent Pull and other officers who entered Club 41 conducted a search of the individuals inside. There were one hundred to two hundred people in Club 41 at the time the search warrant was executed. Individuals who did not have anything on them were released. After processing persons who had been charged, Agent Simmons saw several vehicles that remained on the premises of Club 41. One of the vehicles that remained at the club was a BMW with a North Carolina registration number CXZ-2745, which belonged to the defendant.

According to their testimony, at that time, the officers were of the opinion that if the BMW was left on the lot, it would have been gone by morning or it would have been vandalized. Therefore, they impounded the vehicle and inventoried the vehicle contents at the scene because an independent contractor would be called to tow the vehicle. Agent Simmons gained entry to the passenger area through the sunroof to perform an inventory search. No contraband was found in the passenger area of the car.

Simmons then discovered that the trunk of the vehicle was unlocked and made a decision to open it and to perform an inventory search. Upon searching the trunk of the defendant's vehicle, Agent Simmons found a semiautomatic Armalight 180 2.23 caliber rifle, a weapons case and a 40 round magazine.

Agent Simmons had the serial number of the gun run through N.C.I.C. and the gun was found to have been stolen from a Mr. Kissinger in Hope Mills, North Carolina, on 16 March 1988. The next day, defendant appeared at the Interagency Drug Enforcement office inquiring as to the whereabouts of his vehicle and was arrested for possession of a stolen firearm.

Prior to trial, defendant moved to suppress the evidence of the items found in his automobile on grounds that the seizure and search of the automobile violated his rights under the Constitutions of the United States and North Carolina. The trial court

made findings of fact and concluded that neither the seizure of the automobile nor the subsequent search thereof was constitutionally invalid.

Defendant first argues that the trial court erred in denying his motion to suppress evidence obtained from the warrantless seizure of his automobile and thereafter denying his motion to dismiss. We agree.

Absent consent, or some form of exigent circumstances, a warrant based on probable cause is required for a valid search or seizure under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967). Thus, whenever the State has engaged in any kind of a warrantless search, it must demonstrate, with particularity, how the intrusion was exempted from the general constitutional demand for a warrant before evidence of the fruits of such a search may be admitted in a criminal prosecution. *See Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Jeffers*, 342 U.S. 48 (1951). It necessarily follows then, that when a vehicular search is based upon the inventory search exception, rather than probable cause, the State bears an especially heavy burden to show that the inventory procedure was authorized by a lawful seizure of the car, performed in a reasonable manner and not used as a pretext to bypass the rigorous demands of the Fourth Amendment. *See South Dakota v. Opperman*, 428 U.S. 364 (1976); *State v. Phifer*, 297 N.C. 216, 254 S.E.2d 586 (1979); *State v. Vernon*, 45 N.C. App. 486, 263 S.E.2d 340 (1980).

The State contends that the officers made careful and complete inquiry as to the whereabouts of the owner of the car from all persons present and reasonably concluded that the car should be impounded because leaving the car on the premises of Club 41 would likely result in it being stolen or severely vandalized. Following the police department's written standard operating procedures for such circumstances, an inventory was made of the contents of the car that were accessible. The trunk of the car was unlocked and opened at the push of a button or a twist of a handle and very obviously was an area of the car that was accessible. According to the testimony, the police were not searching for anything, but rather compiling an inventory of items solely to establish a record of what was in the car and accessible to them at the time of their possession of the car and also to secure any such items from theft or vandalism.

The reason for the original search warrant of the nightclub was to determine whether taxpaid liquor was being sold in the club. Officer Simmons knew that the defendant's automobile was locked, in a private lot and presenting no traffic hazard. There is no evidence in the record as to how long the defendant's car had been left unattended. There were also other vehicles left unattended in the lot on that evening. The record does not show whether any effort was made to locate the owners of those cars and whether an effort was made to secure those cars.

Officer Simmons testified that he decided to tow the BMW "so it would not be vandalized." There is no evidence of any other circumstances which would bring the inventory and towing of this vehicle within the police department procedures. We find that the search is invalid as an inventory search, and the necessary probable cause and exigent circumstances to justify the search do not appear.

In *Phifer*, 297 N.C. 216, 254 S.E.2d 586 (1979), the Court established the applicable procedures for the inventory search and impoundment of an automobile. In *Phifer*, the police had stopped defendant for speeding in a 35 m.p.h. zone. An officer recognized defendant as a known drug dealer and ran a driver's license check on defendant and determined that there was a warrant for his arrest for other traffic offenses. The officer advised defendant that he was under arrest. The police decided that a wrecker should be called to tow defendant's car and proceeded to start a vehicle inventory on the car since there had been a few break-ins in the area. *Id.*

The State argued that the warrantless search of the glove compartment of defendant's car by the officers was part of a valid police inventory of the car's contents. The *Phifer* Court held, however, that based upon the language in *Opperman*, 428 U.S. 364 (1976), the search could not be justified as a constitutionally-valid inventory search.

In upholding the validity of such searches, the *Phifer* Court adopted a standard for impounding automobiles:

> "In the interests of public safety and as part of what the Court has called 'community caretaking functions,' automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve

> evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. . . ."

Phifer, 297 N.C. at 219, 254 S.E.2d at 587 (quoting *Opperman*, 428 U.S. at 368-69).

The *Phifer* Court further noted that police have the authority to "remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Id.*

Application of the above principles to the circumstances of the case *sub judice* leads us to conclude that had the automobile in question been obstructing traffic, been a disabled or damaged vehicle, or threatened the public safety by some other means, then the impoundment and subsequent search would be justified as a valid inventory search. However, this is not the case. Here, as in *Phifer*, the officer who searched the defendant's car completely failed to follow the standard procedures for towing and inventory established by the Police Department. Officer Simmons, who searched defendant's car, testified at trial that defendant was not present to make a disposition about the car, that the car was presenting no traffic hazard, parked as it was in the Club 41 parking lot, and that towing the car was in no way necessary to an arrest. Officer Simmons also testified that he decided to tow the BMW so it would not be vandalized. Nowhere in the procedure for towing and inventory does this appear as a ground upon which an officer may tow an automobile and thereby be authorized to perform an inventory search.

Further, the record is void of any evidence which would establish that a sufficient period of time had elapsed before the police determined that the automobile was abandoned. To authorize impoundment and a subsequent inventory search of an automobile that presents no traffic hazard without requiring that more time elapse than in the present case before the car is deemed abandoned would be to authorize the police to impound and search any and every car for which the owner cannot immediately be found.

Therefore, we find that it was impermissible for the officers to inventory, impound, or tow defendant's car. For the reversible

error committed by the court in denying his motion to suppress, defendant is entitled to a new trial.

Reversed and Remanded.

Judge EAGLES concurs.

Judge JOHN concurs in the result only without separate opinion.

HANNAH LOGAN PREVETTE, ADMINISTRATRIX OF THE ESTATE OF HOKE LANE PREVETTE, JR., DECEASED, PLAINTIFF v. FORSYTH COUNTY; FORSYTH COUNTY ANIMAL CONTROL DEPARTMENT; FORSYTH COUNTY ANIMAL CONTROL SHELTER; JERRY CANADY, AS DIRECTOR OF THE FORSYTH COUNTY ANIMAL CONTROL SHELTER; JERRY CANADY, INDIVIDUALLY; AND R. M. SWAFFORD, INDIVIDUALLY, DEFENDANTS

No. 9221SC622

(Filed 6 July 1993)

Municipal Corporations § 450 (NCI4th)— intestate killed by dogs— action against animal control officers—action barred by public duty doctrine—no "special relationship" exception

The public duty doctrine applied to bar plaintiff's claims against defendant animal control officers where plaintiff brought a wrongful death action against defendants for their alleged failure to properly protect an individual from dogs which defendants allegedly had reason to know were dangerous; furthermore, by policing animal control in the neighborhood in which intestate was attacked, defendants did not create a "special relationship" with intestate which created an exception to the public duty doctrine.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 184 et seq.

Appeal by plaintiff from judgment entered 6 April 1992 in Forsyth County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 13 May 1993.

On 18 October 1991, plaintiff, Hannah Logan Prevette, administratrix of the estate of Hoke Lane Prevette, Jr., instituted

a wrongful death action against Forsyth County; Forsyth County Animal Control Department; Forsyth County Animal Control Shelter; Jerry Canady, in his capacity as Director of the Forsyth County Animal Control Shelter and individually; and R.M. Swafford, a Forsyth County employee, individually.

Prior to trial, all defendants filed motions to dismiss the complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Prior to the hearing on defendants' motions, plaintiff filed notice of voluntary dismissal as to defendants Forsyth County Animal Control Department and the Forsyth County Animal Control Shelter. On 6 April 1992, the trial court granted defendants' motion to dismiss pursuant to Rule 12(b)(6) as to all of the remaining defendants. On 5 May 1992, plaintiff filed notice of appeal.

White and Crumpler, by Dudley A. Witt and Teresa L. Hier, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ellen M. Gregg, for defendant-appellees.

WELLS, Judge.

As her sole assignment of error, plaintiff contends that the trial court improperly granted defendants' motion to dismiss for failure to state a claim upon which relief can be granted. In *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986), our Supreme Court stated the standard of review applicable to the case now before us as follows:

> On a motion to dismiss for failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(6), all allegations of fact are taken as true but conclusions of law are not. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985).

More recently, in *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991), this Court reiterated the standard for review of a trial court's 12(b)(6) dismissal.

> "A complaint should be dismissed for failure to state a claim where it is apparent that plaintiff . . . is entitled to no relief under any statement of facts which could be proven, more specifically, when there is an absence of law to support the claim asserted, a want of facts sufficient to establish a good claim, or some defense which will necessarily defeat the claim." *Brawley v. Brawley*, 87 N.C. App. 545, 552, 361 S.E.2d 759, 763 (1987), *disc. rev. denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

The *Herndon* Court went on to add:

> "Strictly speaking, the concept of negligence is composed of two elements: legal duty and a failure to exercise due care in the performance of that legal duty. . . ." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 181, 352 S.E.2d 267, 270 (1987).

In the case now before us, the plaintiff's allegations may be summarized as follows: During all relevant times complained of, Thomas F. Powell owned and kept two rottweiler dogs. On or about 20 October 1989, Hoke Lane Prevette, Jr. was jogging around Mr. Powell's neighborhood, was attacked by Powell's rottweilers, and suffered injuries from which he ultimately died on 20 October 1989.

During all relevant times, Forsyth County, through its departments, the Forsyth County Animal Control Department (FCACD) and the Forsyth County Animal Control Shelter (FCACS), and their agents, was charged with the responsibility of enforcing all state and county laws relating to the care, custody, and control of animals, including, *inter alia*, the confinement or leashing of vicious dogs. At the time in question, Jerry Canady was the duly appointed director of the Forsyth County Animal Control Shelter, and R.M. Swafford was an agent and employee of the Forsyth County Animal Control Shelter.

Prior to 20 October 1989, the two rottweilers, owned by Powell, were picked up by the FCACD and/or the FCACS for allegedly attacking or attempting to attack certain individuals in the area of 601 Banner Avenue, in Winston-Salem. On or about 16 August 1989, the rottweilers were again picked up by FCACD and/or FCACS and after making proper notice, the two dogs were placed for sale on or about 22 August 1989. On that same day, at 5:25 p.m., Powell redeemed the two dogs. Prior to 22 August 1989, agents of FCACD/FCACS had repeatedly picked up Powell's rottweilers

and knew said dogs to be vicious, ferocious, and accustomed to threatening and/or attacking individuals around Powell's neighborhood. With knowledge of the rottweilers' dangerous tendencies, R.M. Swafford or some unknown animal control officer, allowed Powell to redeem his dogs. Such redemption was in violation of pertinent sections of the Forsyth County Code and constituted negligence *per se*. During all relevant times, Forsyth County's agents and/or employees were acting within the scope of their agency and employment.

Defendants Forsyth County, FCACD and FCACS were negligent because they failed to adequately train and supervise their employees/agents in that its agents failed to follow provisions of the Forsyth County Code when they allowed Mr. Powell to redeem his dogs, its agents failed to notify the Forsyth County Health Director of the dangerous propensity of Powell's dogs, and its agents failed to determine that said rottweilers were "potentially dangerous dogs" pursuant to N.C. Gen. Stat. § 67-4.1.

As a direct and proximate result of the defendants' negligence, Powell's rottweilers were in the neighborhood of 601 Banner Avenue on or about 20 October 1989, and attacked and killed Hoke Lane Prevette, Jr.

The factual allegations set forth in plaintiff's complaint operate to shield defendants from liability. In *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897, *rehearing denied*, 330 N.C. 854, 413 S.E.2d 550 (1991), our Supreme Court discussed and applied the public duty doctrine.

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).
>
> . . .
>
> While this policy is a necessary and reasonable limit on liability, exceptions exist to prevent inevitable inequities to certain individuals. There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law en-

forcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Coleman v. Cooper*, 89 N.C. App. at 194, 366 S.E.2d at 6; *see also Martin v. Mondie*, 94 N.C. App. 750, 752-53, 381 S.E.2d 481, 483 (1989). Although we have not heretofore adopted the doctrine with its exceptions, we do so now. [*See also, Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609, *aff'd in part and reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991); and *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *rev. denied*, 330 N.C. 441, 412 S.E.2d 72 (1991)].

The defendants in the case at bar are being sued for their alleged failure to properly protect an individual from dogs which the defendants allegedly had reason to know were dangerous. Because this cause of action clearly arises out of Forsyth County's agents' alleged failure to provide sufficient protection to the individual decedent in this case, we must find that the public duty doctrine applies here and bars plaintiff's cause of action.

Plaintiff next contends that even if the public duty doctrine applies under these facts, an exception to the public duty doctrine should also apply and save plaintiff's cause of action. Plaintiff concedes the defendants never made any explicit promise of protection to the decedent which might fulfill the "promise of protection" exception to the public duty rule, but suggests that, by policing animal control in the neighborhood in which the intestate was attacked, defendants created a "special relationship" with the intestate. Plaintiff further contends that this alleged "special relationship" creates an exception to the public duty doctrine. Plaintiff cites no authority for such a broad application of the "special relationship" exception and we perceive that to do so would not be consistent with our Supreme Court's holding in *Braswell, supra.*

Affirmed.

Judges COZORT and JOHN concur.

THE FARM CREDIT BANK OF COLUMBIA v. MARY H. VAN DORP AND A. H. VAN DORP

No. 922SC713

(Filed 6 July 1993)

Appeal and Error § 209 (NCI4th); Judgments § 36 (NCI4th)— failure of notice of appeal to refer to all prior orders—order appealed from void—errors in attempting to appeal from void judgment insignificant

Where the notice of appeal referred to only one judgment and made no reference to a prior order granting partial summary judgment for plaintiff or to a prior order deeming items contained in plaintiff's Request for Admissions admitted, the notice was insufficient to confer jurisdiction on the Court of Appeals with regard to the prior orders. However, the judgment to which the notice did refer was void as it was entered out of the county and the district without defense counsel's consent; therefore, any attempt by defendants to appeal from that void judgment was inconsequential, no final judgment on the merits has been rendered, and any errors made by defendants in attempting to appeal from the void judgment are without lasting significance. Defendants will have the opportunity to appeal from the final judgment once the trial court has entered it properly, and in so appealing to properly designate all prior interlocutory orders from which they choose to appeal.

Am Jur 2d, Appeal and Error §§ 316 et seq.; Judgments §§ 58 et seq.

Appeal by defendants from Judgment entered 18 March 1992 by Judge William C. Griffin, Jr. in Nash/Hyde County Superior Court. Heard in the Court of Appeals 27 May 1993.

Everett, Everett, Warren & Harper, by Edward J. Harper, II, for plaintiff-appellee.

Lee E. Knott, Jr., for defendants-appellants.

WYNN, Judge.

On 15 August 1975, the defendants borrowed $208,000 from the Federal Land Bank of Columbia, of which the plaintiff is suc-

cessor by merger. This debt was evidenced by a note and secured by a deed of trust dated 15 August 1975. On 18 January 1983, the defendants borrowed an additional $247,000 from the plaintiff, evidenced by a note indicating that it was secured by the security instrument of 15 August 1975.

Prior to the first loan, the collateral described in the deed of trust was appraised at $493,000; prior to the second loan, $865,000. On 18 January 1983, the combined unpaid principal of both loans was $430,438.90. Foreclosure proceedings were instituted by the plaintiff against the defendants on 25 July 1988 attempting to foreclose on the property described in the deed of trust which secured the loans. A foreclosure sale was held on 2 December 1988, at which the plaintiff purchased the collateral for $470,000. The Bank alleges that the amount due under both loans at the time of the foreclosure sale exceeded the amount paid for the property, and, on 6 January 1989, brought this action seeking to recover $104,254.29, alleged to be the balance due on the loans. The defendants denied that any balance was due on the loans because the collateral was fairly worth more than the amount of the debt at the time of the foreclosure sale and the plaintiffs had purchased the collateral at that sale for a sum which was substantially less than its true value.

On 30 October 1989, the case was removed to Hyde County where, by Order dated 31 October 1989, filed 27 November 1989, Judge Thomas S. Watts granted the plaintiff's motion for summary judgment as to all issues raised by the pleadings except the computation of the amount due and the allowance of costs. The defendants gave notice of appeal from that Order on 30 November 1989, and, on 2 February 1990, executed a "Dismissal of Appeal" after determining that the appeal was interlocutory.

Thereafter, on 5 April 1990, the plaintiff served the defendants with a Request for Admissions and Interrogatories, which the defendants answered on 3 May 1990, with supplemental answers filed 9 May 1990, denying the truth of the statements made in the Request for Admissions. On 26 May 1990, Judge William Griffin, Jr. signed an Order, filed 5 June 1990, that all matters contained in the Request for Admissions be deemed admitted as if the defendants had actually admitted such matters in their entirety. On 27 June 1991, the plaintiff requested a further hearing on its prior motion to have the matters contained in the Request for Admissions

deemed admitted. On 17 July 1991, Judge Griffin signed an Order *nunc pro tunc* 8 July 1991 modifying, because of a computer error, his previous Order that the matters contained in the Request for Admissions be deemed admitted. That Order was not filed until 19 March 1992.

Judge Griffin signed a second Order on 18 March 1992, filed 19 March 1992, out of County and out of District, awarding the plaintiff the sum of $164,957.85, interest from 21 February 1992, and attorney's fees of $18,000 from the defendants. The defendants were notified of this judgment through the mail on 20 March 1992 and filed a Notice of Appeal therefrom on 17 April 1992. The relevant portion of that Notice reads as follows:

> The defendants give notice of appeal to the Court of Appeals of North Carolina from the *Judgment signed March 18, 1992 by the Honorable William C. Griffin, Jr.*, Judge Presiding at the March 16, 1992 Civil Term of the General Court of Justice of Nash County, Superior Court Division, said Judgment being filed in the Office of the Clerk of the General Court of Justice of Hyde County on March 19, 1992 and *awarding the plaintiff the full sum of $164,957.85, interest from February 21, 1992, and attorneys' fees of $18,000.00 against the defendants.*

(Emphasis added).

The defendants make six assignments of error on appeal. Three of these pertain to the Order of partial summary judgment entered by Judge Watts on 31 October 1989, two concern the Order signed by Judge Griffin on 8 July 1991, and one applies to Judge Griffin's Order of 18 March 1992. The only Order indicated in the Notice of Appeal, however, is that Order dated 18 March 1992.

The appellate rules provide that, in order to confer jurisdiction on this Court, the Notice of Appeal " 'shall designate the judgment or order from which the appeal is taken.' " *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (quoting N.C.R. App. P. 3). This jurisdictional requirement may not be waived by this Court, and, therefore, if the party appealing fails to comply with it, the appeal must be dismissed. *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 17, 411 S.E.2d 645, 647 (1992). Notwithstanding the mandate of the appellate rules, there are two means by which the Notice of Appeal may be liberally

construed to determine whether this Court has jurisdiction over an unspecified judgment. *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. First, the appeal will not be dismissed if the appellant has made a mistake in designating the judgment but "the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Id.* at 157, 392 S.E.2d at 424 (emphasis in original). Secondly, the appeal will not be lost if the appellant failed technically to comply with the rules of appellate procedure relating to filing papers with the court, but "accomplish[ed] the '*functional equivalent*' of the requirement." *Id.* (emphasis in original).

In the present case, the Notice of Appeal on its face designates only Judge Griffin's Order of 18 March 1992 relating to the deficiency award, interest, and attorneys' fees. We cannot fairly infer from this Notice that the appellants intended to also appeal from Judge Watt's Order granting partial summary judgment for the plaintiff, or from Judge Griffin's other Order deeming the items contained in the plaintiff's Request for Admissions admitted. However, the result of the defendants' appeal from Judge Griffin's 18 March 1992 Order renders our findings regarding the defects in the Notice inconsequential.

An Order that is signed out of County and out of District is void unless the adversary party receives proper notice and consents to the entry of the Order, or such an entry is provided for by statute. *State ex rel. Utilities Comm'n v. State*, 243 N.C. 12, 16, 89 S.E.2d 727, 730 (1955), *reh'g denied*, 243 N.C. 685, 91 S.E.2d 899 (1956); *Fletcher v. Jones*, 69 N.C. App. 431, 433, 317 S.E.2d 411, 413 (1984), *aff'd in part, rev'd in part*, 314 N.C. 389, 333 S.E.2d 731 (1985). Judge Griffin did, in fact, enter the 18 March 1992 Order out of County and out of District, without the defense counsel's consent. The appellants make note of this in the Statement of Procedural History in their brief and the appellee, in its brief, accepts that Statement. Moreover, at oral argument the appellee's counsel stated that he had no quarrel with the law cited by the appellants on this issue, though he also stated that he was unaware of the communication between Judge Griffin and appellants' counsel as relates to the 18 March 1992 signing of the Judgment. The record indicates, however, that the appellants' counsel notified Judge Griffin by letter that he would not consent to Judge Griffin's hearing the appellee's motion, scheduled at that time for 21 February 1992, out of County and out of term. Judge Griffin

did not hear the motion on 21 February 1992, but did hear it on 17 March 1992, prior to signing the Judgment on 18 March 1992. This Court finds that the appellants did not consent to such, and, therefore, the Order entered by Judge Griffin is void.

It should be noted that since the Judgment entered by Judge Griffin on 18 March 1992 is void, no final judgment on the merits has been entered in this case. Any attempt by the defendants to appeal from that void judgment then, is inconsequential, and any errors made in attempting such appeal are without lasting significance. Thus, the prior Orders of Judge Watts and Judge Griffin, which were interlocutory, could not have been appealed from because there has been no final judgment rendered on the merits. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *see also Hinson v. Hinson*, 17 N.C. App. 505, 508, 195 S.E.2d 98, 100 (1973) (distinguishing between interlocutory and final judgments). The defendants, accordingly, will have the opportunity to appeal from the final judgment once the trial court has entered it properly, in session in County and District, and in so appealing to properly designate all prior interlocutory orders from which they choose to appeal in order that this Court may obtain jurisdiction of all issues relevant to the final judgment, which include the prior non-final judgments entered by Judges Watts and Griffin.

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

Vacated.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. FLOYD ALEXANDER CANADY

No. 9212SC613

(Filed 6 July 1993)

Evidence and Witnesses § 29 (NCI4th)— time of sunset—phase of moon—judicial notice of information from newspaper not required

The trial court in a homicide prosecution was not required to take judicial notice of the time of the sunset and the phase

of the moon as reported in *The Fayetteville Observer*, since to warrant judicial notice, the source from which the data is drawn must be a document of such indisputable accuracy as would justify judicial reliance; the newspaper was not such a document in this case; and in the case of facts such as those in question here, a document of indisputable accuracy contemplates material from a primary source in whose hands the gathering of such information rests.

Am Jur 2d, Evidence §§ 14, 18.

Appeal by defendant from judgment entered 3 March 1992 in Cumberland County Superior Court by Judge Joe Freeman Britt. Heard in the Court of Appeals 11 May 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.

Paul F. Herzog for defendant-appellant.

GREENE, Judge.

Appeal by defendant from judgment and commitment to fourteen years imprisonment entered 3 March 1992, after jury verdict convicting him of voluntary manslaughter. N.C.G.S. § 14-18 (1986).

The State's evidence tends to show, *inter alia*, that defendant stabbed George Bullard (Bullard), who was romantically involved with defendant's estranged wife, to death on the evening of 24 May 1990 at the mobile home where defendant's estranged wife was living. One of the State's witnesses, Mrs. Nunnery, testified that her house was approximately 150 feet from Mrs. Canady's mobile home and that she could see Mrs. Canady's mobile home and front yard from her porch. On the evening Bullard was killed, Mrs. Nunnery received a telephone call from Mrs. Canady. Mrs. Nunnery heard a "scuffle" on the phone, and Mrs. Canady asked her to "call the law," which Mrs. Nunnery did. As she hung up the telephone, Mrs. Canady came into her house.

Mrs. Nunnery then went out onto the front porch and observed Bullard and defendant. She saw Bullard standing beside defendant's car with no weapon in his hand. Defendant was inside the car at the time, but the driver's door was open and defendant's leg was outside the door. Mrs. Nunnery observed that Bullard was attempting to get defendant into his car, and heard Bullard say

"[g]et your leg in and go on. I don't want to fight you." Mrs. Nunnery then went back inside her house. She returned to the front porch minutes later and observed both Bullard and defendant standing outside the car, neither one armed. Mrs. Nunnery returned inside, and then heard defendant call out that an ambulance should be called. Mrs. Nunnery was the only witness, other than defendant, to the altercation. Mrs. Nunnery testified that when she was watching defendant and Bullard "[i]t was still daylight. It was getting toward dusk. . . . [T]here was good light."

Defendant's evidence, consisting primarily of statements made to officers at the scene, tended to establish that he killed Bullard in self-defense, and conflicted with the testimony of Mrs. Nunnery. Defendant did not testify, but claimed in statements made to the police that it was dark when he arrived at the mobile home. Defendant's counsel moved in writing that the trial court take judicial notice of the fact that the sunset on 24 May 1990 occurred at 8:19 p.m., and that there was a new moon on that date. Defendant offered verification of these facts in the form of the reports published daily in *The Fayetteville Observer*. The trial court refused defendant's request. The jury returned a verdict finding defendant guilty of voluntary manslaughter.

Defendant contends that the evidence of the time of sunset and presence of a new moon was critical to his case because such information casts doubt on Mrs. Nunnery's testimony that there was sufficient daylight by which to see the exchanges between defendant and Bullard. Thus, defendant claims, he was prejudiced when the trial court wrongfully refused to take judicial notice of the information offered. The State contends that the information in *The Fayetteville Observer* is not official, and therefore not the proper subject for judicial notice.

The dispositive issue is whether the trial court is required to take judicial notice of the time of the sunset and the phase of the moon as reported in *The Fayetteville Observer*.

The Rules of Evidence provide that the trial "court shall take judicial notice [of adjudicative facts] if requested by a party and supplied with the necessary information." N.C.G.S. § 8C-1, Rule 201(d) (1992). Once a request to take judicial notice is made and accompanied by supporting data, the trial court "is entitled to pass upon the sufficiency of the data." 1 Henry Brandis, Jr., *Brandis*

on North Carolina Evidence § 11 (3d ed. 1988) (footnote omitted). The trial court weighs the sufficiency of the data by determining whether the fact put forth for judicial notice is

> one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

N.C.G.S. § 8C-1, Rule 201(b) (1992). To warrant judicial notice under the second part of this test, the source from which the data is drawn must be "a document of such indisputable accuracy as [would] justif[y] judicial reliance." *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979). It is the responsibility of counsel seeking to have a fact judicially noticed to supply the trial court with such information, and "[t]he trial judge is not required to make an independent search for data of which he may take judicial notice." *Id.*

The exact time of sunset and the current phase of the moon on a particular date are not facts "generally known." They are, however, facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Thus, it was the responsibility of defendant's counsel, upon his request that the trial court take judicial notice of the moon phase and time of sunset, to provide that information to the trial court in "a document of such indisputable accuracy as [would] justif[y] judicial reliance." *Dancy*, 297 N.C. at 42, 252 S.E.2d at 515. *The Fayetteville Observer* is not such a document. We note that the newspaper excerpt does not even identify the source of its data. We believe that, in the case of facts such as the time of sunset and the phase of the moon, a document of "indisputable accuracy" contemplates material from a primary source in whose hands the gathering of such information rests. Our Supreme Court has approved this view in *Dancy*, refusing to find error in the trial court's failure to take judicial notice of the phase of the moon when the source was *The Ladies Birthday Almanac*, but taking judicial notice on its own initiative of the same fact as found in the records of the U.S. Naval Observatory. *Id.*

Accordingly, the trial court did not err in failing to take judicial notice of the facts put forth by defendant.

No error.

Judges JOHNSON and WYNN concur.

KENTALLEN, INC. v. THE TOWN OF HILLSBOROUGH, THE BOARD OF ADJUSTMENT FOR THE TOWN OF HILLSBOROUGH AND LARRY CARROLL, SR., AND BETTY CARROLL

No. 9215SC636

(Filed 6 July 1993)

Municipal Corporations § 30.19 (NCI3d)— special exception permit— adjoining landowner—no standing to contest issuance

Petitioner had no standing to contest the decision by respondent Board of Adjustment to issue a special exception permit allowing respondents to add to a metal storage building at the rear of their property, since petitioner's allegation that it was the "owner of adjoining property" did not satisfy the pleading requirement that there be an allegation relating to whether and in what respect petitioner's land would be adversely affected by the Board's issuance of the special exception permit, and evidence that the requested construction would increase "[t]he negative impact" on petitioner's property and "would not be visually attractive" was much too general to support a finding that petitioner had or would suffer any pecuniary loss to its property due to the issuance of the permit.

Am Jur 2d, Licenses and Permits § 82.

Appeal by petitioner from order filed 17 March 1992 in Orange County Superior Court by Judge F. Gordon Battle. Heard in the Court of Appeals 13 May 1993.

Cheshire, Parker and Butler, by D. Michael Parker, for plaintiff/petitioner-appellant, Kentallen, Inc.

Michael B. Brough & Associates, by Jan S. Simmons, for defendant/respondent-appellees The Town of Hillsborough and The Board of Adjustment for the Town of Hillsborough.

Robert Maggiolo for defendant/respondents Larry Carroll, Sr. and Betty Carroll (no brief filed).

GREENE, Judge.

Respondents Larry Carroll, Sr. and Betty Carroll (the Carrolls) own property located within the limits of respondent Town of Hillsborough (the Town). The Carrolls applied, on 21 March 1991, to the Town's Planning Department for a permit to construct a thirty-foot by thirty-five-foot addition to a metal storage building located at the rear of their property. The existing metal storage building is located less than the required twenty feet from the rear boundary of the Carrolls' lot, and is a non-conforming use pursuant to the Town's Zoning Ordinance (the Ordinance). Notice of a public hearing on the matter before respondent Board of Adjustment for the Town of Hillsborough (the Board) was sent to nearby property owners. In response, Kentallen, Inc. (Kentallen), owner of the property adjoining the Carroll property, sent a letter to the Board stating in part that allowing the nonconforming use would substantially increase "[t]he negative impact" on its property. The letter was signed by Neal Littman (Littman). Littman also appeared at the public hearing on 10 April 1991, and testified that the view of the nonconforming building from the Kentallen property "would not be visually attractive." The Board issued a special exception permit on 11 April 1991, allowing the nonconforming use requested by the Carrolls.

On 10 May 1991, Kentallen filed a petition in superior court alleging that the addition to the metal storage building extends, enlarges, and expands the present nonconforming use of the metal storage building, and is, therefore, in violation of the Ordinance. Kentallen further alleged that it is "the owner of adjoining property, and is an aggrieved party." The petition prayed that a writ of certiorari be directed to the Board requiring that the Board forward the complete record of its decision on the Carrolls' application for a special exception permit to the superior court for consideration. An order granting the writ was filed 16 July 1991. A hearing was held on the matter on 24 February 1992. In a letter, which is included in the record, addressed to both parties and dated 28 February 1992, the trial judge stated that he had decided to affirm the decision of the Board and instructed respondents' counsel to prepare an appropriate order. The trial judge also stated that "I am not going to dismiss the proceeding because of any alleged lack of standing." The order affirming the Board's decision was filed 17 March 1992.

Kentallen appeals, assigning as error the trial court's findings of fact as not supported by the evidence, the trial court's conclusions of law as not supported by the findings of fact, and that the trial court failed to consider the overall intent of the Ordinance in arriving at its decision.

Respondents cross-assign as error the trial court's failure to dismiss the action on the ground that Kentallen lacked standing to contest the issuance of the special exception permit.

The dispositive issue is whether Kentallen had standing to contest the Board's decision to issue the special exception permit.

North Carolina Gen. Stat. § 160A-388 allows cities and towns to appoint Boards of Adjustment for the purpose of hearing and deciding appeals from decisions of officials charged with the regulation of planning and development, including zoning. N.C.G.S. § 160A-388(a) (Supp. 1992). "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. § 160A-388(e) (Supp. 1992). Only aggrieved parties have standing to seek such review. *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990). Aggrieved parties include owners of property upon which restrictions are imposed and "those who have sustained pecuniary damage to real property in which they have an interest." 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* §§ 43.02[1], 43.03[1] (1993) [hereinafter *Rathkopf's*]; *see Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) ("adjoining or nearby" property owner has standing if he "will sustain . . . from the proposed use . . . a reduction in the value of his own property"). Not only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege "the facts on which [the] claim of aggrievement is based." *Rathkopf's* at § 43.04[1]; 4 Robert M. Anderson, *American Law of Zoning* 3d § 27.23 (1986) (petitioner "must allege the circumstances which establish his status"); *see Heery v. Town of Highlands Zoning Bd. of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983). The petition must therefore allege "the manner in which the value or enjoyment of [petitioner's] land has been or will be adversely affected." *Rathkopf's* at § 43.04[1] (footnote omitted). Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase

the danger of fire, increase the traffic congestion and increase the noise level. *Id.* Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury "has resulted or will result from [the] zoning action." *Id.*

In this case, Kentallen's allegation that it is the "owner of adjoining property" does not satisfy the pleading requirement, in that there is no allegation relating to whether and in what respect Kentallen's land would be adversely affected by the Board's issuance of the special exception permit. Furthermore, the evidence presented before the Board, that the requested construction would increase "[t]he negative impact" on the petitioner's property and "would not be visually attractive," is much too general to support a finding that Kentallen will or has suffered any pecuniary loss to its property due to the issuance of the permit.

The order appealed from is vacated, and the matter is remanded to the trial court for entry of an order (1) dismissing the petition for a writ of certiorari filed 10 May 1991; (2) vacating the writ of certiorari granted 16 July 1991; and (3) reinstating the special exception permit issued by the Board on 11 April 1991.

Vacated and remanded.

Judges JOHNSON and WYNN concur.

STATE OF NORTH CAROLINA, BY AND THROUGH ITS NEW BERN CHILD SUPPORT ENFORCEMENT OFFICE, EX REL., CAROL YVETTE HILL, PLAINTIFF v. SAM MANNING, DEFENDANT

No. 923DC1261

(Filed 6 July 1993)

1. Appeal and Error § 107 (NCI4th)— order for DNA testing— unappealable interlocutory order—merits considered in public interest

An interlocutory order requiring the parties and their minor child to submit to DNA testing did not affect a substantial right of plaintiff and was not appealable. However, the

Court of Appeals in its discretion will address the merits of this case in order to expedite the decision in the public interest.

Am Jur 2d, Appeal and Error §§ 134 et seq.

2. Illegitimate Children § 11 (NCI4th)— adjudication of paternity—subsequent order for DNA testing—res judicata

The trial court erred in allowing defendant's motion to compel DNA testing to further establish paternity after paternity had been adjudicated since the doctrine of *res judicata* prohibited defendant from raising that issue in subsequent hearings.

Am Jur 2d, Bastards § 94.

Judgment in bastardy proceeding as conclusive of issues in subsequent bastardy proceeding. 37 ALR2d 836.

Appeal by plaintiff from order entered 20 July 1992 by Judge Jerry F. Waddell in Craven County District Court. Heard in the Court of Appeals 14 June 1993.

The State instituted this action on behalf of Carol Yvette Hill by complaint filed 30 August 1990. Pursuant to Article 9, Chapter 110 and Article 3, Chapter 49 of the General Statutes, the State sought to establish defendant's paternity of Hill's minor child. Defendant failed to answer and entry of default was entered against him on 22 October 1990. Upon entry of default, defendant moved for an order compelling a blood grouping test. The motion was granted and the tests were performed. Based on the test results which found a 99.99% probability that defendant was the father of the minor child, defendant was adjudicated the father by order dated 4 February 1991.

On 13 July 1992 defendant moved for an order compelling DNA or gene testing to further establish paternity. On 20 July 1992 the motion was granted. From this order plaintiff appeals.

Attorney General Michael F. Easley, by Assistant Attorney General T. Byron Smith, for the State.

Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, P.A., by Marcus W. Chesnutt and James M. Ayers, II, for defendant appellee.

ARNOLD, Chief Judge.

[1] Normally, no appeal lies from an interlocutory order which does not deprive the appellant of a substantial right which he would lose if the order or ruling is not reviewed before final judgment. *Blackwelder v. North Carolina Dep't of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). A court order requiring parties and their minor child to submit to blood grouping testing does not affect a substantial right and is, therefore, interlocutory and not appealable. *Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E.2d 78, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). In our discretion, however, we will address the merits of this case in order to expedite the decision in the public interest. *See Person County ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985).

[2] The sole issue before this Court is did the trial court err in ordering DNA or gene testing subsequent to an adjudication of paternity. We find that, based on the doctrine of *res judicata*, the order was entered in error and must be vacated.

> It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter. *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157. ". . . (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore*, 44 N.C. 157.

Masters v. Dunstan, 256 N.C. 520, 523-24, 124 S.E.2d 574, 576 (1962).

The doctrine has been repeatedly applied in cases where there has been a judicial finding of paternity and the defendant subsequently raises the issue of paternity in an effort to avoid payment of child support. *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984) (defendant estopped from challenging paternity when previous criminal conviction for willful neglect of and refusal to support children necessarily established paternity); *see Sampson County Child Support Enforcement Agency ex rel. McNeill v.*

Stevens, 101 N.C. App. 719, 400 S.E.2d 776 (1991) (original paternity judgment ruled *res judicata* in later contempt proceedings where a blood test was requested); *Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (reversal of trial court granting motion for blood grouping test where issue of paternity was determined at earlier hearing).

In the present case, upon motion of defendant, a blood grouping test was ordered and submitted to by the parties and the minor child. The trial court held the results of that test were sufficient to establish paternity beyond a reasonable doubt. Under existing case law defendant is precluded from raising that issue in subsequent hearings.

We hold that the trial court erred in ordering the parties to submit to DNA or gene testing, and we vacate that order.

Vacated.

Judges GREENE and MARTIN concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF DONALD C. ENDERLE AND WIFE, JEAN WATKINS POOLE ENDERLE, MORTGAGORS/GRANTORS TO W. MARK CUMALANDER, SUBSTITUTE TRUSTEE AND THE FIDELITY BANK, BENEFICIARY AND NOTEHOLDER

No. 9210SC629

(Filed 6 July 1993)

Mortgages and Deeds of Trust § 14 (NCI4th)— validity of deed of trust executed for debt of another—failure to identify obligation secured—deed of trust invalid

A person may execute a valid deed of trust for the debt of another; however, in this case the deed of trust did not properly identify the obligation secured, and it was therefore invalid.

Am Jur 2d, Mortgages §§ 132 et seq.

Appeal by mortgagors Donald C. Enderle and wife, Jean Watkins Poole Enderle from order signed 15 April 1992 in Wake County Superior Court by Judge George R. Greene. Heard in the Court of Appeals 13 May 1993.

J. Kenneth Edwards, by J. Kenneth Edwards, for mortgagor-appellants.

Cumalander & Cumalander, by W. Mark Cumalander and Tonya C. Cumalander, for John W. Byrne, Trustee-appellee.

GREENE, Judge.

Donald C. Enderle and Jean Watkins Poole Enderle (the Enderles) appeal from the trial court's order affirming the decision of the clerk of court authorizing foreclosure on property owned by the Enderles by trustee W. Mark Cumalander (substitute trustee), pursuant to a deed of trust held by the Fidelity Bank (the Bank).

The Bank loaned $255,000.00 to Donald and Arlene Tant (the Tants) on 17 June 1987, for the purpose of improving property owned by the Tants. The note signed by the Tants reflects that the loan is secured in part by "Deed of Trust on Lot 7 1.09 Acres Barton Creek Township Wake Co." On the same day, the Enderles executed a deed of trust, with the bank as beneficiary and John W. Byrne as trustee, which states that the Enderles are indebted to the bank for the sum of $255,000.00, and conveys in trust "Lot 7 according to map entitled 'Subdivision Land of Jean Poole Enderle.' " This is the same property listed as security in the Tant note. The deed of trust contained a power of sale upon default. Cumalander was later named as substitute trustee.

On 30 June 1991, the Tants defaulted in the repayment of the note. The Bank requested that the substitute trustee foreclose on the Enderle deed of trust pursuant to the power of sale. The substitute trustee filed a notice of hearing for foreclosure of a deed of trust on 20 September 1991. A hearing on the substitute trustee's right to proceed with foreclosure was held by the clerk of court on 10 October 1991, and an order authorizing foreclosure was filed 1 November 1991. The Enderles appealed the order to superior court. After hearing arguments from both parties, the superior court signed an order on 15 April 1992, which order authorized foreclosure.

The issue is whether a person may execute a valid deed of trust for the debt of another.

The Enderles argue that "the State's public policy will not allow an individual's property to be foreclosed upon unless the

individual property owner is personally indebted and in default upon a debt or other obligation owed to the party seeking foreclosure." Thus, the Enderles contend, because they were not indebted to the Bank, the execution of a deed of trust to the Bank securing the debt of the Tants cannot support a foreclosure upon default by the Tants.

A " 'mortgage to secure the debt of a third person, the mortgagor being subject to no obligation, is clearly valid.' " Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 2.1 (2d ed. 1985) (citation omitted); 9 George W. Thompson, *Commentaries on The Modern Law of Real Property* § 4776 (John S. Grimes ed. 1958) (mortgage valid without personal liability on part of mortgagor); 59 C.J.S. *Mortgages* § 90 (1949) (benefit to third party can constitute consideration for mortgage and "[h]ence, the debt may be the debt of another and the consideration . . . may consist [of] a loan to a third person" (footnotes omitted)); 55 Am. Jur. 2d *Mortgages* § 146 (1971) ("[m]ortgages may be executed to secure the obligations of third persons" and "[a]n undertaking . . . to be personally responsible for the payment of the debt of the third person is not essential to the validity" (footnotes omitted)). Therefore, had the deed of trust in question been given as security for the debt of the Tants, the foreclosure would have been valid.

In this instance, however, the deed of trust states that it is given "to secure the payment of" a debt in the amount of $255,000.00 owed by the Enderles to the Bank, as evidenced by a note "made by" the Enderles. There is no reference in the deed of trust to indicate that it is security for a debt of the Tants. Therefore, because, as the Bank admits, the Enderles are not indebted to the Bank, and because the alleged Enderle debt is the one referenced in the deed of trust, the substitute trustee was without authority to foreclose. Simply put, because the deed of trust did not properly "identify the obligation secured," it is invalid. *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958).

We do not address the issue, because it is not raised, of whether, because the deed of trust may fail to express the true intent of the parties, it should be reformed. *See Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977) (deed of trust can be reformed upon a showing, by clear and convincing evidence, that a mutual mistake occurred in its drafting); *Ragsdale v. Kennedy*, 22 N.C. App. 509, 511, 207 S.E.2d 301, 303, *rev'd on other grounds*, 286

N.C. 130, 209 S.E.2d 494 (1974) (reformation must be pled with particularity).

Accordingly, the decision of the trial court is

Reversed.

Judges JOHNSON and WYNN concur.

NEIL REALTY COMPANY, INC. v. MEDICAL CARE, INC., AND J. KENNETH LEE

No. 928SC811

(Filed 6 July 1993)

Venue § 5.1 (NCI3d)— declaratory judgment as to option agreement—action affecting title to land—county where property situated proper venue

The trial court properly granted defendant's motion for change of venue to the county where a nursing home facility was located where plaintiff alleged in its complaint that it entered into an option agreement with defendant, pursuant to which plaintiff was given the opportunity to purchase outright at a discount the note and deed of trust on the facility held by defendant's trustee; upon plaintiff's exercise of the option, legal title to the facility would transfer from the trustee to plaintiff; by seeking a judgment declaring that the option was still in effect and that it could exercise the option, plaintiff was seeking a judgment which would affect title to land located in Guilford County; and pursuant to N.C.G.S. § 1-76 the action had to be tried in Guilford County.

Am Jur 2d, Venue §§ 10, 63.

Appeal by plaintiff from order filed 11 June 1992 in Lenoir County Superior Court by Judge James D. Llewellyn. Heard in the Court of Appeals 16 June 1993.

Ward and Smith, P.A., by John M. Martin, Ryal W. Tayloe, and Andrew H. D. Wilson, for plaintiff-appellant.

Becton, Slifkin & Fuller, P.A., by Charles L. Becton and Asa L. Bell, Jr., for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from an order filed 11 June 1992, granting defendants' motion for change of venue to Guilford County, North Carolina.

Plaintiff Neil Realty Company, Inc. (Neil Realty) instituted this action on 8 April 1992, seeking declaratory relief. In its complaint, Neil Realty alleges that on 26 January 1990, it purchased the assets, including the real property, of the St. James Nursing Center, Inc. (St. James), a nursing home facility located in Greensboro, North Carolina. St. James had previously purchased the real property on which the nursing home is located from defendant Medical Care, Inc. (Medical Care), subject to a promissory note and purchase money deed of trust held by Medical Care's trustee. St. James then defaulted on the note. Pursuant to the purchase agreement between Neil Realty and St. James, Neil Realty assumed the debt owed by St. James to Medical Care. Neil Realty simultaneously entered into an agreement with Medical Care, pursuant to which Neil Realty, at any time from 26 January 1990 until 26 January 1992, would have an option to purchase from Medical Care the note and deed of trust outright at a substantial discount. For every month that Neil Realty did not exercise the option, Neil Realty's monthly payments on the St. James promissory note were to be $7,650.31.

Neil Realty alleges that it attempted to exercise the option prior to the expiration date of 26 January 1992, but did not because of representations made by defendant J. Kenneth Lee, sole shareholder of Medical Care. Medical Care subsequently informed Neil Realty that the option was no longer in effect. Neil Realty filed a complaint in Lenoir County, North Carolina, its principal place of business, seeking a judgment declaring that the option "was extended by valid oral agreement, and that as a result of the extension, [Neil Realty] may exercise" the option. Medical Care filed a motion on 5 May 1992 pursuant to N.C.G.S. § 1-76 to remove the action to Guilford County, North Carolina, on the ground that the action seeks determination of rights or interests in real proper-

ty located there. From an order granting Medical Care's motion, Neil Realty appeals. *See Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) (grant of a motion asserting a statutory right to venue, though interlocutory, affects a substantial right and is therefore immediately appealable).

The sole issue presented is whether the trial court properly determined that Neil Realty's pursuit of a judgment declaring the option agreement still in effect constitutes an action for the "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest" pursuant to N.C.G.S. § 1-76 and therefore requires that the action be tried in Guilford County.

An action for the "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," must be tried in the county in which the subject of the action is situated. N.C.G.S. § 1-76(1) (1983). If the county in which an action is commenced is not the proper one, the defendant, before the time of answering expires, may demand in writing that the trial be conducted in the proper county. N.C.G.S. § 1-83 (1983). "In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint." *Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 212, 368 S.E.2d 41, 42 (1988).

North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law In North Carolina* § 255, at 302 n.2 (3d ed. 1988) [hereinafter *Hetrick*]; *accord Riddick v. Davis*, 220 N.C. 120, 125, 16 S.E.2d 662, 666 (1941). In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. *Hetrick* § 257, at 304. Thus, in North Carolina, the trustee holds legal title to the land.

Neil Realty's complaint alleges that it entered into an option agreement with Medical Care, pursuant to which Neil Realty was given the opportunity to purchase outright at a discount the note and deed of trust held by Medical Care's trustee. Upon Neil Realty's

exercise of the option, legal title will transfer from the trustee to Neil Realty. Thus, by seeking a judgment declaring that it may exercise the option, Neil Realty is seeking a judgment which would affect title to land located in Guilford County, and therefore the trial court properly granted Medical Care's motion for change of venue.

Affirmed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. GLENDEN RAY SULLIVAN

No. 9212SC820

(Filed 6 July 1993)

Burglary and Unlawful Breakings § 93 (NCI4th); Criminal Law § 1284 (NCI4th)— attempt to break into coin-operated machine—misdemeanor—not basis for habitual felon charge

An attempt to break into a coin-operated machine is a misdemeanor and thus cannot serve as a prosecution to which an habitual felony proceeding can attach as an ancillary proceeding.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 15, 20.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

Appeal by defendant from judgment entered 25 March 1992 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 8 June 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Parish, Cooke, & Russ, by James R. Parish, for defendant-appellant.

JOHNSON, Judge.

Defendant-appellant, Glenden Ray Sullivan, was tried on an indictment charging defendant with (1) "feloniously" attempting to break into a coin-operated machine in violation of North Carolina General Statutes § 14-56.1 (1986), (2) unlawfully and willfully damaging real property in violation of North Carolina General Statutes § 14-127 (1986), (3) possessing drug paraphernalia in violation of North Carolina General Statutes § 90-113.22 (1990), and (4) trespassing in violation of North Carolina General Statutes § 14-159.13 (1986). Defendant was also indicted as a habitual felon. The first count of the indictment charging defendant with feloniously attempting to break into a coin-operated machine served as the ancillary proceeding to which the habitual felon proceeding could attach.

At the close of the State's case, the court dismissed the charge of trespass. The jury returned guilty verdicts as to the remaining charges. A subsequent proceeding was immediately held to determine defendant's status as a habitual felon. From a special verdict by the jury that defendant was a habitual felon, the court imposed a sentence of 30 years in the North Carolina Department of Corrections. Defendant appeals.

On appeal, defendant brings forth thirteen assignments of error. We find the first assignment of error dispositive. Defendant contends that there was no underlying felony for which defendant was convicted to serve as an ancillary prosecution to which the habitual felon proceeding could attach. He further argues that his convictions and sentence must be vacated because the charges on which he was charged, tried and convicted were all misdemeanors tried in a superior court which had no subject matter jurisdiction.

The State, however, contends that the charge of attempting to break into a coin-operated machine is a felony because it is an offense which is infamous, done in secrecy and malice, or with deceit and intent to defraud. *See* North Carolina General Statutes § 14-3(b) (Cum. Supp. 1992) which states that "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony."

It is well settled that in order to support a habitual felon conviction and sentence, there must be an ancillary felony prosecu-

tion to which the habitual felon proceeding could attach. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977). It is also well-settled law that exclusive original jurisdiction of all misdemeanors is in district court unless jurisdiction is conferred to the superior court by a circumstance enumerated in North Carolina General Statutes § 7A-271 (1989). In the case at bar, there is no ancillary felony prosecution to which the habitual felon proceeding could attach; therefore, the superior court was without subject matter jurisdiction.

The offense of attempting to break into a coin-operated machine is not a felony and can be distinguished from the felonious offenses of attempted burglary, attempted common law robbery and attempted armed robbery, which generally pose a great threat of harm to the public. *See State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949); *State v. McNeely*, 244 N.C. 737, 92 S.E.2d 853 (1956). The State concedes that it cannot distinguish the instant case from *State v. Grant*, 261 N.C. 652, 135 S.E.2d 666 (1964), which held that an attempt to break or enter was a misdemeanor. We hold that the charge of attempting to break into a coin-operated machine is a misdemeanor; therefore, it cannot serve as an ancillary prosecution to which the habitual felon proceeding could attach.

Because the Cumberland County Superior Court did not have subject matter jurisdiction to hear the misdemeanor charges levied against defendant, those convictions must be vacated; and because there was no felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, defendant's conviction and sentence as a habitual felon must also be vacated.

The decision of the trial court is vacated, and the case is remanded to the superior court with directions that defendant's convictions and sentence be vacated.

Judges GREENE and WYNN concur.

GLENDA S. HARRINGTON v. PAUL WILSON HARRINGTON, JR.

No. 9223DC1189

(Filed 6 July 1993)

Divorce and Separation § 172 (NCI4th)— claim against former husband—failure to seek equitable distribution not bar

Plaintiff wife's claim against her former husband for breach of a contract to maintain lease payments on an automobile was not barred by plaintiff's failure to seek equitable distribution of this debt prior to the entry of absolute divorce since (1) equitable distribution is an alternative rather than an exclusive remedy, and (2) the debt was incurred after the separation and thus was not a marital debt subject to equitable distribution.

Am Jur 2d, Divorce and Separation §§ 950 et seq.

Appeal by defendant from judgment entered 22 July 1992 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 12 April 1993.

Plaintiff instituted this action alleging that she and defendant entered into an agreement whereby defendant agreed to maintain the lease payments on one 1989 Toyota Corolla GTS in exchange or consideration for her promise to relinquish any claim or right to use and enjoy the automobile. Defendant fell in arrears on three payments. Plaintiff took possession of the vehicle and sold it in an attempt to mitigate the damages caused by defendant's alleged breach of the agreement. She asserted claims for breach of contract, fraud, and unfair or deceptive trade practices. Plaintiff subsequently voluntarily dismissed her claims of fraud and unfair or deceptive trade practices.

Defendant filed an answer in which he asserted as an affirmative defense that the agreement was a marital debt, subject to equitable distribution, and thus the action was barred by plaintiff's failure to request equitable distribution prior to the entry of an absolute divorce.

The matter was tried before a jury. The jury found that the parties entered into a contract whereby defendant agreed to maintain the lease payments, that defendant did breach the contract,

and that plaintiff sustained damages in the amount of $5,000.00. From the entry of judgment on the jury verdict, defendant appeals.

Ferree, Cunningham & Gray, by George G. Cunningham, for plaintiff-appellee.

Edward Jennings for defendant-appellant.

JOHNSON, Judge.

All of defendant's assignments of error arise out of his contention that the agreement between the parties constituted a marital debt and thus this action is barred by plaintiff's failure to seek equitable distribution of the debt prior to the entry of absolute divorce. On this basis, he assigns error to the denial of his motion for summary judgment, to the denial of his motion for a directed verdict, to the court's instructing the jury on a theory of contract instead of equitable distribution, and to the court's instructing the jury that the absolute divorce did not affect plaintiff's right to proceed in this action.

We overrule these assignments of error. Defendant misreads North Carolina General Statutes § 50-11(e) (1987). That statute provides that the right to equitable distribution of marital property is lost unless the party asserts the right prior to the entry of an absolute divorce. Equitable distribution is not an exclusive remedy but merely an alternative remedy. *See Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988). Moreover, under the equitable distribution statute, a marital debt is one which is incurred prior to the separation of the parties. North Carolina General Statutes § 50-20(b)(1) (1987). The debt here was incurred after the separation of the parties and thus was not subject to equitable distribution.

The judgment of the trial court is affirmed.

No error.

Judges WYNN and JOHN concur.

TAYLORSVILLE FEDERAL SAVINGS AND LOAN ASSOCIATION, PLAINTIFF v. L. Q. KEEN AND WIFE, DORIS KEEN, DEFENDANTS

No. 9222SC691

(Filed 6 July 1993)

Courts § 84 (NCI4th)— denial of summary judgment—subsequent allowance by another judge—absence of authority

Where plaintiff's first motion for summary judgment was denied by one superior court judge, another superior court judge did not have authority to allow plaintiff's second motion for summary judgment on identical issues.

Am Jur 2d, Courts §§ 87 et seq.

Appeal by defendants from judgment entered 7 April 1992 by Judge Preston Cornelius in Alexander County Superior Court. Heard in the Court of Appeals 27 May 1993.

Joel C. Harbinson for plaintiff appellee.

Edward Jennings for defendant appellants.

COZORT, Judge.

Plaintiff Taylorsville Federal Savings and Loan Association loaned Ray Eugene Foy and Ruth Foy $20,000 pursuant to a promissory note executed by the parties on 7 November 1985. The note matured on 7 February 1986. Defendants L.Q. Keen and Doris Keen also signed the promissory note. On 26 May 1988, plaintiff filed this action against the Keens, alleging that they had failed to pay the indebtedness. The record reflects that the parties' attorneys were in contact concerning the taking of a voluntary dismissal by plaintiff, so long as defendants would not avail themselves of a statute of limitations defense in the event of a reinstatement of the action against them. No conditions were explicitly agreed upon, but the plaintiff's attorney nonetheless filed a voluntary dismissal on 3 March 1989.

Plaintiff re-filed the cause of action on 1 April 1991. Plaintiff never obtained leave of court to extend the one-year period for re-filing the action. On 1 August 1991, plaintiff filed a motion for summary judgment; the motion was denied by an order entered by Judge John M. Gardner on 12 August 1991. Defendants filed

a motion for summary judgment on 3 March 1992. Plaintiff filed a second motion for summary judgment on 13 March 1992. Following a hearing on the matter, Judge Preston Cornelius denied the defendants' motion for summary judgment and granted plaintiff's second motion for summary judgment. Defendants appeal. We reverse.

Defendants argue on appeal that plaintiff is barred from bringing this action, since plaintiff took a voluntary dismissal pursuant to N.C.R. Civ. P. 41 and failed to re-file the action until over two years later. We need not address the Rule 41 issue, however, because we find that the trial court did not have the authority to grant plaintiff's second motion for summary judgment.

"[A] motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues." *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 440, 291 S.E.2d 892, 894, *cert. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

> This rule is based on the premise that no appeal lies from one superior court judge to another. Moreover . . . to allow an unending series of motions for summary judgment "would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law."

Id. (quoting *Carr v. Carbon Corp.*, 49 N.C. App. 631, 634, 272 S.E.2d 374, 377 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981)).

In the case below, plaintiff made, on 1 August 1991, a motion for summary judgment, which was denied. On 13 March 1992, plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion. "[B]oth the language and policy behind N.C.R. Civ. P. 56 contemplate a single hearing on a motion for summary judgment involving the same case on the same legal issues." *Id.* at 441, 291 S.E.2d at 895. Because "[t]he issue may not be relitigated by way of a second motion for summary judgment before a different judge," *id.*, we conclude the trial court erred by granting plaintiff's motion for summary judgment. Having decided the summary judgment issue in defendants' favor, we need not address their additional assignment of error. The award of

summary judgment granted to plaintiff by Judge Cornelius is reversed and the cause is remanded.

Reversed and remanded.

Judges WELLS and JOHN concur.

STATE OF NORTH CAROLINA v. FRANK LEWIS PARTRIDGE

No. 9210SC862

(Filed 6 July 1993)

Criminal Law § 1524 (NCI4th)— probation revocation—discretion to order concurrent rather than consecutive terms

Defendant is entitled to a new probation revocation hearing where the trial judge at the probation revocation hearing erroneously believed that he had no discretion to reduce defendant's sentence by ordering that his two five-year terms run concurrently rather than consecutively as originally ordered. N.C.G.S. § 15A-1344(d).

Am Jur 2d, Criminal Law § 578.

Appeal by defendant from judgment entered 30 April 1992 in Wake County Superior Court by Judge George R. Greene. Heard in the Court of Appeals 16 June 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Bailey & Dixon, by Steven M. Fisher, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 30 April 1992, revoking defendant's probation, activating defendant's suspended sentence, and sentencing defendant to a term of ten years.

On 10 December 1991, judgment was entered suspending defendant's sentence of two five-year consecutive terms based on pleas of guilty to five counts of forgery and five counts of uttering. Defendant was placed on supervised probation. On 31 March 1992,

defendant's probation officer filed violation reports charging that defendant had violated the terms of his probation by being convicted of larceny of an automobile on 30 March 1992. A hearing on the officer's report was held pursuant to N.C.G.S. § 15A-1345(e) on 30 April 1992 in Wake County Superior Court, the Honorable George R. Greene presiding, at which defendant admitted the probation violation. The following exchange then occurred:

> COURT: Do you wish to be heard?
>
> [DEFENDANT'S ATTORNEY]: Yes, sir. I do.
>
> COURT: I already know what I am going to do despite anything you say.
>
> [DEFENDANT'S ATTORNEY]: Well, despite that, I—
>
> COURT: I am going to revoke him but I will order that his sentence on revocation run concurrent with what he is now doing.
>
> [DEFENDANT'S ATTORNEY]: Okay, Your Honor. I would ask for a modification. He got five years on the forgery and five years on the uttering. They run—
>
> COURT: I can't run those concurrent. I can't touch that. Only the Court of Appeals or North Carolina Supreme Court can change that.

Judge Greene then revoked defendant's probation and activated his original sentence of two consecutive five-year terms. Defendant appeals.

The issue presented is whether the trial court's determination that it had no authority to reduce defendant's suspended sentence prior to activating it by imposing concurrent rather than consecutive terms entitles defendant to a new revocation of probation hearing.

If a convicted defendant, without lawful excuse, violates a valid condition of probation prior to the expiration of the probation period, the trial court may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing. N.C.G.S. § 15A-1344(d) (1988); *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). Prior to activating the original sentence, the court may reduce the sentence. N.C.G.S. § 15A-1344(d); *State v. Mills*, 86 N.C. App. 479, 480, 358 S.E.2d 86, 87 (1987).

In the instant case, pursuant to Section 15A-1344(d), Judge Greene had the discretion to reduce defendant's suspended sentence prior to activating it, which would include ordering that defendant's two five-year sentences run concurrently rather than consecutively. It is apparent from a reading of the transcript, however, that Judge Greene felt that he did not have the authority to do so. Therefore, defendant is entitled to a new revocation of probation hearing. *Cf. Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 277, 367 S.E.2d 655, 658 (1988) ("[w]hen a trial court has failed to exercise its discretion regarding a discretionary matter and has ruled on it under the mistaken impression it is required to rule a particular way as a matter of law, its holding must be reversed and the matter remanded for the trial court to exercise its discretion").

Reversed and remanded.

Judges EAGLES and LEWIS concur.

EZRA V. MOSS, JR., EVCO CONSTRUCTION CO., INC., GARY H. WATTS, TROY D. POLLARD, BENNIE J. SPRINGS AND AUDREY SPRINGS, PLAINTIFF-APPELLEES AND CROSS-APPELLANTS v. J. C. BRADFORD AND COMPANY AND J. C. BRADFORD FUTURES, INC., DEFENDANT-APPELLANTS AND CROSS-APPELLEES

No. 9226SC554

(Filed 6 July 1993)

1. **Contracts § 148 (NCI4th)— breach of securities contract—account liquidated without margin call—motion for directed verdict or j.n.o.v. for defendants—denied**

The trial court properly denied defendants' motions for a directed verdict, a motion for judgment notwithstanding the verdict, or a new trial in a breach of contract action arising from the liquidation of plaintiffs' S & P 500 stock index futures on 20 October 1987 where the jury could reasonably have concluded that defendants breached the terms of the customer agreement in liquidating plaintiffs' accounts from evidence that the parties' contract obligated defendants to make a margin call upon plaintiffs and to give plaintiffs a reasonable time

to meet the margin call before liquidating their accounts; that plaintiff Moss was making a good faith effort to meet the margin call when defendants liquidated the account; that at least one of defendants' agents believed that Moss's actions would sufficiently satisfy the margin call; and that Moss was not informed that he risked liquidation by not arriving with the funds before 11:15 a.m.

Am Jur 2d, Building and Construction Contracts § 129.

2. Trial § 38 (NCI3d)— breach of contract—requested instructions denied—issue fully and fairly presented—no error

The trial court did not err in a breach of contract action arising from the liquidation of plaintiffs' margin account in S & P 500 stock index futures by refusing to give requested jury instructions where the instructions given fully and fairly presented the issue asserted in the requested instructions.

Am Jur 2d, Trial § 1098.

3. Damages § 122 (NCI4th)— liquidation of margin account—measure of damages—reasonable time for reentry into market—less than one day—volatile conditions—no error

The trial court did not err by denying plaintiffs' motion for a judgment notwithstanding the verdict in an action arising from the liquidation of their margin accounts where they contended that the jury must have considered a "window of reentry" of less than one business day in calculating damages. While giving plaintiffs at least one business day to reenter the market at defendants' expense may well have been reasonable under normal conditions, it cannot be said as a matter of law that it was unreasonable for a fact-finder to determine that some period less than one full day would be an appropriate window of opportunity under the extremely volatile market conditions of 20 October 1987.

Am Jur 2d, Damages §§ 912, 913.

Appeal by defendants and cross-appeal by plaintiffs from judgment entered on 5 February 1992 in Mecklenburg County Superior Court by Judge C. Walter Allen. Heard in the Court of Appeals 28 April 1993.

On 15 February 1988, plaintiffs filed a complaint against defendants, alleging breach of contract and seeking compensatory

and punitive damages. Defendants filed a timely answer to the complaint of plaintiff Ezra V. Moss, Jr., along with a motion to dismiss for improper venue regarding the complaint of the remaining plaintiffs. The motion to dismiss was denied and defendants filed timely answers. On 15 June 1988, plaintiffs filed an amended complaint through leave of court and an answer and amended answer were subsequently filed by defendants.

Defendants filed a motion for summary judgment and plaintiffs filed a motion for partial summary judgment. Judge Chase Sanders denied plaintiffs' motion for partial summary judgment and granted partial summary judgment to defendants on the issue of punitive damages only. Plaintiffs filed a timely notice of appeal from that judgment and this Court affirmed the trial court's judgment in an unpublished opinion, *Ezra V. Moss et al. v. J.C. Bradford Company et al.*, 103 N.C. App. 393, 407 S.E.2d 902 (1991).

The case came on for a jury trial before Judge C. Walter Allen. Defendants moved for a directed verdict at the close of plaintiffs' evidence and at the close of all the evidence. The trial court denied both motions. The jury returned a verdict in favor of plaintiffs in the amount of $175,000. The trial court denied defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court also denied plaintiffs' motion for judgment notwithstanding the verdict in the amount of $242,000. Both parties filed timely notices of appeal.

Howard M. Widis; and Hedrick, Eatman, Gardner & Kincheloe, by Hatcher B. Kincheloe; for plaintiffs-appellees/cross-appellants.

Moore & Van Allen, by James P. McLoughlin, Jr. and Randel E. Phillips, for defendants-appellants/cross-appellees.

WELLS, Judge.

Defendants' Appeal

The contract at issue in plaintiffs' action is a customer agreement in which defendants agreed to act as a securities broker for plaintiffs. The parties' agreement, which incorporated the rules of the Chicago Mercantile Exchange and regular course and dealing within the securities business, sets out the rights and responsibilities of each party. Among other things, the agreement sets out procedures by which defendants could liquidate plaintiffs' accounts.

On 20 October 1987, under circumstances which we will discuss later, defendants liquidated plaintiffs' accounts. At trial, the jury found that defendants' liquidation of plaintiffs' accounts constituted a breach of the parties' customer agreement and returned a verdict for plaintiffs in the amount of $175,000.

[1] In their first issue on appeal, defendants contend that the trial court erred by not ruling, as a matter of law, that the defendants did not breach the parties' contract. Specifically, defendants appeal from the trial court's denial of their motion for directed verdict at the close of plaintiffs' evidence, their motion for directed verdict at the close of all the evidence, and their motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

"In ruling on a motion for JNOV or for a directed verdict, the same standard applies." *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 388 S.E.2d 178, *rev. denied*, 327 N.C. 428, 395 S.E.2d 678 (1990). In *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 389 S.E.2d 444, *rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990), this Court stated the applicable standard of review of a trial court's denial of a defendant's motion for directed verdict:

> 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, Effler 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.*

At trial, plaintiffs' evidence, taken in its most favorable light, tended to show the following. In 1985, Mr. Ezra V. Moss, a resident of Charlotte, N.C., opened a commodity and options account and entered into a customer agreement with J.C. Bradford & Co. and J.C. Bradford Futures, Inc. [hereinafter referred to as Bradford], a brokerage house headquartered in Nashville, Tennessee with an

office in Charlotte. Over the next two years, Moss made a profit of approximately $60,000 through his account with Bradford.

In 1987, having learned of Moss's success in the market, the other five plaintiffs in the case opened margin accounts and entered into customer agreements with Bradford which were identical to Moss's account and agreement. Each of the other plaintiffs deposited $10,000 in a margin account through Bradford and authorized Moss to begin trading on their behalf.

The plaintiffs in this case invested in Standard and Poor's 500 [S & P 500] stock index contracts which were traded on the Chicago Mercantile Exchange. Plaintiffs purchased seven stock index contracts on margin, paying a deposit of $10,000 per contract purchased. In September of 1987, when Moss bought the seven S & P 500 index contracts for himself and the plaintiffs, the S & P 500 index was at 324.10 points. With an index point value at $500, the seven contracts plaintiffs purchased on margin with a deposit of $10,000 per contract had an initial value of $162,050 each.

By buying S & P futures, the plaintiffs were betting that the index would rise between the purchase and expiration of the stock index contracts. Unlike commodity futures contracts, stock index futures do not contemplate physical delivery, but rather, at the maturity of a stock index contract, a cash transfer occurs based on whether the index price is above or below the contract price. For every point rise in the index, plaintiffs stood to profit by $500 per each stock index contract they owned; for every point the index fell, plaintiffs stood to lose $500 per stock index contract.

Investors in S & P 500 stock index contracts realize profits and losses at the end of each trading day. The futures clearing corporation calculates the profit or loss on each future at the end of the day and makes a call on the investors' brokers. In this case, defendants were the plaintiffs' broker. Profits are credited that night and may be drawn immediately. Losses must also be paid immediately. Exchange regulations require that the broker keep a maintenance margin on account with the clearing corporation. Thus, losses must be replenished by the investors each day to keep a minimum credit balance per contract. The individual investor is responsible for paying each day's losses, but if the investor does not pay the amounts owed, the broker is liable to the clearing corporation.

Included in the terms of the customer agreement, the defendants reserved the right to make margin calls to secure account deficits at their own discretion and to liquidate plaintiffs' stock contracts at any time after plaintiffs failed to meet a margin call. However, the agreement clearly contemplated that before liquidating plaintiffs' accounts on defendants' own initiative, defendants were under a duty to make a margin call and give plaintiffs a reasonable time within which to respond to the call.

Soon after the plaintiffs purchased their stock index contracts, the stock market index began to fall. On Monday, 19 October 1987, the S & P index dropped 23%. That afternoon, Moss was informed by Ed Caulfield, a securities broker at Bradford, that Bradford had issued a margin call. To raise money to meet the margin call, Moss brought 23,988 shares of Southern National Corporation [SNC] stock to Caulfield as collateral to secure a loan from Bradford. Because Exchange rules do not allow over-the-counter stock, such as the SNC stock, to be used to satisfy a margin call, the SNC stock had to be deposited in Moss's account and used as collateral for a loan from Bradford.

On Tuesday, 20 October 1987, at about 8:00 A.M., Charles Manning, a futures broker at Bradford, issued a new margin call for plaintiffs' accounts for $105,000. That same morning, Manning turned over the task of monitoring plaintiffs' accounts to Roy Leslie, of defendants' Nashville office. Moss told Caulfield that he would be arriving with $65,000 to meet the margin call. Leslie instructed Caulfield to sell $40,000 worth of Moss's SNC stock to add to the $65,000 Moss was bringing in to meet the $105,000 margin call.

Leslie testified that, on the morning of 20 October 1987, he believed that the $65,000 which Moss was bringing, combined with the $40,000 from the anticipated sale of the SNC stock, would satisfy that morning's margin call. Furthermore, Leslie also testified that it was not unusual for J.C. Bradford to give investors at least a full business day to meet margin calls. At no time on the morning that the accounts were liquidated was Moss informed by defendants that he must meet the margin call within a prescribed time or that the $65,000 he told Caulfield he was bringing would not meet the margin call.

Between 11:00 and 11:10 a.m. on Tuesday, 20 October 1987, the index was at 210-212 points. At 11:09 a.m., Leslie informed Caulfield that the market was deteriorating and that Leslie was

entering a stop loss order to sell the seven contracts should the Index hit 190. About 15 to 20 minutes later, the Index dropped to 190 and the plaintiffs' contracts were sold.

Taking the evidence in the light most favorable to the plaintiffs, the evidence tended to show that (1) the parties' contract obligated defendants to make a margin call upon plaintiffs, and give plaintiffs a reasonable time in which to meet the margin call, before liquidating plaintiffs' accounts; (2) that, at the time defendants liquidated plaintiffs' accounts, Moss was making a good faith effort to meet the margin call; (3) that at least one of defendants' agents believed that Moss's actions would sufficiently satisfy the 20 October 1987 margin call; and (4) that Moss was not informed by defendants that, by not arriving with the funds before 11:15 A.M. on Tuesday, he risked liquidation. From the foregoing evidence, the jury could reasonably have concluded that in liquidating plaintiffs' accounts, defendants breached the terms of the customer agreement.

Accordingly, we hold that the trial court properly denied defendants' motions for directed verdict and motion for judgment notwithstanding the verdict, or in the alternative, a new trial.

[2] Lastly, defendants contend that the trial court erred by refusing to instruct the jury in accordance with defendants' proposed jury instructions. Before charging the jury, the trial court refused the defendants' timely request for two special instructions to instruct the jury that (1) if plaintiffs had not met an outstanding margin call, defendants had no duty to issue a new margin call before liquidating plaintiffs' accounts and (2) if plaintiffs were in debt at the time defendants liquidated plaintiffs' accounts, defendants had no duty to refrain from liquidating the accounts.

The trial court's instructions, as given, fully and fairly presented the issue asserted in defendants' requested instructions, and it therefore was not prejudicial to defendants to refuse their special request. *See, Rowan County Bd. of Education v. U.S. Gypsum Co.*, 103 N.C. App. 288, 407 S.E.2d 860, *review on additional issues allowed*, 330 N.C. 121, 409 S.E.2d 601, *and affirmed in part, review improvidently granted in part*, 332 N.C. 1, 418 S.E.2d 648 (1992); *Alston v. Monk*, 92 N.C. App. 59, 373 S.E.2d 463, *rev. denied*, 324 N.C. 246, 378 S.E.2d 420 (1989).

Plaintiffs' Cross-Appeal

[3] In their only assignment of error, plaintiffs contend that the trial court erred in failing to find, as a matter of law, that one day was a reasonable window of opportunity to consider when assessing plaintiffs' damages. Both parties to this appeal agree that, following a wrongful liquidation, damages are determined by finding the difference between the price at which the securities were wrongfully liquidated and the highest intermediate price the securities reached between the time of the wrongful dissolution and a reasonable time thereafter to allow the injured party to reenter the market. *Schultz v. Commodity Futures Trading Com'n*, 716 F.2d 136 (2d Cir. 1983).

The parties are in dispute over what constitutes a "reasonable time" during which to assess plaintiffs' damages. Plaintiffs contend that, by arriving at $175,000 in damages, the jury must have considered a "window of reentry" of less than one business day. Plaintiffs contend that had the jury considered even one full day to be a reasonable period over which to assess damages, the damages awarded would have properly been $242,000. Plaintiff goes on to contend that, as a matter of law, one business day is the minimum amount of time a jury could reasonably consider when assessing damages after a wrongful liquidation.

While under normal conditions, giving the plaintiffs at least one business day in which to reenter the market at the defendants' expense may well be very reasonable. However, under the extremely volatile market conditions that existed on 20 October 1987, we cannot say that, as a matter of law, it would be unreasonable for a fact-finder to determine that some period less than one full day would be an appropriate window of opportunity to consider when assessing plaintiffs' damages. Therefore, we find no error in the trial court's denial of plaintiffs' motion for judgment notwithstanding the verdict.

No error.

Judges GREENE and WYNN concur.

CHRISTINE GILLIAM, APPELLEE/CROSS-APPELLANT v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT/CROSS-APPELLEE

No. 9126SC1103

(Filed 6 July 1993)

1. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions— disqualification of petitioner for unemployment benefits—basis for disqualification—sanctions not appropriate**

The trial court did not err by refusing to impose sanctions under N.C.G.S. § 1A-1, Rule 11 against the Employment Security Commission for retroactively disqualifying petitioner for unemployment benefits where petitioner argued that she was explicitly told by an employee of the Commission that she was not required to conduct a job search during her temporary recall, but N.C.G.S. § 96-18(g) provides that any person who has received any sum as benefits to which he was not entitled for any reason, including errors on the part of any representative of the Commission, shall repay the sum. Rule 11 sanctions cannot be imposed because there are grounds for the Commission's holding.

Am Jur 2d, Courts § 79; Unemployment Compensation §§ 121, 196, 199, 209.

Repayment of unemployment compensation benefits erroneously paid. 90 ALR3d 987.

2. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions— Employment Security Commission—dismissal of appeal—basis for dismissal—sanctions not proper**

The trial court did not err by refusing to impose sanctions under N.C.G.S. § 1A-1, Rule 11 against the Employment Security Commission for dismissing petitioner's appeal on procedural grounds where the dismissal was grounded in existing law.

Am Jur 2d, Appeal and Error § 86.

3. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions— Employment Security Commission—argument in trial court for remand—sanctions not proper**

The trial court did not err by refusing to impose sanctions under N.C.G.S. § 1A-1, Rule 11 against the Employment Security Commission for arguing in superior court for a remand

to the ESC rather than a reversal. The superior court judge had no authority to make findings of fact with respect to the substantive issues in the case and the only options the trial judge had were to affirm the Commission's dismissal of the appeal or remand the case for consideration of the substantive issues by the Commission.

Am Jur 2d, Unemployment Compensation § 5.

4. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—Employment Security Commission—failure to comply with judgment—consideration of sanctions unclear—remanded

A case which began as a retroactive disqualification for unemployment insurance benefits was remanded for the trial court to consider whether Rule 11 sanctions should be imposed where a superior court judgment remanded the case to the Commission to consider the substantive issue of whether petitioner was properly denied benefits for the relevant time period, the judgment ordered the Commission to make a final decision no later than 25 February, and the Commission remanded the case to an appeals referee on 22 February. That remand was not a final decision, did not comply with the directive of the trial court, and may have caused unnecessary delay or needless increase in the cost of litigation; however, although petitioner's prayer for relief requested Rule 11 sanctions, it is unclear from the record whether Rule 11 sanctions were considered by the trial court.

Am Jur 2d, Appeal and Error §§ 51, 56.

5. Contempt of Court § 38 (NCI4th)— Employment Security Commission—remand to appeals referee rather than final decision—contempt—attorney fees

An order finding the Employment Security Commission in contempt and ordering the payment of petitioner's attorney fees was remanded to the trial court where the Commission had been ordered to make a final decision by 25 February, the Commission remanded the case to an appeals referee on 22 February, and no final decision was made by 25 February. The evidence was sufficient to support the trial court's ruling holding the Commission in contempt, but attorney's fees are not properly awarded in contempt cases.

Am Jur 2d, Contempt § 114.

Allowance of attorneys' fees in civil contempt proceedings. 43 ALR3d 793.

Appeal by petitioner from order entered 21 March 1991 by Judge Julia V. Jones in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 1992.

Legal Services of Southern Piedmont, Inc., by Kenneth L. Schorr, for petitioner-appellant.

John B. DeLuca, Staff Attorney, for the Employment Security Commission.

JOHNSON, Judge.

On 6 July 1990, the Employment Security Commission (the ESC) retroactively disqualified the petitioner, Christine Gilliam, from receiving unemployment insurance benefits for the weeks ending 28 April 1990 through 30 June 1990, on the basis that she failed to conduct a work search for that period, as required by North Carolina General Statutes § 96-13(a)(3) (1991).

On 18 July 1990, the Commission issued an overpayment notice to the petitioner in the amount of $1,002.00, reduced petitioner's benefits to recover the overpayment and recovered those benefits from petitioner.

Petitioner Gilliam filed a timely appeal of the decision disqualifying her from receiving benefits. On 17 August 1990, the appeals referee issued a decision finding that claimant did not conduct a work search during the relevant period. Petitioner filed an appeal from the referee's decision on 22 August 1990. On 28 September 1990, the Commission issued a decision dismissing claimant's appeal on the basis that the claimant did not timely submit a "clear written statement containing the grounds for the appeal" as required by North Carolina General Statutes § 96-15(c) (1991). On 12 October 1990, Gilliam filed a timely petition for review of administrative decision in Mecklenburg County Superior Court. The superior court reversed the Commission's decision which dismissed Gilliam's appeal and, at the request of the Commission, remanded the case to the Commission with an explicit order that the Commission make a final decision on the petitioner's appeal within 45 days of the 10 January hearing.

On 18 January 1991, the superior court issued a final judgment including the provision that the Commission "make a final decision on the Petitioner's appeal . . . no later than 25 February 1991." The superior court remanded the case "to the Employment Security Commission with instructions that it consider the merits of the petitioner's appeal from the decision of the Appeals Referee dated August 17, 1990." Therefore, on remand, the Commission was to have considered the substantive issue of whether petitioner was properly denied benefits for the relevant time period. The information needed to make the determination was included in the record.

On 22 February 1991, the Commission entered an order remanding the case for a new appeals referee hearing on an issue which had not been previously raised in the proceedings. The Commission contends that the remand was a final decision as required by the trial court. As of 25 February 1991, the Commission had not made a final decision on Gilliam's appeal. On 5 March 1991, the superior court, at petitioner's request, entered an order directing the Commission to appear on 21 March 1991 and show cause why it should not be held in contempt of court for wilfully violating the court's 18 January 1991 order. The superior court issued an order holding the Commission in contempt. The order permitted the Commission to purge itself of the contempt by paying Gilliam's counsel $750.00, representing the time spent by counsel on the matter after the Commission violated the prior order. The Commission appealed, as did Gilliam.

On appeal, the petitioner argues that the trial court erred in failing to impose sanctions on the ESC, the Chief Deputy Commissioner and the staff attorneys pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, including the payment of attorney's fees to petitioner's counsel.

Rule 11 of the North Carolina Rules of Civil Procedure provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost

> of litigation[.] . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

North Carolina General Statutes § 1A-1, Rule 11 (1990).

This Court has the authority to review the decision of the superior court not to award Rule 11 Sanctions, *de novo*. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). "In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under [Rule 11]." *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

[1] Petitioner first argues that Rule 11 sanctions are warranted because the decision to retroactively disqualify petitioner for the period of 22 April to 30 June 1990 was without any basis in fact or law. During this time, plaintiff had been temporarily recalled to her previous job on a part-time basis. She argues that her disqualification for failure to conduct a job search during this time was without any basis in law or in fact because she was explicitly told by an employee of the Commission that she was not required to conduct a job search during her temporary recall, and was not given forms to make such reports.

North Carolina General Statutes § 96-18(g)(2) (1991) provides, however, that any person who has received any sum as benefits under this Chapter by reason of the nondisclosure or misrepresentation by him or another of a material fact or has been paid benefits to which he was not entitled for any reason, including errors on the part of any representative of the Commission, shall repay the sum. Because there are grounds for the Commission's holding, Rule 11 sanctions cannot be imposed.

Petitioner's second assignment of error is encompassed in the previous one and does not merit a separate discussion.

[2] Petitioner's third assignment of error states that the Commission's decision to dismiss Gilliam's appeal on procedural grounds was without any basis in law or fact. Petitioner filed her appeal which stated that she was appealing because the decision was wrong. She wrote "it is wrong." Petitioner contends that Rule 11 sanctions should be imposed because the ESC employee took the appeal, signed it, and led plaintiff to believe that it was properly filed. On 28 September 1990, the Commission issued a decision dismissing claimant's appeal on the basis that claimant did not timely submit a "clear written statement containing the grounds for the appeal" as required by North Carolina General Statutes § 96-15(c). Such decision was grounded in existing law. Accordingly, the imposition of Rule 11 sanctions are not proper on this basis.

[3] Petitioner next contends that defendants, in superior court, argued for a remand to the ESC rather than a reversal, which was without any basis in law or fact and therefore warrants the imposition of Rule 11 sanctions.

In superior court, Gilliam sought the reversal of her disqualification of benefits. The Commission, however, argued that even if it were incorrect in dismissing plaintiff's appeal, the superior court should remand the case to the Commission instead of deciding the case on its merits. We agree with the Commission, noting that the superior court judge had no authority to make findings of fact with respect to the substantive issues in the case. *See In re Enoch*, 36 N.C. App. 255, 243 S.E.2d 388 (1978). The only options the trial judge had were to affirm the Commission's dismissal of the appeal or remand the case for consideration of the substantive issues by the Commission.

[4] Petitioner Gilliam next argues that the Commission should be sanctioned under Rule 11 for failing to comply with the portion of the judgment signed on 17 January 1991, which required the Commission to issue a final decision by 25 February 1991. Instead of issuing a final judgment on the merits of petitioner's appeal from the 17 August 1990 decision of the appeals referee, on or before 25 February 1991, the Commission remanded the case to a hearing officer on 22 February 1991. The Commission now argues that its remand to the hearing officer was a final decision complying with the order of the trial court.

We believe that the remand was not a final decision; that the action did not comply with the directive of the trial court; and that the remand may have caused unnecessary delay or needless increase in the cost of litigation. It was very unlikely that the appeals referee would have returned a decision upon which the full Commission could have ruled in the span of three days or by 25 February 1991. Moreover, the decision that the Commission was directed to make by the superior court could have been decided on the record; the remanding of the case only served to prolong litigation. *Compare Vieregge v. N.C. State University*, 105 N.C. App. 633, 642, 414 S.E.2d 771, 776 (1992) (When this Court remands a case to the Industrial Commission for entry of an appropriate order, it is not sufficient for the Commission to remand the case to a deputy to carry out its duties; this procedure "extends the time to a final order in a case already too long delayed.").

We therefore find that this act was possibly worthy of Rule 11 sanctions. Rule 11 would apply in this case because the Commission actually signed an order remanding the matter to a hearing officer just three days prior to 25 February 1991, the date by which the Commission was to have entered a final order on the merits of petitioner's appeal. The Commission's signing of that order could be calculated as an attempt to delay the litigation or increase its cost.

We acknowledge that "in reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper[.]" *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. In the instant case, we find no abuse of discretion. However, in the instant case, although petitioner's prayer for relief requested the imposition of Rule 11 sanctions, it is unclear from the record as to whether Rule 11 sanctions were considered by the trial court. We must therefore remand this case for the trial court to consider whether Rule 11 sanctions should be imposed.

[5] The Commission's cross-appeal contends that there was insufficient evidence to find it in contempt, but even if it were, the award of attorney's fees was improper.

It is undisputed that the trial court directed the Commission to enter a final decision on the merits of petitioner's appeal on or before 25 February 1991 and instead of issuing a final order, the Commission remanded the matter to a hearing officer on 22 February 1991. We find this evidence sufficient to support the

trial court's ruling holding the Commission in contempt. However, attorney's fees are improperly awarded in contempt cases. *See M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988); *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990). Because the trial court improperly awarded attorney's fees in this contempt matter, we must remand the matter in order that the trial court consider imposing a legitimate means by which the Commission may purge itself of contempt.

In summary, on remand the trial court should determine if the Commission, in entering an order remanding this matter to a hearing officer on 22 February 1991, when a final order on the merits of petitioner's appeal was to have been entered on or before 25 February 1991, as directed by the court, caused unnecessary delay or needless increase in the cost of litigation which merits the imposition of Rule 11 sanctions. The trial court should also consider a legitimate basis upon which the Commission may purge itself of the contempt.

The decision of the trial court is reversed in part and remanded in part for the consideration of Rule 11 sanctions and a proper means by which the Commission may purge itself of contempt.

Judges COZORT and LEWIS concur.

KENNETH R. CLARK, PLAINTIFF APPELLANT v. VELSICOL CHEMICAL CORPORATION AND FORSHAW CHEMICAL, INC., DEFENDANT APPELLEES

No. 925SC238

(Filed 6 July 1993)

1. Limitations, Repose, and Laches § 145 (NCI4th)— statute of limitations—action filed in federal court—statute tolled

Filing an action in federal court which is based on state substantive law tolls the statute of limitations while that action is pending.

Am Jur 2d, Limitation of Actions §§ 306, 307.

2. Limitations, Repose, and Laches § 145 (NCI4th)— statute of limitations—tolling by filing in federal court—pending petition for certiorari to United States Supreme Court—action not alive

The statute of limitations was not tolled, and plaintiff's action was not timely filed in state court, where plaintiff filed a timely negligence action in federal court, that action was dismissed because of no federal question and lack of diversity, the United States Court of Appeals affirmed, plaintiff filed a petition for certiorari to the United States Supreme Court, and plaintiff filed a substantially similar action in state court while the petition for certiorari was pending. A petition for writ of certiorari is not an appeal of right and the treatment of the case after a petition is filed is uncertain; therefore, the action was not alive for the purpose of tolling the statute of limitations while the petition was pending. Because the federal action was not alive when plaintiff filed in state court, the statute of limitations was no longer tolled and plaintiff's action was not timely filed.

Am Jur 2d, Limitation of Actions §§ 306, 307.

3. Limitations, Repose, and Laches § 145 (NCI4th)— statute of limitations—originally filed in federal court—saving provision of Rule 41(b)—not applicable

The savings provision of N.C.G.S. § 1A-1, Rule 41(b) did not apply to allow plaintiff extra time to file after the statute of limitations ran where plaintiff originally filed in federal court, that action was dismissed for no federal question and lack of diversity; the dismissal was affirmed in the federal court of appeals, plaintiff petitioned the United States Supreme Court for a writ of certiorari and filed a state action while the petition was pending, and the state action was dismissed as time barred. Although plaintiff relies on *Bockweg v. Anderson*, 328 N.C. 436, that case is distinguishable because plaintiff's case here was involuntarily dismissed for lack of diversity. However, even if N.C.G.S. § 1A-1, Rule 41(b) applies, *Bockweg* does not dictate that plaintiff may invoke the savings provision because the plaintiffs there dismissed pursuant to Rule 41(a)(1) and were automatically allowed an additional year to refile. Rule 41(b) requires that the dismissal order specify that a new action based on the same claim may be filed within

one year and it was plaintiff's responsibility to convince the federal courts to include such a statement in the order or opinion.

Am Jur 2d, Limitation of Actions §§ 306, 307.

Appeal by plaintiff from judgment entered 9 December 1991 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 9 March 1993.

On 2 September 1986, plaintiff was injured by a hazardous chemical after it leaked from a drum which defendants shipped through plaintiff's employer. Plaintiff filed a timely action in federal court on 1 September 1989 alleging that defendants were negligent and failed to comply with federal regulations governing the shipment, labelling, and packaging of hazardous materials. On 14 August 1990, the federal court dismissed plaintiff's action because of no federal question and lack of complete diversity. Plaintiff appealed to the United States Court of Appeals which affirmed the district court's decision on 10 September 1991. On 9 December 1991, plaintiff filed a petition for writ of certiorari to the United States Supreme Court. The Supreme Court denied the petition on 24 February 1992.

On 8 October 1991, plaintiff filed a complaint in New Hanover County Superior Court which was substantially identical to the complaint filed in federal court. Defendants filed a motion to dismiss based on the running of the statute of limitations. Thereafter, plaintiff filed an amended complaint alleging, in substance, that the federal action, including the appeal and petition, tolled the statute of limitations. The superior court determined that plaintiff's state court action was time barred and entered judgment dismissing the action. From this judgment plaintiff appeals.

Shipman & Lea, by Gary K. Shipman and Jennifer L. Umbaugh, for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas; and Spriggs & Hollingsworth, by Joe G. Hollingsworth, Katharine R. Latimer, and Barbara A Milnamow, for defendant appellee Velsicol Chemical Corporation.

Murchison, Guthrie, Davis & Henderson, by Dennis L. Guthrie, for defendant appellee Forshaw Chemical, Inc.

ARNOLD, Chief Judge.

Plaintiff presents two issues. First, does commencing an action in federal court toll our statute of limitations and keep it tolled until the United States Supreme Court rules on a petition for certiorari to review an involuntary dismissal of that federal action. Next, does the savings provision of N.C.R. Civ. P. 41(b) apply to allow plaintiff an additional year to file in state court when the federal court order dismissing his action does not specify additional time within which to file. The answer to both questions is no.

[1] In a negligence action, the statute of limitations begins to run when the cause of action accrues. *Fulton v. Vickery*, 73 N.C. App. 382, 389, 326 S.E.2d 354, 359, *disc. review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985). Once the statute of limitations begins to run, it continues to run until appropriate judicial process is commenced. *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 781, 245 S.E.2d 234, 235 (1978). Here, process was commenced in federal court before the statute of limitations ran. The question is, did commencing the action in federal court toll the statute of limitations.

Defendant cites *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982), for the proposition that commencing an action in federal court does not toll the statute. That statement in *Evans* is apparently based upon the conclusion that "the court" referred to in N.C.R. Civ. P. 3 is a court of this state, so that filing in a court other than a court of this state does not toll the statute of limitations. That conclusion was not necessary to the holding in *Evans*; therefore, the statement is only dicta.

The Indiana Court of Appeals addressed this issue in *Torres v. Parkview Foods*, 468 N.E.2d 580 (Ind. App. 1984). In that case, plaintiffs brought a personal injury action in the United States District Court for the Northern District of Indiana one day before the statute of limitations ran. Defendant moved to dismiss for lack of complete diversity. Before the federal court ruled on the motion, plaintiffs filed a complaint and an amended complaint in the state superior court alleging the same cause of action and alleging that the statute of limitations was tolled while the federal action was pending. After the federal court dismissed plaintiffs' action, the superior court dismissed the state action on the ground that it was filed outside the statute of limitations.

The Indiana Court of Appeals reversed the dismissal, holding that the statute of limitations was tolled while the federal action was pending. The *Torres* court relied partly on the following language regarding tolling the statute of limitations:

> The commencement of an action to enforce a right before the statute of limitations has run against it, arrests or suspends the running of the statute, and a lapse of time after the action is commenced which is not attributable to the appellants' fault or neglect will not bar the enforcement of the right.

Torres, 468 N.E.2d at 582 (citing *Elam v. Neville*, 129 F. Supp. 437 (N.D. Ind. 1955), other state citations omitted). The *Torres* court held that filing a case in federal court under the mistaken belief that the federal court had jurisdiction was not the type of fault which prevents the tolling of the statute of limitations.

The *Torres* court looked to the purpose of the statute of limitations in making its decision. In doing so, it relied upon an Illinois case, *Roth v. Northern Assurance Co.*, 203 N.E.2d 415 (Ill. 1964), which explained the "rationale for permitting a state action brought after a federal court had previously dismissed the same action for lack of diversity jurisdiction and the statute of limitations had expired during the pendency of the federal action." *Torres*, 468 N.E.2d at 583. The Illinois court quoted Judge Cardozo:

> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. *The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.* When that has been done, a mistaken belief that the court has jurisdiction stands on the same plane as any other mistake of law.

Torres, 468 N.E.2d at 583 (quoting *Gaines v. City of New York*, 109 N.E. 594, 596 (N.Y. 1915) and citing *Roth v. Northern Assurance Co.*, 203 N.E.2d 415 (Ill. 1964)). Because the defendant in *Torres* received timely notice that the plaintiffs intended to assert their claim, the purpose behind the statute of limitations was not violated by tolling the statute.

We agree with the reasoning in the *Torres* case. Filing an action in federal court puts a defendant on notice that a claim

is being asserted against him. We see no reason why filing in federal court should not toll the statute of limitations on a claim which is based on state substantive law. Therefore, we hold that filing an action in federal court which is based on state substantive law does toll the statute of limitations while that action is pending.

[2] The question now is did plaintiff file the action in state court while the statute of limitations was tolled, thereby making the state action timely filed. We hold that he did not. "[T]he statute of limitations is tolled when suit is *properly* instituted, and it stays tolled as long as the action is alive . . . ." *Long v. Fink*, 80 N.C. App. 482, 485, 342 S.E.2d 557, 559 (1986). Plaintiff argues that the federal action was alive when he filed in state court because a decision on his petition for writ of certiorari to the United States Supreme Court was pending. We disagree.

A petition for writ of certiorari is not an appeal of right, and no review is guaranteed once the petition is filed. The treatment of the case after a petition is filed, including whether or not it will be heard on its merits, is uncertain. Therefore, for the purpose of tolling the statute of limitations, we do not consider the action alive while a decision to grant or deny the petition was pending. Because the federal action was not alive when plaintiff filed in state court, the statute of limitations was no longer tolled, and plaintiff's action was not timely filed.

[3] Plaintiff next argues that N.C.R. Civ. P. 41(b) applied to the dismissal in federal court and the savings provision of that rule allowed him a year to refile his action after the decision to dismiss became final in federal court. We disagree.

Plaintiff relies on *Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991) for this proposition. In *Bockweg*, plaintiffs voluntarily dismissed in federal court and refiled in state court outside the statute of limitations. Our Supreme Court determined that the plaintiffs in *Bockweg* were allowed to invoke the savings provision of N.C.R. Civ. P. 41(a)(1) because the federal court was sitting in diversity and applying state law. Here, plaintiff's case was involuntarily dismissed for lack of diversity. Therefore, *Bockweg* is distinguishable. However, even if N.C.R. Civ. P. 41(b) applies, *Bockweg* does not dictate that plaintiff may invoke the Rule 41(b) savings provision.

N.C.R. Civ. P. 41(a)(1) provides in pertinent part: "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . ." Because the plaintiffs in *Bockweg* dismissed pursuant to Rule 41(a)(1), they automatically were allowed an additional year to refile by operation of the rule. On the other hand, N.C.R. Civ. P. 41(b) reads "[i]f the court specifies that the dismissal of an action . . . is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal." If plaintiff was to take advantage of the savings provision, it was his responsibility to convince the federal courts to include in the order or opinion a statement specifying that plaintiff had an additional year to refile. Plaintiff failed to do this.

Nothing in the record indicates that plaintiff moved the district court to amend its judgment to specify that plaintiff be given additional time to refile, or moved that the district court dismiss pursuant to N.C.R. Civ. P. 41(b). The record does not indicate that any argument was presented to the federal court of appeals to modify the district court order. Neither the district court's order nor the court of appeals's opinion specifies additional time within which plaintiff may refile. "In the absence of such a specification, a dismissal under Rule 41(b) does not extend any applicable statute of limitation." *Jarman v. Washington*, 93 N.C. App. 76, 78, 376 S.E.2d 252, 253 (1989). The burden was on plaintiff to move the court to specify additional time within which he could refile. *See Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987) (because dismissal order operates as an adjudication on the merits unless the order specifically states to the contrary, party whose claim is being dismissed has the burden to convince the court he deserves a second chance and should move the court for dismissal without prejudice).

We are not deciding which version of Rule 41(b), state or federal, applies under these facts. No matter if the federal courts correctly applied Fed. R. Civ. P. 41(b) or mistakenly applied it, the result is the same. Plaintiff was not allowed additional time to refile, and the statute of limitations ran before the state action was filed. Plaintiff's case was pending in federal court for two years. In that time, plaintiff chose not to file in state court even after the district court dismissed his action for lack of jurisdiction.

Plaintiff's time has run out, and we hold that the savings provision of N.C.R. Civ. P. 41(b) does not apply in this case to allow plaintiff additional time to file after the statute of limitations has run.

Finally, plaintiff argues that his rights under the state and federal Constitutions will be violated if we do not hold in his favor. We find these arguments unpersuasive and reject them.

The superior court's order dismissing plaintiff's action is affirmed.

Affirmed.

Judges GREENE and McCRODDEN concur.

STATE OF NORTH CAROLINA v. MARK MASTERSON RODDEY, DEFENDANT

No. 9226SC513

(Filed 6 July 1993)

1. Robbery § 4.3 (NCI3d) — armed robbery — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in an armed robbery prosecution, though there was no physical evidence of the armed robbery and the victim may have contradicted himself, where the evidence tended to show that the victim was chased by two black men, and he hid in some bushes to escape; the man with the gun ran past his hiding place, but the second man stopped and pulled him from the bushes; the man with the gun then returned and demanded all of the victim's money while defendant searched the victim's pockets; at trial the victim positively identified defendant and his companion as the individuals who had robbed him; the victim also stated that he observed defendant and his companion after they robbed him until they were stopped by the police and gave an adequate description of defendant to police; and the victim immediately identified defendant to the arresting officers as the one who had robbed him.

Am Jur 2d, Robbery §§ 62, 63.

2. Criminal Law § 327 (NCI4th)— different offenses against two defendants—joinder proper

The trial court did not err in permitting joinder of the trials against defendant and his companion, though defendant was not charged with one of the crimes his companion was charged with, since the offenses of the two defendants were closely related in time and place, and were all part of a single act or transaction. N.C.G.S. § 15A-926(b).

Am Jur 2d, Actions § 159.5.

3. Evidence and Witnesses § 400 (NCI4th)— victim's ability to identify black people—inquiry not allowed—no error

The trial court did not err in refusing to allow defendant, a black man, to inquire into the ability of an armed robbery victim who was white to identify black people, since it is always proper to inquire into a victim's ability to identify his attacker, but to inquire into a victim's familiarity with members of another race and his ability to identify members of another race has no tendency to prove a fact in issue and does nothing more than inject racial issues into the trial process.

Am Jur 2d, Evidence § 367.

Appeal by defendant from judgment and commitment entered 18 September 1991 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Edwin B. Hatch and Associate Attorney General Lisa Bland Mould, for the State.

Raymond A. Warren, P.A., by Raymond A. Warren, for defendant.

LEWIS, Judge.

Defendant was indicted and convicted of robbery with a dangerous weapon. The evidence presented at trial tended to show that during the early morning hours of 8 April 1991, the Charlotte Police Department received a call that two black males were chasing a white male in the area of Beatties Ford Road. When they arrived on the scene, officers observed defendant and another individual walking along the side of the road, at which time the officers

stopped to investigate the report. While questioning defendant and his companion, the officers observed what appeared to be a weapon on defendant's companion and began a routine pat down search. During the search a gun concealed on defendant's companion discharged and injured one of the officers. The officers then arrested defendant's companion for carrying a concealed weapon but they did not charge defendant. While the officers continued to question the two men, Garth Hall stumbled out of the bushes in an inebriated state claiming that defendant and his companion had robbed him earlier that evening. Initially the officers did not believe Mr. Hall, but after further questioning they deemed him credible and took defendant and his companion into custody for robbery with a dangerous weapon.

At trial, Mr. Hall was the only eyewitness who testified against defendant, and for this reason defendant in his first assignment of error has challenged the sufficiency of the evidence against him. At the appropriate stages during the trial, defendant made motions to dismiss, for a directed verdict and for entry of a judgment of not guilty. All were denied and defendant contends that the denial of these motions was improper because the evidence was "inadequate, contradictory, not credible and insufficient as a matter of law." Although we agree that several inconsistencies exist in the State's case, we do not believe that the trial court committed error in denying defendant's motions regarding the sufficiency of the evidence.

"In testing the sufficiency of the evidence to sustain a conviction, a motion for dismissal pursuant to G.S. 15A-1227 is identical to a motion as in the case of nonsuit under G.S. 15-173." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Thus, since all of defendant's motions have challenged the sufficiency of the evidence, the same standard will be applied in determining the appropriateness of the trial court's rulings. In ruling on a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and that defendant was the perpetrator. *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). Substantial evidence has been defined as the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). In determining whether substantial evidence exists

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

State v. Small, 328 N.C. 175, 180, 400 S.E.2d 413, 415-16 (1991). In addition, the defendant's evidence is not to be considered unless it is favorable to the State. *Id.* at 180, 400 S.E.2d at 416.

Defendant was indicted pursuant to N.C.G.S. 14-87 for robbery with a dangerous weapon. With the above-stated standard in mind, we have undertaken an examination of the elements of robbery with a dangerous weapon to determine whether substantial evidence existed. The offense described in N.C.G.S. § 14-87(a) as robbery with a dangerous weapon is more commonly known as armed robbery. *See State v. Thomas*, 85 N.C. App. 319, 354 S.E.2d 891 (1987). In fact, it is the presence of a firearm or a dangerous weapon which distinguishes armed robbery from common law robbery. *State v. Smallwood*, 78 N.C. App. 365, 337 S.E.2d 143 (1985). The elements of armed robbery include: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon and (3) whereby the life of a person is endangered or threatened. *Small*, 328 N.C. at 181, 400 S.E.2d at 416.

[1] The essence of defendant's argument is that since there was no physical evidence of the armed robbery and since Mr. Hall repeatedly contradicted himself, it was impossible for substantial evidence to have existed. We do not agree and hold that substantial evidence did exist in the record to support the trial court's submission of the case to the jury. The fact that no physical evidence was found does not automatically preclude the existence of substantial evidence, it only means that the credibility of Mr. Hall was at a premium in establishing the existence of substantial evidence.

Mr. Hall testified that on the night in question he was chased by two black men and that he hid in some bushes to escape. Mr. Hall further testified that the one with the gun ran past his hiding place, but that the second man stopped and pulled him from the bushes. The man with the gun then returned and demanded all of Mr. Hall's money while defendant searched Mr. Hall's pockets.

At trial Mr. Hall positively identified the defendant and his companion as the individuals who had robbed him. Mr. Hall also stated that he observed defendant and his companion after they robbed him until they were stopped by the police and gave an adequate description of defendant to the police. Most important, however, was the fact that Mr. Hall immediately identified defendant to the arresting officers as the one who had robbed him.

Mr. Hall's testimony was clearly adequate to present substantial evidence that defendant was the perpetrator of the crime charged. Although the amount is disputed, Mr. Hall's testimony also provides substantial evidence that defendant took money from Mr. Hall. The use of a firearm does not appear to be in dispute as the police found a rifle in the possession of defendant's companion and Mr. Hall testified that one of his pursuers had a gun and aimed it at him during the robbery. The fact that the gun was found in the possession of defendant's companion does not alter our holding because all persons who aid or abet and are present at the scene of the crime are equally guilty. *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975). Thus the only remaining element is whether Mr. Hall's life was endangered or threatened. Given that this element is typically presumed where a firearm is used, *State v. Wiggins*, 78 N.C. App. 405, 337 S.E.2d 198 (1985), and no evidence was presented to the contrary, we find that substantial evidence existed as to this element as well.

By his argument, defendant asks that we disregard the time-honored tradition of the jury to serve as the trier of fact and to determine the credibility of the witnesses. We place more faith in the ability of our jury system than defendant does. Admittedly there were inconsistencies in Mr. Hall's testimony, but these are matters for the jury to consider. We hold that substantial evidence existed as to each element of the crime charged and that the trial court did not commit error in denying defendant's motions.

[2] In his second assignment of error, defendant addresses the propriety of the trial court's decision to permit joinder of the trials against defendant and his companion. Joinder of offenses and defendants is governed by N.C.G.S. § 15A-926 which provides in pertinent 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 the others.

N.C.G.S. § 15A-926(b)(2) (1988). Defendant was not charged with the firearm violation, so the decision to try defendant and his companion together was necessarily made under part (b) of the statute. The decision of whether to allow a motion to join two or more defendants for trial is directed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing that defendant has been deprived of a fair trial. *State v. Short*, 322 N.C. 783, 370 S.E.2d 351 (1988). Having reviewed the record before us, we find that there was no abuse of discretion in joining the two defendants for trial as the offenses of the two defendants were closely related in time and place, and were all part of a single act or transaction. Accordingly defendant's second assignment of error is overruled.

[3] In his third assignment of error, defendant claims that the trial court erred in not allowing him to inquire into Mr. Hall's ability to identify black people. As mentioned previously Mr. Hall had difficulty in identifying defendant at various stages of the trial process. As a result, defendant's counsel attempted to inquire into Mr. Hall's ability to identify black people and his familiarity with black people in general. In support of this line of questioning defendant claims that Mr. Hall had worked at a country club and lived in a predominately white section of town. Defendant asserts that this information was relevant to his defense because "it is obvious and a matter of common knowledge (and therefore worthy of judicial notice) that African Americans ("black" people) look different than persons of European descent ("white" people)." The prosecutor objected to this inquiry and the trial court sustained the objection. We find no error in the trial court's ruling.

Evidence is relevant if it has any tendency to make a fact of consequence more probable than it would be without the evidence. N.C.G.S. § 8C-1, Rule 401 (1992). Defendant's argument about Mr. Hall's ability to identify black people is based on nothing more than racial stereotypes which have no place in our legal process. It is always proper to inquire into a victim's ability to identify his attacker, but it is another matter entirely to inquire into a victim's familiarity with members of another race and his ability to identify members of another race. Such an inquiry has no tendency to prove a fact in issue and does nothing more than inject racial issues into the trial process. Although a trial court's rulings on relevancy issues are not discretionary they are still afforded great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *appeal dismissed and disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, and *cert. denied, Wallace v. North Carolina*, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992). We defer to the trial court's ruling and find no error on this issue.

Defendant's remaining assignment of error contends that even if we don't find the individual assignments of error meritorious, then their totality was sufficiently prejudicial to defendant to warrant a new trial. We disagree. Having found defendant's individual assignments of error to be without merit and since defendant has failed to offer any authority in support of his cumulative error approach, we will not address this issue further. We hold that defendant received a fair trial free from prejudicial error.

No Error.

Chief Judge ARNOLD and Judge COZORT concur.

IN THE MATTER OF: TAMMY RICHARD AND LAURA RICHARD, MINOR CHILDREN, CELESTE RAST, GUARDIAN AD LITEM, PETITIONER v. ROSEMARY LEE MICHNA (A/K/A ROSEMARY KWIATKOWSKI) AND RENE PAUL RICHARD, RESPONDENTS

No. 9228DC662

(Filed 6 July 1993)

Parent and Child § 116 (NCI4th)— termination of parental rights— appointment of guardian ad litem for parent—not raised at trial level—required

A termination of parental rights proceeding was remanded for a new trial with a guardian ad litem appointed for the respondent mother where petitioner alleged and the trial court found that the respondent was incapable of proper care and supervision of her children because of mental retardation and other mental conditions but the issue of appointing a guardian ad litem was never presented at the trial court level. N.C.G.S. § 7A-289.23 mandates the appointment of a guardian ad litem where it is alleged that a parent's rights should be terminated pursuant to N.C.G.S. § 7A-289.32(7), which permits a court to terminate parental rights where the parent is incapable of providing proper care and supervision of the child as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition. N.C.G.S. § 7A-289.23 is clearly mandatory and does not require or imply that it is the respondent's responsibility to ask for a guardian ad litem.

Am Jur 2d, Parent and Child § 7.

Appeal by respondent Rosemary Michna from judgment entered 5 December 1991 in Buncombe County District Court by Judge Rebecca B. Knight. Heard in the Court of Appeals 25 May 1993.

This case arises from a petition for termination of parental rights brought by the guardian ad litem against respondents Rosemary Michna and Rene Richard. The record tends to show the following facts and circumstances leading up to this action:

Respondents Rosemary Michna and Rene Richard are the mother and father of two minor children, Tammy and Laura. The minor children have been in the continuous care of the Buncombe County

Department of Social Services (hereinafter "the Department") since 4 July 1989.

On 1 July 1989, the respondent mother left the minor children in Asheville, North Carolina with a twenty-year-old babysitter while respondent mother went to Massachusetts to visit her mother who was allegedly ill at the time. When she left, respondent mother did not have the financial resources to return to North Carolina. She gave the babysitter $60.00 for the care of her children, and told the babysitter she would wire more money when she got to Massachusetts. Respondent mother never wired any money.

On 4 July 1989, the babysitter, while giving the minor children a bath, noticed that their vaginal openings were unusually large. She took the children to the hospital and it was determined that they had been sexually abused. The children indicated they had been sexually abused by Richard Michna, respondent mother's husband at the time. When a social worker contacted respondent mother in Massachusetts concerning the 4 July report, respondent mother stated she knew Richard Michna had sexually abused the children, and she would get him out of the home as soon as she returned from Massachusetts. The respondent mother also indicated that the minor children had been sexually abused by their natural father, Rene Richard, by her brother-in-law, Mark Michna, by her sister-in-law, Sharon Michna, and by two teenagers. The minor children were taken into custody of the Department on 4 July 1989. Respondent mother eventually returned from Massachusetts on 1 August 1989, almost one month later. When she returned from Massachusetts, she moved back in with Richard Michna and continued to live with him for some time thereafter.

The Department has been involved with respondent mother and the two minor children on several prior occasions when it received complaints alleging sexual abuse and neglect. The previous sexual abuse allegations were not substantiated but the Department did find substantial neglect and developed services for the family, including family counseling, developmental evaluation, and household monitoring. Prior to these services being implemented, however, respondent mother left for Massachusetts.

Respondent mother was evaluated on 19 September 1989 and again on 6 May 1991. The tests revealed that respondent mother is mildly mentally retarded, has a personality disorder that is resistant to treatment, and is involved in substance abuse. On 10 January

1990, respondent mother was hospitalized in a psychiatric unit for eight days for suicidal tendencies and unstable behavior.

After she was released, respondent mother was admitted to the Richmond Hill Rest Home as a resident, at the request of respondent mother's social worker. Barbara Williams, the owner of the rest home, agreed to allow respondent to become an employee of Richmond Hill. Respondent mother was employed at Richmond Hill, on and off, from late January 1990 through November 1990. The longest time that respondent mother worked at Richmond Hill at any one continuous period was for four months. She quit her job several times because Ms. Williams would not allow respondent mother's boyfriend, who drank and used drugs, to spend the night with her at Richmond Hill. Respondent mother left the employment of Richmond Hill Rest Home for the last time in November 1990 after a disagreement with Ms. Williams. Respondent mother has not been able to keep a job nor has she had steady employment since leaving Richmond Hill in November 1990.

In December 1990, respondent mother informed a social worker that she was returning to Massachusetts to take care of her sick mother. Respondent mother called the social worker a few weeks later to say that she was not coming back, that she had run into an old friend, Mark Michna, the brother of Richard Michna, and that they were engaged to be married. Respondent mother told the social worker that Mark Michna was one of the persons who had sexually abused her children. The proposed marriage fell through.

Respondent mother returned to Asheville in April 1991. Shortly thereafter, she met Dewey Shelton and married him on 4 May 1991, although she did not know whether she was legally divorced from Richard Michna. Respondent mother then moved into Mr. Shelton's place of residence, a two-bedroom construction trailer in very poor condition. The trailer had no electricity, no running water in the kitchen, and a large hole in the bathroom floor. Two of Mr. Shelton's three children by a previous marriage live with respondent mother and Mr. Shelton in the trailer.

Respondent mother testified at trial that she was receiving SSI in the amount of $339.00 a month, that she is not employed, and that she lives with her husband, Dewey Shelton. At no time while the children were in the custody of the Department did respondent mother make any child support payments for the children.

When the children were removed from the custody of their mother, the minor child, Tammy, was pre-anorexic and diagnosed as being a failure to thrive child. Both Tammy and Laura appeared traumatized by and frightened of their mother. At first, after each visit with their mother, their behavior would deteriorate, the children would have nightmares and spells of uncontrollable screaming during the day, and they became incontinent. Their visits with respondent mother in 1991 were not as traumatic, but there was no bonding between the children and their mother.

Respondents' case was handled by the Department from July 1989 through 13 June 1991, when a petition was filed seeking to terminate parental rights. Although the petition for termination was served on respondent Rene Richard on 18 June 1991, he did not file an answer or response to the petition, nor was he present in court. A hearing on the petition was held on 25 September 1991. As a result of the hearing, the trial court made extensive findings of fact and conclusions of law and entered its order of 5 December 1991 terminating respondent appellant's parental rights, as well as those of the children's natural father. From that judgment, respondent Rosemary Michna appeals.

Barry L. Master; and Charlotte A. Wade; for petitioner-appellees.

Kathy A. Gleason; and Susan C. Lewis; for respondent-appellant.

WELLS, Judge.

Appellant's first assignment of error is a generalized, non-specific statement that the trial court erred in entering judgment terminating her parental rights. Pursuant to this "broadside" assignment, appellant asserts for the first time on appeal that she was denied due process because she was not appointed a guardian ad litem, citing and relying on the provision of N.C. Gen. Stat. § 7A-289.23. We find, without addressing respondent's due process objection, that G.S. § 7A-289.23 mandates the appointment of a guardian ad litem and requires reversal on this basis alone.

N.C. Gen. Stat. § 7A-289.23 provides as follows:

> The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.

> . . . In addition to the right to appointed counsel . . . a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:
>
> (1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7A-289.32(7)

G.S. § 7A-289.32(7) permits a court to terminate parental rights where "the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child. . . ." Here, the petitioner alleged and the trial court found, *inter alia*, the respondent mother was incapable, because of mental retardation and other mental conditions, of proper care and supervision of her children. Respondent mother had a right to a guardian ad litem under these circumstances; however, a review of the record indicates that the respondent mother never petitioned the trial court to appoint a guardian ad litem, nor did she object to the failure to have one appointed at trial. In short the issue was never presented at the trial court level.

The question before us now is whether respondent mother's right to a guardian ad litem under these circumstances may be waived by failure to assert that right at trial. We note initially that this is a case of apparent first impression in this State, inasmuch as we have been unable to locate published opinions dealing with this precise issue involving G.S. § 7A-289.23.

Instead, we rely on the well established law regarding waiver of a statutory or constitutional right. The general rule, set forth in *In re Bullabough*, 89 N.C. App. 171, 365 S.E.2d 642 (1988), is that failure to assert a statutory or constitutional right in the trial court is a waiver of that right. *See also State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970). This broadly stated rule does not hold, however, where the statute in question is expressly mandatory in nature. The North Carolina Supreme Court shed light on this exception.

> When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial. We also have recognized that a trial court sometimes has a duty to act *sua sponte* to avoid statutory violations; for example, the trial court must exclude evidence

rendered incompetent by statute, even in the absence of an objection by the defendant.

State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988) (citations omitted). The court further noted that this exception does not apply where a statute requires a motion by the defendant before he is entitled to the rights it guarantees or where the trial court is only required to act when prompted to do so by the litigants. In such cases, the general rule of waiver adheres.

G.S. § 7A-289.23 is clearly mandatory, and its mandate is directed to the trial court. It expressly requires that a guardian ad litem "shall be appointed" whenever the petitioner alleges, as it did here, that parental rights should be terminated because the parent is incapable of proper care and supervision of the children due to mental retardation or other mental condition. Under G.S. § 1A-1, Rule 17, only the trial court has the authority to make the appointment of the guardian ad litem. The statute does not require, nor does it imply, that it is the respondent's responsibility to ask for the appointment of the guardian ad litem. *See Hucks, supra.*

While inclined to note that we do not believe respondent mother has in any way been prejudiced by this error, in keeping with the clear import of *Hucks*, we are persuaded that the mandate of the statute must be observed, and a guardian ad litem must be appointed.

We therefore remand this case for a new trial with a guardian ad litem to be promptly appointed for the respondent mother to accommodate the statutory requirement of G.S. § 7A-289.23. In so doing, it appears obvious to us that the children should remain in the physical custody of the Department of Social Services pending further adjudication, due to the aggravated circumstances and evidence of abuse in this case. The portion of the trial court's order terminating the parental rights of the respondent father, not having appealed in this action, remains undisturbed.

Reversed and remanded for a new trial.

Judges COZORT and JOHN concur.

IN THE MATTER OF: THE APPEAL OF GENE A. DICKEY AND DEBORAH A. DICKEY FROM THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1990

No. 9210PTC668

(Filed 6 July 1993)

1. **Taxation § 25.3 (NCI3d)— house listed by taxpayers— administrative error by assessor's office—house not "discovered property"**

The N.C. Property Tax Commission properly determined that the house belonging to appellee taxpayers could not be considered "discovered property" as that term was defined in N.C.G.S. § 105-312(a)(1) (1985) (repealed effective 10 April 1991) since the taxpayers listed their property, including their house, on a 1989 property tax listing form signed by taxpayer husband on 17 January 1989, and the County did not argue that the taxpayers listed the house but substantially understated its value; therefore, N.C.G.S. § 105-312, authorizing retroactive taxation of discovered property, provided no authority for the county assessor's office to add a sum to the previously assessed value and assess the taxpayers an additional $2100 in taxes.

Am Jur 2d, State and Local Taxation § 719.

2. **Taxation § 25.5 (NCI3d)— failure of assessor to appraise house—subsequent appraisal and levy of tax—no retroactive increase in appraisal of property value**

N.C.G.S. § 105-287, prohibiting retroactive increases in appraised property values, did not operate to preclude the county assessor's office from levying the challenged 1989 tax on taxpayers' house in 1990, since the record revealed that the portion of the taxpayers' 1989 property tax listing form which contained the listing of the house was inadvertently removed and destroyed; the Assessor was unaware for tax purposes of the existence of any improvements to the lot which had previously been appraised; the Assessor therefore could not have ascertained in 1989 the true value of a house which it did not know existed; the Assessor, due to an administrative error, simply failed to appraise the house or to bill the taxpayers in 1989 for taxes owed thereon; and the Tax Commis-

sion therefore erred in finding that the Assessor appraised in 1989 the value of the taxpayers' house at $0.00.

Am Jur 2d, State and Local Taxation § 712.

3. **Taxation § 25.4 (NCI3d)— tax bill—failure to include assessment for improvements—immaterial irregularity**

Failure by the Assessor, due to an administrative error, to include on the taxpayers' 1989 tax bill an assessment for the improvements to their lot was an immaterial irregularity and did not, contrary to taxpayers' contention, invalidate the tax owed by them on their house.

Am Jur 2d, State and Local Taxation § 712.

Appeal by Forsyth County from Final Decision of the North Carolina Property Tax Commission entered 20 February 1992. Heard in the Court of Appeals 25 May 1993.

Office of Forsyth County Attorney, by Forsyth County Attorney P. Eugene Price, Jr., and Assistant Forsyth County Attorneys Davida W. Martin and Paul A. Sinal, for appellant Forsyth County.

Gene A. Dickey and Deborah A. Dickey, pro se.

GREENE, Judge.

The Forsyth County Board of Equalization and Review For 1990 (the County) appeals from a Final Decision of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review entered 20 February 1992.

The facts pertinent to this appeal are as follows: On 28 October 1988, Gene A. Dickey and his wife, Deborah A. Dickey (the Dickeys) purchased a lot and a newly constructed house in Winston-Salem, North Carolina, for $272,500.00. The Dickeys submitted their "1989 Property Tax Listing" on 17 January 1989. The Dickeys' 1989 tax bill from the Forsyth County Assessor's Office (the Assessor) assessed the Dickeys for real property valued at $37,500.00. The tax bill was paid by the Dickeys' escrow agent, and the balance of the escrow account was refunded to the Dickeys.

On 12 June 1990, the Assessor notified the Dickeys that their property "ha[d] been taxed improperly" for the year 1989. The

Assessor, pursuant to N.C.G.S. § 105-312 (discovered property), added to the previously assigned value the sum of $185,500.00, and assessed the Dickeys an additional $2,094.30 in taxes. The Dickeys, asserting that they had properly filed their 1989 taxes, challenged the assessment as being untimely and requested and were granted a hearing with the Assessor on 18 July 1990. The Dickeys did not, and do not, dispute that their house on 1 January 1989 had a value of $185,500.00. After the hearing, the Assessor informed the Dickeys that there would be "no change in the 1989 assessment for the improvements" on the Dickeys' lot.

The Dickeys appealed to the County, appellant herein, which dismissed their appeal. On 4 January 1991, the Dickeys appealed to the North Carolina Property Tax Commission (the Commission). In its final decision, the Commission found that the Dickeys properly listed the house on their property tax listing dated 17 January 1989 "on a portion of the listing form which was designed to be torn off if it was not completed." According to the Commission, "[a]fter receipt by the County, this portion of the form was removed and destroyed even though it had been completed by the [Dickeys]." The Commission further found:

> 10. While [the Dickeys'] Exhibit 3, the Forsyth County 1989 tax bill for the [Dickeys], indicates a "real value" of $37,500 and a motor vehicle value of $6,120 for a total taxable value of $43,620, the real estate excise tax stamps on the deed by which the [Dickeys] acquired the subject property (County Exhibit 1) indicate that the purchase price paid by the [Dickeys] for the house and lot was approximately $272,500. Despite the large difference between the purchase price of $272,500 and the "real value" of $37,500 on the 1989 tax bill, Mr. Dickey testified that he was unaware of the County's error until 1990.

The Commission concluded that, because the Dickeys submitted a timely and accurate 1989 property tax listing, the improvements on the Dickeys' lot cannot be considered "discovered property" under the provisions of N.C.G.S. § 105-312. The Commission also concluded that the Assessor appraised the house at a value of $0.00 for the tax year 1989, and that, under the provisions of N.C.G.S. § 105-287, the Assessor was authorized to reappraise the house in 1990, but that such reappraisal is effective as of 1 January of the year in which it is made and is not retroactive. The Commission ordered the Assessor to revise its tax records to reflect that

the appraised value of the Dickeys' house for the year 1989 is $0.00. The County appeals.

The issues are (I) whether the Assessor properly assessed in 1990 the Dickeys' house as "discovered property" pursuant to N.C.G.S. § 105-312; (II) whether the Assessor "appraised" the house in 1989 at a value of $0.00 and therefore is precluded pursuant to N.C.G.S. § 105-287 from retroactively increasing the appraised value of the house; and (III) whether the Assessor's failure to assess the Dickeys in 1989 for 1989 taxes owed on the house constitutes pursuant to N.C.G.S. § 105-394 an "immaterial irregularity" which does not invalidate the tax levied in 1990.

This Court may reverse or modify a decision of the Property Tax Commission

> if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> . . . .
>
> (4) Affected by . . . errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted . . . .

N.C.G.S. § 105-345.2 (1992). In applying the "whole record" test set forth in Section 105-345.2(5), the reviewing court is not permitted " 'to substitute its judgment for [that of the Commission] as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the [Commission's] decision and the contradictory evidence from which a different result could be reached.' " *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987) (citation omitted).

I

[1] The County argues that the Commission made an error of law in failing to determine that the Dickeys' house is "discovered property" and was therefore properly taxed in 1990 for taxes owed in 1989. We disagree.

All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is excluded or exempted.

N.C.G.S. § 105-274 (1992). All property subject to ad valorem taxation shall be listed annually,[1] as a general rule during the month of January. N.C.G.S. §§ 105-285(a), 105-307 (1992). The law in effect at the time the Dickeys filed their 1989 property listing and when the Assessor notified the Dickeys in June, 1990, of the "discovered improvements" on the Dickeys' lot provided:

> (1) The phrase "discovered property" shall include property that was not listed by the taxpayer or any other person during a regular listing period and also property that was listed but with regard to the value, quantity, or other measurement of which the taxpayer made a substantial understatement in listing.

N.C.G.S. § 105-312(a)(1) (1985) (repealed effective 10 April 1991).[2] Discovered property "shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation." N.C.G.S. § 105-312(g) (1992).

The evidence in the record supports the Commission's finding that the Dickeys listed their property, including the house, on a 1989 property tax listing form signed by Mr. Dickey on 17 January 1989, and the County does not argue that the Dickeys listed the house but substantially understated its value. Therefore, we conclude that the Commission properly determined that the house cannot be considered "discovered property" as that term is defined in former Section 105-312(a)(1). Thus, Section 105-312, authorizing retroactive taxation of discovered property, provides no authority for the Assessor's challenged actions.

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1. The term "list," when used as a verb, is not defined in North Carolina's tax code. "List" or "listing," when used as a noun, means "the document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded." N.C.G.S. § 105-273(9) (1992). Our use of the verb "list" in this opinion means the process by which the taxpayer files with the tax assessor a tax list or abstract showing the required property information. *See generally* N.C.G.S. § 105-309 (1992).

2. The County argues that the Assessor, not the taxpayer, is charged with the duty to "list" property for taxation, and that therefore, even though *the Dickeys* may have submitted a 1989 property tax listing, the house may nevertheless be considered discovered property under Section 105-312 because it was not listed by *the Assessor*. Based on our interpretation of the verb "list," *see* n.1, *supra*, and on the definition of "discovered property" in Section 105-312(a)(1), we reject this argument.

II

[2] The County argues that the Commission's finding that the Assessor appraised in 1989 the value of the Dickeys' house at $0.00 is not supported by competent, material and substantial evidence in view of the entire record as submitted. According to the County, the Assessor never appraised the Dickeys' house for tax purposes in 1989 and that therefore, contrary to the Commission's finding and the Dickeys' contention, N.C.G.S. § 105-287 has no application. We agree.

The tax assessor, in certain situations and at certain times not relevant here, may increase or decrease the appraised value of real property, but such increase or decrease "is effective as of January 1 of the year in which it is made and is not retroactive." N.C.G.S. § 105-287(c) (1992). The term "appraisal" means both the true value of property and the process by which the true value of property is ascertained. N.C.G.S. § 105-273(2) (1992). The Commission found that the Assessor "appraised" the Dickeys' house in 1989 at a value of $0.00, and that the Assessor, pursuant to Section 105-287, properly "increased" this "appraised value" in 1990 to the sum of $185,500.00. The Commission determined, however, that because any increase in appraised value is not retroactive, the increase was effective only as of 1 January 1990, and could not be applied to taxes owed by the Dickeys in 1989.

Based on the definition of the term "appraisal" in Section 105-273, the Commission's finding that the Assessor appraised the house at a value of $0.00 in 1989 simply is not supported by the evidence. There is no evidence that the Assessor prior to 1990 attempted to ascertain the true value of the Dickeys' house, and it is undisputed that the true value of the house in 1989 was not *zero* dollars. Rather, the record reveals that, because the portion of the Dickeys' 1989 property tax listing form which contained the listing of the house was inadvertently removed and destroyed, the Assessor was unaware for tax purposes of the existence of any improvements to the lot. Therefore, it defies logic to find that the Assessor could have ascertained in 1989 the true value of a house which it did not know existed. Furthermore, the 1989 tax bill received by the Dickeys lists the "real value" of the Dickeys' property as $37,500.00, the same value assigned to the property by the Assessor in 1988, prior to the improvement of the lot. A fair reading of the record reveals that the Assessor, due to

an administrative error, simply failed to appraise the house or to bill the Dickeys in 1989 for taxes owed thereon. Therefore, contrary to the determination of the Commission, Section 105-287, prohibiting retroactive increases in *appraised* property values, does not operate to preclude the Assessor from levying the challenged tax in 1990.

III

[3] The County finally argues that the Assessor's failure to levy any tax on the house in 1989 is an "immaterial irregularity" which does not invalidate the tax owed on the house in 1989 and imposed by the Assessor in 1990.

North Carolina Gen. Stat. § 105-394 provides that "[i]mmaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax . . . shall not invalidate the tax imposed upon any property." N.C.G.S. § 105-394 (1992). Examples of immaterial irregularities include the "failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law." *Id.* Furthermore, this Court has held that "a clerical error by a tax supervisor's office is an immaterial irregularity under G.S. 105-394 so as not to invalidate the tax levied on the property." *In re Notice of Attachment*, 59 N.C. App. 332, 333-34, 296 S.E.2d 499, 500 (1982), *disc. rev. denied*, 307 N.C. 576, 299 S.E.2d 645 (1983).

Significantly, the Dickeys do not contend that their house is statutorily excluded or exempted from taxation, or that the $185,500.00 value assigned to the house by the Assessor is erroneous. Rather, they argue simply that, because an employee of the Assessor inadvertently destroyed the portion of the Dickeys' 1989 tax listing form containing the listing of the house—and because the Assessor did not become aware of the error until 1990—the Assessor is legally precluded from collecting the tax. Based on the clear and unambiguous language of Section 105-394, we conclude that the failure by the Assessor due to an administrative error to include on the Dickeys' 1989 tax bill an assessment for the improvements to the lot is an immaterial irregularity and does not, contrary to the Dickeys' contention, invalidate the tax owed on the house. *See State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) (where language of a statute is clear and unambiguous, courts must give it its plain meaning). Because we have discovered no authority setting forth

a time limit within which the Assessor may correct an immaterial irregularity, *see In re Notice*, 59 N.C. App. at 335, 296 S.E.2d at 501 (if time limit is to be put on the assertion of immaterial irregularities under Section 105-394, that is a task for the Legislature), the Commission's decision relieving the Dickeys from their 1989 tax obligation must be

Reversed.

Judges JOHNSON and WYNN concur.

ROBERT D. MURPHY v. SYLVIA J. GLAFENHEIN, EXECUTRIX OF THE ESTATE OF HERBERT OTTO GLAFENHEIN, SR., DECEASED; AND BERNSTEIN HURST D/B/A/ HURST TRAILERS; AND GENE MANNING D/B/A MANNING TRACTOR, TRUCK AND EQUIPMENT

No. 9224SC698

(Filed 6 July 1993)

Courts § 14 (NCI4th)— Tennessee defendant—long-arm statute—due process

When personal jurisdiction is alleged to exist pursuant to N.C.G.S. § 1-75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process. In this case, defendant Manning's contacts with North Carolina are adequate to meet the due process requirements associated with the exercise of personal jurisdiction in that Manning has a number of contacts with North Carolina, including a business located near the North Carolina state line which caters in part to North Carolina residents, resulting in sales and deliveries of trailers and related equipment to North Carolina residents, and an established relationship with at least three North Carolina businesses; North Carolina has an interest in adjudicating this dispute in that plaintiff is a resident of this state, his injuries occurred here, and North Carolina law governs these claims; the location of evidence and thirteen witnesses in North Carolina, as well as Manning's proximity to North Carolina, suggests that North Carolina is the most convenient forum

in which to adjudicate these claims; and Manning could reasonably anticipate being haled into court in North Carolina because he knowingly sold trailers to North Carolina residents and purposefully availed himself of the privilege of conducting business in North Carolina by voluntarily contracting for the purchase of equipment with North Carolina enterprises.

Am Jur 2d, Courts §§ 118, 119.

Appeal by defendant Gene Manning d/b/a Manning, Tractor, Truck and Equipment from order filed 23 March 1992 in Yancey County Superior Court by Judge Beverly T. Beal. Heard in the Court of Appeals 27 May 1993.

Joseph A. Ferikes for plaintiff-appellee.

Adams Kleemeier Hagan Hannah & Fouts, by Larry I. Moore, III, and Edward L. Bleynat, Jr., for defendant-appellee Sylvia J. Glafenhein, Executrix of the Estate of Herbert Otto Glafenhein, Sr., Deceased.

Blue, Fellerath, Cloninger & Barbour, P.A., by John C. Cloninger and John C. Hensley, Jr., for defendant-appellant Gene Manning d/b/a Manning Tractor, Truck and Equipment.

GREENE, Judge.

Defendant Gene Manning d/b/a Manning Tractor, Truck and Equipment (Manning) appeals from an order filed on 23 March 1992, denying Manning's motions to dismiss plaintiff's complaint and defendant Sylvia J. Glafenhein's cross-claims on the grounds of lack of *in personam* jurisdiction and failure to state a claim upon which relief can be granted.

The facts pertinent to this appeal are as follows: On 10 July 1989, Herbert Glafenhein (Mr. Glafenhein) purchased a trailer from defendant Manning's place of business in Sevierville, Tennessee. On 27 August 1989, Mr. Glafenhein, using the trailer which he had purchased from defendant Manning, began transporting a farm tractor from Clemmons, North Carolina, to his home in Sevierville, Tennessee. At approximately 9:40 that evening on Interstate 40 in McDowell County, North Carolina, Mr. Glafenhein collided with plaintiff. Mr. Glafenhein was killed in the accident.

On 21 February 1990, plaintiff filed a complaint in Yancey County, North Carolina, against Sylvia Glafenhein (Mrs. Glafenhein), the wife of Mr. Glafenhein and executrix of his estate. Plaintiff later amended his complaint to add Manning as a defendant, and Manning was served with a summons and amended complaint on 21 August 1991. Manning subsequently, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2) and (6), filed motions to dismiss the complaint as well as cross-claims asserted by Mrs. Glafenhein on the grounds of lack of personal jurisdiction and the claims' failure to state a claim upon which relief can be granted.

At the hearing on Manning's motions held on 3 February 1992, the trial court considered the arguments of counsel, briefs, and the affidavits of Billie Delane, Ray Flowers, and Jerry King. With the consent of the parties, the trial court took the matter under advisement. Subsequently, the court, over Manning's objection, considered material offered by Mrs. Glafenhein's attorney, specifically, excerpts of depositions of Mrs. Glafenhein, Manning, and Manning's employee Jeff Sims (Sims), who had assisted Mr. Glafenhein with his purchase of the trailer. The deposition of Mrs. Glafenhein considered by the court was one taken during discovery in a case instituted prior to the instant case; those of Manning and Sims were taken during discovery in the instant case.

On 23 March 1992, the trial court filed an order denying Manning's motions to dismiss. In its order, the court made the following pertinent findings:

> 2. Defendant Manning has operated a business in Sevierville, Tennessee, and at the time of the accident complained of operated that business for the sale of farm equipment and other vehicles, including trailers of this type. Sevierville is in Sevier County, Tennessee and is contiguous to the North Carolina border. The deceased, Herbert Glafenhein, purchased a trailer from Defendant Manning. The business operation of Manning included sales to North Carolina residents. . . . From the [affidavit of Billie Delane], the Court finds that the Manning business ordered on an irregular basis equipment from Gill Manufacturing in Charlotte, North Carolina. From the [affidavit of Ray D. Flowers], the Court finds that the Manning business was and has become a dealer of Befco, Inc. since February, 1990, and that the Manning business has made orders for equipment from Befco on a regular basis from the Rocky Mount

> factory of Befco. The Affidavit of Jerry King recites that Mr. Manning has purchased motor vehicles from King Auction & Realty Company in Fletcher, North Carolina, and records of sales are attached to that Affidavit.

Based on these and other findings, the court concluded that "there are substantial contacts between Defendant Manning's business operation located in Tennessee and the State of North Carolina to submit the Defendant Manning to the jurisdiction of this Court under N.C.G.S. [§ 1-75.4(1)(d)] and the exercise of jurisdiction does not unconstitutionally violate due process of law." From this order, Manning appeals.[1] *See* N.C.G.S. § 1-277(b) (1983) ("[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant").

The issues presented are whether the trial court's findings support its conclusion that the court may exercise personal jurisdiction over Manning pursuant to (I) North Carolina's long-arm statute; and (II) the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As an initial matter, Manning contends that the trial court erred in considering, subsequent to the hearing on Manning's motion to dismiss and over his objection, excerpts of the depositions of Manning, Manning's employee Jeff Sims, and Mrs. Glafenhein. We, however, do not address the propriety of the trial court's actions in this regard because we need consider only the court's findings which are based on the evidence presented at the hearing, as well as the admissions in Manning's brief in support of his motions to dismiss, in order to determine whether the trial court properly found *in personam* jurisdiction.

A two-part inquiry is required in order to determine whether a trial court may exercise personal jurisdiction over a nonresident defendant. *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626,

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1. Although Manning appeals from the trial court's denial of both his Rule 12(b)(2) and Rule 12(b)(6) motions, Manning asserts no argument relating to the court's denial of the Rule 12(b)(6) motions. For this reason, and for the further reason that such denial is an interlocutory order not affecting a substantial right and is therefore not immediately appealable, *see* N.C.G.S. § 1A-1, Rule 54(b) (1990), we do not address the propriety of the trial court's denial of these motions.

629, 394 S.E.2d 651, 654 (1990). " 'First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.' " *Id.* (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)). The plaintiff has the burden of proving by a preponderance of the evidence the existence of grounds for the exercise of personal jurisdiction over the defendant. *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters., Inc.*, 36 N.C. App. 673, 677, 245 S.E.2d 782, 784 (1978); *see also* 2A *Moore's Federal Practice* § 12.07[2.-2] (1993).

I

Long-Arm Statute

Manning argues that the trial court lacked statutory authority under the North Carolina long-arm statute to subject him to *in personam* jurisdiction.

North Carolina's "long-arm" statute, N.C.G.S. § 1-75.4, provides that

> [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:
>
> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C.G.S. § 1-75.4(1)(d) (1983).

Our Supreme Court, in construing subsection (1)(d) of North Carolina's long-arm statute, stated that

> [b]y the enactment of G.S. 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under

> federal due process. Thus, we hold that G.S. 1-75.4(1)(d) applies to defendant and, statutorily, grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process.

Dillon v. Numismatic Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 630-31 (1977) (citation omitted). In other words, when personal jurisdiction is alleged to exist pursuant to Section 1-75.4(1)(d), "the question of statutory authorization 'collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.' " *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1226 (M.D.N.C. 1988) (citations omitted). Thus, we proceed directly to the constitutional issue.

II

Due Process Requirements

Manning argues that the exercise of personal jurisdiction in the instant case would be unconstitutional because he lacks the requisite minimum contacts with the State of North Carolina. We disagree.

The pivotal inquiry in determining whether the exercise of personal jurisdiction over a nonresident defendant comports with due process is whether the defendant has established "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). Although no single factor controls,

> [f]actors for determining the 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.' " In each case, it is essential that defendant purposely act to avail himself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Additionally, defendant's contacts with the forum state must be such that he or she "should reasonably anticipate being haled into court there."

Cherry, 99 N.C. App. at 632, 394 S.E.2d at 655-56 (citations omitted).

Based on the findings of the trial court previously recited in this opinion, which are supported by the evidence in the record, Manning's contacts with North Carolina are adequate to meet the due process requirements associated with the exercise of personal jurisdiction. First, Manning has a number of contacts with North Carolina, including a business located near the North Carolina state line which caters in part to North Carolina residents, resulting in sales and deliveries of trailers and related equipment to North Carolina residents, and an established relationship with at least three North Carolina businesses. In fact, Manning at the time he was served with plaintiff's complaint had become a dealer for Befco, Inc., out of Rocky Mount, placing equipment orders from Befco to be shipped to him in Tennessee on a regular basis. " '[A] continuing contractual business relationship, not one or two isolated transactions,' is sufficient to establish *in personam* jurisdiction." *Cherry*, 99 N.C. App. at 633, 394 S.E.2d at 656.

In addition, North Carolina has an interest in adjudicating this dispute as plaintiff is a resident of this State, his alleged injuries occurred here, and North Carolina law governs his claims as well as the cross-claims asserted by Mrs. Glafenhein. *See Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787 ("a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors"); *White v. Vananda*, 13 N.C. App. 19, 23, 185 S.E.2d 247, 250 (1971) (law of the state where the collision occurs governs adjudication of plaintiff's claim). Furthermore, the location of thirteen witnesses and evidence in North Carolina, as well as Manning's proximity to North Carolina, suggests that North Carolina is the most convenient forum in which to adjudicate the asserted claims. Finally, because Manning knowingly sold trailers to North Carolina residents and because he purposefully availed himself of the privilege of conducting business in North Carolina by voluntarily contracting for the purchase of equipment with North Carolina enterprises, Manning could reasonably anticipate being haled into court in this State.

Based on the foregoing, the findings of the trial court support its exercise of personal jurisdiction over Manning, and his assignments of error in this regard are rejected.

Affirmed.

Judges JOHNSON and WYNN concur.

STATE OF NORTH CAROLINA v. EARL LEE HAWKINS

No. 9214SC778

(Filed 6 July 1993)

1. Appeal and Error §§ 75, 141 (NCI4th)— guilty plea—denial of appropriate relief—appealability

The Court of Appeals was without jurisdiction to consider the merits of defendant's direct appeal from the original judgment where the judgment was entered upon defendant's guilty plea and none of the exceptions in N.C.G.S. § 15A-1444(e) are applicable. However, the trial court's denial of defendant's motion for appropriate relief is subject to appellate review pursuant to N.C.G.S. § 15A-1422(c)(1).

Am Jur 2d, Appeal and Error § 271.

2. Criminal Law § 1283 (NCI4th)— habitual felon indictment—failure to allege current felonies

An habitual felon indictment was invalid where it failed to allege any of the underlying substantive felonies with which defendant was currently charged.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21; Indictments and Informations § 197.

3. Indictment, Information, and Criminal Pleadings § 48 (NCI4th)— material defects in indictment—no waiver by guilty plea without motion or objection

Defendant did not waive material defects in an habitual felon indictment by entering his plea of guilty without making a motion to quash or otherwise objecting to the indictment, and the trial court should not have accepted defendant's guilty plea to the defective indictment. N.C.G.S. § 15A-1022(c).

Am Jur 2d, Indictments and Informations §§ 281, 299.

4. Criminal Law § 980 (NCI4th)— consolidation of convictions for judgment—arrest of judgment on one conviction—remand of other cases for proper judgment

Judgment predicated upon defendant's plea of guilty to an invalid habitual felon indictment is arrested. However, where the habitual felon indictment was consolidated with the underlying substantive felonies for judgment, and no error appears

with regard to those felonies, the case must be remanded for proper judgment on the valid convictions even though those convictions would support the judgment entered.

Am Jur 2d, Criminal Law § 524.

Appeal by defendant from judgment entered 18 February 1992 and from order entered 2 April 1992 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 March 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for the State.

Public Defender Robert Brown, Jr. for defendant appellant.

JOHN, Judge.

Defendant contends the trial court erred in sentencing him as an habitual felon because of an alleged defect in the habitual felon indictment. We agree.

Defendant was indicted on (1) four counts of felonious breaking and entering, (2) three counts of felonious larceny, and (3) one count of being an habitual felon. The habitual felon indictment properly alleged that defendant had been convicted of three previous counts of felonious breaking or entering, but failed to allege defendant was currently charged with either felonious breaking or entering or felonious larceny. The cases came on for trial at the 18 February 1992 session of court. After a jury was selected and impaneled, defendant withdrew his not guilty pleas and entered pleas of guilty to all charges including the habitual felon indictment. This was accomplished pursuant to a plea arrangement with the State whereby it was agreed that the cases were to be consolidated for judgment and defendant would receive a fourteen year active prison sentence "under the habitual offender statute." The trial court accepted the pleas and sentenced defendant in accordance with the agreement.

Three days later on 21 February 1992, defendant filed a motion for appropriate relief wherein he argued that the habitual felon indictment was defective because it "did not allege any underlying felonies" and failed "to state that the defendant was charged with separate felony charges for which the State sought to enhance the sentence of the defendant." By order entered 2 April 1992

the trial court denied this motion. On 7 April 1992 defendant filed notice of appeal from both the judgment and the order, and on 19 August 1992 filed a petition for writ of certiorari with this Court.

I.

[1] We first determine whether this Court has jurisdiction to consider defendant's appeal. In relevant part, G.S. § 15A-1444(e) provides:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty . . . has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Because the trial court entered judgment upon defendant's guilty plea and none of the exceptions enumerated in G.S. § 15A-1444(e) are applicable, this Court is without jurisdiction to consider the merits of defendant's direct appeal from the original judgment. However, the trial court's denial of his motion for appropriate relief is subject to appellate review pursuant to G.S. § 15A-1422(c)(1). *See* G.S. §§ 15A-1444(f); 15A-1448(a)(2).

We note also that the sole argument contained in defendant's petition for writ of certiorari is that his motion for appropriate relief should have been granted. Since we consider herein the merits of that motion, we need not examine defendant's petition and it is hereby denied. *See Nobles v. First Carolina Communications Inc.*, 108 N.C.App. 127, 131, 423 S.E.2d 312, 314-315 (1992), *disc. review denied*, 333 N.C. 463, 427 S.E.2d 623 (1993).

II.

[2] Defendant contends his motion for appropriate relief should have been granted because the habitual felon indictment failed to allege any of the underlying substantive felonies. An habitual felon indictment must meet the requirements of G.S. § 14-7.3 which provides in pertinent part:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 *with the commission of any felony . . . must . . . also charge that said person is an habitual felon.* The indictment charging the defendant

> as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

G.S. § 14-7.3 (emphasis added). This procedure contemplates two indictments: one charging the underlying substantive felony, and another charging defendant as an habitual felon. *State v. Allen*, 292 N.C. 431, 433, 233 S.E.2d 585, 587 (1977). Both indictments must be disposed of in the same criminal proceeding. *Id.* at 433-434, 233 S.E.2d at 587.

Defendant's argument raises the following question: *to what extent does G.S. § 14-7.3 require that the substantive felony indictment and the habitual felon indictment cross-reference one another*? This problem has been examined in *State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985) (the substantive felony indictment need not refer to the defendant's status as an habitual felon); *State v. Sanders*, 95 N.C.App. 494, 504-505, 383 S.E.2d 409, 416, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 470 (1989) (the substantive felony indictment need not refer to the defendant's status as an habitual felon); and *State v. Moore*, 102 N.C.App. 434, 402 S.E.2d 435 (1991).

In *State v. Moore*, defendant was indicted for three felonies (substantive felonies) and for being an habitual felon. The habitual felon indictment, however, referred to only two of the substantive felonies. At trial defendant (1) was convicted of *only the one substantive felony not referred to in the habitual felon indictment* and (2) thereafter pled guilty to being an habitual felon. *State v. Moore*, 102 N.C.App. at 438-439, 402 S.E.2d at 437. This Court held that it was error to sentence defendant as an habitual felon. "The felonious sale of cocaine was not alleged as [a substantive] felony in the habitual felon indictment. Accordingly, defendant did not have sufficient notice of this particular charge against him." *Id.* at 438, 402 S.E.2d at 437. Furthermore, this defect was not abrogated by defendant Moore's plea of guilty. *Id.* at 438-439, 402 S.E.2d at 437.

It is well settled that we are bound by prior decisions of this Court. *In the matter of Appeal from Civil Penalty*, 324 N.C. 373, 383-384, 379 S.E.2d 30, 36-37 (1989). Thus, in view of *State v. Moore*, we hold the trial court erred in denying defendant's motion for appropriate relief since the habitual felon indictment did not reference any of the underlying substantive felonies.

III.

[3] Notwithstanding any deficiencies in the habitual felon indictment, the State argues the trial court correctly concluded in its order denying defendant's motion for appropriate relief that defendant's "failure to move to have the indictment as to habitual offender status quashed or otherwise dismissed constitutes a waiver of any such defect." We are compelled to rule otherwise.

A plea to an indictment *which sufficiently charges every essential element* of the offense waives mere irregularities. *State v. Stallings*, 4 N.C.App. 184, 187, 166 S.E.2d 464, 466 (1969); *see also* 17 Strong's N.C. Index 4th *Indictment, Information, and Criminal Pleadings* § 48 (1992). However, the general rule is that defects in an indictment "which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused," 41 Am. Jur.2d, *Indictments and Informations*, § 299 (1968), and a plea of guilty does not preclude a defendant from claiming that the facts alleged in the indictment do not constitute a crime under the laws of this state. *State v. Harrington*, 15 N.C.App. 602, 603, 190 S.E.2d 280, 281 (1972). While an habitual felon indictment does not charge a crime, it does charge a status which subjects a defendant to enhanced punishment. *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). Therefore, this indictment must satisfy the same requirements as other criminal indictments and must allege the essential elements of habitual felon status. *See State v. Moore*, 102 N.C.App. 434, 438, 402 S.E.2d 435, 437 (1991). As previously discussed, the indictment charging defendant as an habitual felon failed in this regard.

G.S. § 15A-1022(c), moreover, provides that "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." In *State v. Moore*, this Court held that because (1) defendant Moore was acquitted of the substantive felony charges alleged in the habitual felon indictment and (2) this indictment did not allege the substantive felony of which Moore was convicted, "the trial court should not have ac-

cepted defendant's plea" of guilty to the habitual felon indictment in view of G.S. § 15A-1022(c). *State v. Moore*, 102 N.C.App. at 439, 402 S.E.2d at 437. The *State v. Moore* opinion contains no indication that any objection was raised or relief sought in the trial court, but rather that the validity of the habitual felon indictment was challenged only in the appeal to this Court.

In the case *sub judice*, factually very similar to *State v. Moore*, the habitual felon indictment failed to allege *any* of the underlying substantive felonies. Under *State v. Moore*, then, we are required to hold that the trial court should not have accepted defendant's guilty plea and, despite the lack of prior objection or motion, that defendant did not waive the material defects in the habitual felon indictment by his plea.

IV.

[4] In view of our holding that it was error to deny defendant's motion for appropriate relief, there remains the question as to disposition of this matter. This question has, in part, been answered by our Supreme Court. It is proper to arrest judgment, *ex mero motu*, when it is apparent that no judgment could lawfully be entered because of some fatal defect appearing in the criminal charge (the information, warrant or indictment). *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 131-132 (1990). Where an indictment contains some fatal flaw, but nonetheless results in a conviction, the reviewing court must arrest the judgment. *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982). Accordingly, we arrest the judgment predicated upon defendant's plea of guilty to the habitual felon indictment.

The habitual felon indictment, however, was consolidated with the underlying substantive felonies for purposes of judgment. "Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. 'Presumably this (the single judgment) was based upon consideration of guilt on both charges.' " *State v. Stonestreet*, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955) (*quoting State v. Camel*, 230 N.C. 426, 428, 53 S.E.2d 313, 315 (1949)). We therefore remand for entry of proper judgment as regards those offenses wherein there ap-

pears no error. *See State v. Pakulski*, 326 N.C. 434, 439-440, 390 S.E.2d 129, 132 (1990); *State v. Stonestreet*, 243 N.C. at 31, 89 S.E.2d at 737; *State v. Braxton*, 230 N.C. 312, 315, 52 S.E.2d 895, 898 (1949).

While not necessary for the resolution of defendant's appeal, in the interests of time and justice we note the State may elect upon remand to try defendant as an habitual felon upon a subsequent indictment proper in form, and in accordance with procedures approved in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977). When judgment is arrested due to some fatal flaw appearing on the face of the record, such as a substantive error in the indictment, the verdict is vacated and the State must seek a new indictment if it elects to proceed again. *State v. Pakulski*, 326 N.C. at 439, 390 S.E.2d at 132. " 'The granting of a motion in arrest of judgment does not operate as an acquittal but only places the defendant in the same situation in which he was before the prosecution was begun.' " *Id.* at 439, 390 S.E.2d at 132 (*quoting* 21 Am. Jur.2d *Criminal Law* § 524 (1981)).

In summary, we hold:

As to 91CRS21116, judgment arrested.

As to 91CRS18593, 18594, 18796, 18797, remanded.

Judges COZORT and LEWIS concur.

IRON STEAMER, LTD., PLAINTIFF v. TRINITY RESTAURANT, INC. AND JOEL D. CANTOR, DEFENDANTS

No. 923SC800

(Filed 6 July 1993)

1. Landlord and Tenant § 57 (NCI4th)— lease of restaurant— maintenance—breach by landlord

The trial court did not err in an action for breach of a commercial lease by finding that plaintiff, the landlord, had breached the lease by failing to replace a water heater, failing to replace or otherwise repair an exterior door, and failing

to replace an inadequate heating and air conditioning system. There was evidence to support the findings of the court, sitting without a jury, in that the lease provided that facilities disrepair that solely caused a loss of the required sanitation rating would be the landlord's responsibility and the hot water heaters ran out of hot water too quickly in violation of health department requirements; the lease required the landlord to maintain all the exterior including a leakproof roof and walls and an exterior door facing the ocean routinely blew open, allowing air into the restaurant; and the lease required the landlord to put the air conditioners in proper working order while there was evidence that the air conditioning unit was not working properly and that plaintiff had never replaced the system.

Am Jur 2d, Landlord and Tenant §§ 613 et seq., 828 et seq.

Rights and remedies of tenant upon landlord's breach of covenant to repair. 28 ALR2d 446.

2. **Damages § 125 (NCI4th)— breach of commercial lease by landlord—maintenance—lost profits**

The trial court erred in an action for breach of a commercial lease when, sitting without a jury, it made findings and an award for defendant restaurant based on lost profits. Defendants failed to meet their burden of proof in that they presented insufficient evidence at trial to ascertain or measure lost profits with "reasonable certainty." Defendant Cantor's estimation of lost profits is based on assumptions that are purely speculative; moreover, the relationship between lost profits and the income needed to generate such profits in an unestablished resort restaurant context is peculiarly sensitive to variables including quality of food and service and the seasonal nature of the business. Proof of lost profits with reasonable certainty under these circumstances requires more specific evidence and thus a higher burden of proof.

Am Jur 2d, Damages §§ 912, 913.

Appeals by plaintiff and defendants from judgment entered 3 April 1992 in Carteret County Superior Court by Judge W. Russell Duke, Jr. Heard in the Court of Appeals 15 June 1993.

Plaintiff, Iron Steamer, Ltd., instituted this action for breach of a written lease agreement against defendants Trinity Restaurant,

Inc. and Joel D. Cantor, seeking monetary damages for nonpayment of rent allegedly due under the lease. Defendants counterclaimed for breach of the lease agreement, alleging certain conditions at the demised premises which caused defendants loss of profits and other monetary damages. The pertinent facts leading up to this dispute are as follows:

In 1989, plaintiff was the owner of the Iron Steamer Resort, a complex consisting of a fishing pier with tackle shop, a motel, a gift shop, and a restaurant facility. In March of 1989, defendant lessee, Trinity Restaurant, Inc., entered into a lease with plaintiff for the restaurant facility, with a term beginning March 1989 and ending November 1989. Defendant lessee delivered the sum of $2,000.00 to plaintiff as rent and utility deposits. Defendant Joel Cantor guaranteed that lease.

Defendant lessee entered into possession of the leased premises in early April 1989 and operated the restaurant without incident until July of 1989, when defendant lessee began making late rent payments. Thereafter, defendant also stopped paying the garbage collection and water bills and left a portion of the electric bill unpaid in the fall.

During the spring and early summer of 1989, defendant lessee began having certain problems with existing parts of the restaurant facility. A water heater that was insufficient for operation of the restaurant was replaced by defendant lessee after plaintiff refused to replace it. A door in the restaurant was adversely affecting the heating and cooling system for the facility. When plaintiff refused to replace the door, defendant lessee purchased and installed a storm door. Defendant lessee also advised plaintiff that the air conditioning and heating system was not adequate for the restaurant facility but the system was never replaced. Defendant lessee vacated the leased premises prior to the termination date of the lease and left the restaurant facility dirty and with broken plumbing.

Defendant lessee claims that plaintiff was obligated under the lease to make certain repairs of existing restaurant fixtures and that plaintiff's failure to do so was a breach of the lease agreement, costing defendant lessee lost profits and replacement expenditures. Plaintiff contends that it was defendant lessee that breached the lease agreement and prayed for damages consisting of unpaid water bills, garbage collection charges, electrical charges, clean up charges, and plumbing repair charges.

After the trial, the court entered a judgment to the effect that all parties had breached the lease. The trial court found defendants liable to plaintiff for a net total of $2,409.12, which represented the unpaid water bills, garbage collection charges, electrical charges, clean up charges and plumbing repair charges, crediting the deposit defendants paid at the initiation of the lease. The trial court also found defendants entitled to recover from plaintiff the sum of $8,809.20, which included lost profits and replacement expenditures. Therefore, the net award in the judgment in favor of defendants was $6,400.08. From this judgment, plaintiff and defendants appeal.

Bennett, McConkey, Thompson and Marquardt, P.A., by Samuel A. McConkey, Jr., for plaintiff-appellant-appellee.

Darden, Coyne, Simpson & Harris, P.A., by H. Buckmaster Coyne, Jr., for defendants-appellees-appellants.

WELLS, Judge.

[1] Plaintiff sets forth three arguments in support of six assignments of error for our review. First, plaintiff contends the trial court erred in finding that plaintiff breached the lease agreement, where plaintiff failed to render the premises tenantable for the intended purpose (1) by failing to replace the water heater, (2) by failing to replace or otherwise repair the exterior door, and (3) by failing to replace the inadequate heating and air conditioning system.

In general, where a court sits without a jury, its findings of fact are "conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). In the instant case, there is ample evidence to support the court's findings as to each of the three items of breach.

Defendants presented evidence that the hot water heaters ran out of hot water too quickly in violation of health department requirements and that defendant lessee asked plaintiff to install a new heater. After plaintiff refused defendant lessee's request, defendant lessee paid $1,200.00 to purchase and install a new water heater. The pertinent portion of the lease provides, "facilities disrepair that solely causes a loss of the required [sanitation] rating shall be LANDLORD'S responsibility." (paragraph 8.a. of the Lease Agreement). The lease also limits defendant lessee's responsibility to minor repairs and maintenance of equipment and fixtures. In

light of these provisions and the evidence presented, the trial court's finding that such inaction by the plaintiff constituted a breach of the lease agreement was proper.

Defendants also introduced evidence that an exterior door, facing the ocean, routinely blew open allowing air into the restaurant. Upon plaintiff's refusal to replace the door, defendant lessee purchased a new storm door. Both parties agree that the portion of the lease governing the storm door is paragraph 8.d. which requires a landlord to ". . . maintain all the exterior of the subject premises specifically including a leakproof roof and walls. . . ." The trial court reasonably interpreted this provision as requiring action by plaintiff to replace the exterior door and therefore its findings are binding upon us.

Defendants also presented evidence that the heating and air conditioning unit was not functioning properly. There is no question that plaintiff never replaced the heating and air conditioning system in the restaurant facility. The lease contains a specific provision regarding air conditioners to the following effect: "LANDLORD agrees to put all air conditioners in proper working order, and TENANT agrees to maintain and make minor repairs thereafter, excepting motors and compressors which may need replacement without cause of TENANT." (paragraph 8.e. of the Lease Agreement). Clearly, there is sufficient evidence to find that failure to repair or replace the heating and air conditioning unit by the plaintiff lessor was a breach of the lease. This assignment of error is overruled.

[2] Plaintiff next challenges the trial court's findings of fact with respect to lost profits and the award of damages based on those findings. We agree.

In order to recover damages for lost profits, the complainant must prove that except for the breach of contract, profits would have been realized, and he must ascertain such losses with "reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578, *petition denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses. Our courts, however, have not gone so far as to apply the "New Business Rule" which categorically precludes an award of damages for lost profits where the party seeking damages is a new business with no record of profitability. *See Olivetti, supra.* Instead, we have chosen to evaluate the quality

of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with "reasonable certainty."

Plaintiff argues that defendants have failed to prove with the requisite degree of certainty, the amount of lost profits defendants should recover due to the alleged breach of contract by plaintiff. The burden of proving damages is always on the party claiming injury. *See Olivetti, supra.* Defendants have failed to meet this burden of proof in that they have presented insufficient evidence at trial to ascertain or measure lost profits with "reasonable certainty."

Defendant lessee began operating the restaurant as a new business in April 1989, continuing through November 1989. It is uncontroverted that defendant lessee's gross revenues for August, September, October and November were lower than the revenues received in May, June or July. The trial court found that, but for plaintiff's breach of contract, "the gross sales figures for a restaurant of that type and location, for the month of August, should have been similar to the gross sales figures for the month of July." The court further found since September, October and November are good fishing months, the resort restaurant's revenues "should have been similar to, or better than, the gross sales figures for the months of May or June."

The court's designated findings of fact, reflect the method by which the court calculated damages or lost profits. While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E.2d 605 (1977). Therefore, such questions are fully reviewable by this court. *Olivetti, supra.*

The trial court's determination that gross revenues for August through November would be at least as much, if not more, than the gross revenues for May, June, or July is based on the following evidence: Defendant Joel Cantor testified that "if August had held up the same as July, we would have had eleven thousand dollars more in gross [income]." From this figure, Mr. Cantor estimated the lost profits for that month would "most likely have been around eighty-five or eighty-six hundred dollars." Mr. Cantor arrived at the figure for gross profits essentially by assuming that August would have produced a higher gross income, and by subtracting

what he thought would be the approximate additional food, drink, labor and overhead costs needed to accommodate the increase in business. Mr. Cantor then made similar projections for the months of September, October and November. Mr. Cantor's bases for estimating the lost profits at this restaurant in Pine Knoll Shores was his brief experience, less than one year, at a restaurant in another city, and his experience as a cook for the Ramada Inn in Pine Knoll Shores, which lasted about one year.

Upon reviewing the entire record, we find no factual basis upon which a jury could calculate lost profits with a "reasonable certainty." Mr. Cantor's estimation of lost profits is based on assumptions that are purely speculative in nature. Our Court in *Meares v. Construction Co.*, 7 N.C. App. 614, 173 S.E.2d 593 (1970), held that an estimate of anticipated profits does not provide an adequate factual basis for a jury to ascertain the measure of damages. *See also Catoe v. Helms Construction & Concrete Co.*, 91 N.C. App. 492, 372 S.E.2d 331 (1988).

We also note that in an unestablished resort restaurant context, the relationship between lost profits and the income needed to generate such lost profits is peculiarly sensitive to certain variables including the quality of food, quality of service, and the seasonal nature of the business. Therefore, proof of lost profits with reasonable certainty under these circumstances requires more specific evidence and thus a higher burden of proof. While difficult to determine, "damages may be established with *reasonable certainty* with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similar enterprises." (Emphasis added). 22 Am.Jur.2d §627 (1988) (*citing* Restatement, Contracts 2d §352, comment b). The record of evidence simply does not support the trial court's findings of lost profits.

For the reasons stated herein, we reverse the portion of the trial court's order awarding lost profits to defendants.

Because our decision in this case resolves all dispositive issues, we do not reach the merits of plaintiff's additional assignments of error or defendants' appeal.

Affirmed in part, reversed in part.

Judges ORR and McCRODDEN concur.

MARY JO OSBORNE AND JOHN OSBORNE, PLAINTIFF v. G. B. WALTON, JR., M.D., AND COLUMBUS COUNTY HOSPITAL, INC., DEFENDANTS

No. 9213SC28

(Filed 6 July 1993)

1. **Rules of Civil Procedure § 3 (NCI3d)— extension of time to file complaint—failure to file timely answer—complaint abated**

Where plaintiffs filed an application for an extension of time within which to file a complaint against defendants, and the application was granted, but plaintiffs failed to file their complaint until twenty-one days past the date specified in the order granting the extension, plaintiffs' action abated; the action could only be revived by commencing a new action; but such action was barred in this case by the three-year statute of limitations. N.C.G.S. § 1A-1, Rule 3.

Am Jur 2d, Limitation of Actions §§ 301-318.

2. **Rules of Civil Procedure § 3 (NCI3d); Limitations, Repose, and Laches § 139 (NCI4th)— complaint—new action—action barred by statute of limitations**

Even if the trial court had the discretion to extend the time for the filing of a complaint, the action would have to be deemed a new action since the old one had abated, and the new action would be barred by the statute of limitations.

Am Jur 2d, Limitation of Actions §§ 301-318.

Appeal by plaintiffs from an order entered in open court on 30 September 1991 and signed on 4 October 1991 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 9 December 1992.

On 17 May 1991, plaintiffs filed an application for an extension of time within which to file a complaint against defendants in Columbus County Superior Court. The Assistant Clerk of Court granted this application by issuing an order extending plaintiffs' time to file their complaint against defendants to and including 6 June 1991. Additionally, on 17 May 1991, the Assistant Clerk issued a summons to be served upon defendants.

On 22 May 1991, defendant Columbus County Hospital (the "Hospital") was served with the summons directed to Ralph Rogers,

Administrator, and a copy of the order extending plaintiffs' time to file a complaint. Defendant G. B. Walton, Jr., M.D. was also served personally with the summons directed to him and a copy of the order. On 17 June 1991, the registered agent of the Hospital received a duplicate summons and copy of the order by certified mail.

On 27 June 1991, plaintiffs filed their complaint seeking damages for medical malpractice and loss of consortium. Additionally, on 27 June 1991, Dr. Walton accepted service of the complaint personally, and Ralph Rogers accepted the complaint against the Hospital signing as the administrator. On 5 August 1991, the Hospital's registered agent received a copy of plaintiffs' complaint by certified mail.

On 9 July 1991, the Hospital filed a motion to dismiss this action pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure based on lack of jurisdiction, insufficient service of process, and the contention that the action abated pursuant to Rule 3 of the North Carolina Rules of Civil Procedure. The insufficient service of process allegation was based on the contention that Ralph Rogers was not the administrator of the Hospital on 27 June 1991 and that he was not, therefore, the person upon whom service could be properly made.

On 15 July 1991, Dr. Walton filed a motion for extension of time to file his answer, which was granted. On 17 July 1991, Dr. Walton filed an answer and motion to dismiss. In his answer, Dr. Walton denied plaintiffs' claims and asserted that the applicable statute of limitations barred the action.

On 30 September 1991, plaintiffs filed a motion to the court to allow plaintiffs additional time to file their complaint based on the assertion that the late filing of their complaint was the fault of their attorney and his office staff and not due to any fault of the plaintiffs and on the assertion that a trial judge may extend the time to file the complaint in his discretion. On 30 September 1991, Judge B. Craig Ellis entered an order in open court, which was reduced to writing and signed on 4 October 1991, finding that the action had abated pursuant to Rule 3 of the North Carolina Rules of Civil Procedure and that there were no discretionary matters for the trial court to consider. Based on these findings, the trial court granted defendants' motion to dismiss. From this order, plaintiffs appeal.

Bailey & Dixon, by Dorothy V. Kibler and Steven M. Fisher; and Britt & Britt, by William S. Britt, for plaintiff-appellants.

Harris, Shields and Creech, P.A., by Thomas E. Harris, C. David Creech and Robert S. Shields, Jr., for defendant-appellee G. B. Walton, Jr., M.D.

Marshall, Williams & Gorham, by Lonnie B. Williams, for defendant-appellee Columbus County Hospital, Inc.

ORR, Judge.

[1] Plaintiffs do not dispute that the action abated pursuant to Rule 3 of the North Carolina Rules of Civil Procedure; instead, they argue that the trial court had the discretionary power to extend the time in which to file their complaint pursuant to Rule 6(b) of the North Carolina Rules of Civil Procedure. Based on the specific facts of this case, we disagree.

Rule 3, "Commencement of action", of the North Carolina Rules of Civil Procedure states:

> (a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.
>
> A civil action may also be commenced by the issuance of a summons when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.
>
> The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

Thus, under Rule 3, the plaintiffs' action in the case *sub judice* originally commenced on 17 May 1991 when plaintiffs made an

application to the court stating the nature and purpose of the action and requesting permission to file their complaint within twenty days and the court made an order stating the nature and purpose of the action and granting their request. The court's order of 17 May 1991 extended plaintiffs' time in which to file their complaint up to and including 6 June 1991. Plaintiffs filed their complaint on 27 June 1991, twenty-one days past the date specified in the court's order. Subsequently, based on the specific language of Rule 3, when plaintiffs failed to file their complaint on or before 6 June 1991, their action abated.

"As used in reference to actions at law, [the] word abate means that action is utterly dead and cannot be revived except by commencing a new action." Black's Law Dictionary, 16 (Revised 4th ed. 1968); *See also, Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982) (after action abated upon failure to timely issue a proper summons, it was revived upon the issuance and service of summons on defendant, and this Court stated, "the effect of the second summons . . . was to revive and commence a *new* action on the date of [the issuance of the second summons]." (Emphasis added.)). We find no merit to plaintiffs' argument that an abated action remains "dormant" so that a new action is not needed to revive it.

When plaintiffs failed to file their action on or before 6 June 1991, and the action abated on 7 June 1991, at that time, based on our review of the record, the applicable statute of limitations had run. Normally, the applicable statute of limitations in a medical malpractice action is three years. N.C. Gen. Stat. § 1-52; *See also, Mathis v. May*, 86 N.C. App. 436, 439, 358 S.E.2d 94, 96, *disc. review denied*, 320 N.C. 794, 361 S.E.2d 78 (1987). This period begins to run at the time of defendant's last act giving rise to the cause of action. N.C. Gen. Stat. § 1-15; *Mathis, supra.* An exception to the standard three-year statute of limitations applies when an injury that is not readily apparent is discovered more than two years after defendant's last act which gave rise to the claim. N.C. Gen. Stat. § 1-15; *Mathis*, 86 N.C. App. at 439, 358 S.E.2d at 96-97.

In the present case, the exception to the normal three-year statute of limitations does not apply, and defendants' last act giving rise to the action occurred on 18 May 1988. In their complaint, plaintiffs alleged that on 18 May 1988, defendant Walton negligent-

ly failed to diagnose plaintiff Mary Jo Osborne as having lung cancer after conducting x-rays of her chest. The complaint stated:

> Plaintiff was told by Dr. Joyner [plaintiffs' family physician] that "according to Dr. Walton, the lungs were clear and the x-rays were fine" and diagnosed her as having a cold or pleurisy. That after, the Plaintiff began to have frequent colds and pain in her lungs where she was referred to various physicians who diagnosed her as having lung cancer. That subsequently, Plaintiff has had to undergo surgery for the lung cancer in an attempt to stop the spread and growth of it.

According to an affidavit contained in the record which plaintiffs submitted, Mary Jo Osborne's condition was diagnosed in January 1990, and she began treatment. Thus, as already stated, plaintiffs' action does not fall under the exception to the three-year statute of limitations set out in N.C. Gen. Stat. § 1-15, and defendant Walton's last act which triggers the applicable three-year statute of limitations occurred on 18 May 1988. Thus plaintiffs had until 18 May 1991 to file this action under the statute, and they acted in accord with this requirement.

On 17 May 1991, as previously noted, plaintiffs filed for an extension of time to file their complaint which the court granted, extending the time for filing to and including 6 June 1991. Plaintiffs did not file their complaint until 27 June 1991. When plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run.

[2] Plaintiffs now argue on appeal that the trial court could extend their time in which to file their complaint to and including 27 June 1991 under N.C.R. Civ. P. 6(b) thus reviving the original action and avoiding the statute of limitations. Our Supreme Court has held that "Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.' " *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). However, "the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense", and "[i]t is clear that a judge may not, in his discretion, interfere with the vested rights of a party where pleadings

are concerned." *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970) (citations omitted).

Thus, based on *Lemons*, it would appear that the trial court was incorrect in saying that it had no discretion to extend the time for the filing of a complaint. However, even if the trial court had properly extended the time, based on the authority previously cited, the action would have to be deemed a new action since the old one had abated. Even under that circumstance, the statute of limitations would still have run, and the trial court properly dismissed the action.

We find no prejudicial error and affirm the trial court.

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

GEORGE R. SAIEED AND WIFE, TIFFNEY L. SAIEED, PLAINTIFFS-APPELLEES v. THEODORE ROOSEVELT BRADSHAW AND WIFE, WINNIE MARIE S. BRADSHAW; AMAR AHUJA AND WIFE, KAMINI AHUJA; ARTEMIS C. KARES; HELEN C. KARES; GEORGE CHRIS KARES AND WIFE, EDNA MARIE JONES KARES; JOANNE KARES; CHRISANTHE KARES; AND PAMLICO SOUND LEGAL SERVICES, INC., DEFENDANTS-APPELLANTS

No. 923DC591

(Filed 6 July 1993)

Rules of Civil Procedure § 58 (NCI3d)— determination of date of entry of judgment—appeals taken thirty-one days later—appeals properly dismissed

The trial court did not err in finding the proper date for entry of judgment to have been 7 October 1991, as it constituted an early identifiable point at which entry of judgment occurred, and neither party could be said to be unfairly surprised by the entry of judgment on that date, as defendants admitted in open court that they had "actual notice of the filing of the judgment on or about October 7, 1991." Therefore, the trial court properly dismissed defendants' appeals taken thirty-one days after entry of judgment.

Am Jur 2d, Judgments §§ 59, 61.

Appeal by defendants except for Pamlico Sound Legal Services, Inc., from order entered in open court 16 April 1992 and filed 24 April 1992 by Judge E. Burt Aycock, Jr., in Pitt County District Court. Heard in the Court of Appeals 11 May 1993.

Everett, Everett, Warren & Harper, by C. W. Everett, Jr., and Edward J. Harper, II, for plaintiff appellees.

Speight Watson & Brewer, by James M. Stanley, Jr., for defendant appellees.

COZORT, Judge.

Defendants (except Pamlico Sound Legal Services, Inc.) appeal the dismissal of their appeals for failure to timely file notice of appeal within thirty days from the entry of judgment pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. We find the trial court properly determined the date of the entry of judgment, and the defendants failed to file timely notice. We thus affirm.

Plaintiffs instituted this action seeking declaratory and injunctive relief relating to the use of an alleyway running between property owned by them and property owned or used by defendants. Defendants Theodore Roosevelt Bradshaw and Winnie Marie S. Bradshaw asserted a counterclaim seeking to be declared the owners in fee simple of the alleyway. The trial court held a hearing on the counterclaim and ruled in favor of the plaintiffs. At trial, the jury found in favor of plaintiffs as to most issues. The record indicates that when the verdict was rendered, the court instructed the clerk to record the verdict in the minutes and to note that the parties had agreed to reschedule a hearing for injunctive relief sought by plaintiffs outside the current term of court.

On 6 October 1991, the trial court signed a comprehensive judgment resolving all the issues presented in the case, including those raised by the counterclaim. The judgment was filed on 7 October 1991. On 7 November 1991, thirty-one days after the judgment was filed, defendants Theodore Roosevelt Bradshaw, Winnie Marie S. Bradshaw, Amar Ahuja, and Kamini Ahuja gave notice of appeal from the judgment "entered on October 7, 1991." On 15 November 1991, the remaining defendants, except Pamlico Sound Legal Services, Inc., additionally gave notice of appeal from the 7 October 1991 judgment. The latter notice was given pursuant

to N.C.R. App. P. 3(c), which provides, in part, "If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party." Thereafter, the defendant appellants gave notice of the joinder of their appeals pursuant to N.C.R. App. P. 5(a).

On 7 April 1992, plaintiffs filed a motion to dismiss the appeal based on the untimeliness of the appeals taken and based on the appellants' failure to timely contract with the court reporter for production of the trial transcript as prescribed by N.C.R. App. P. 7. By order filed 24 April 1992, the trial court found that the appellants had substantially complied with N.C.R. App. P. 7; however, the trial court dismissed the joint appeal based on the appellants' failure to give timely notice of appeal from the judgment.

The trial court's order dismissing the appeal included the following findings:

> 1. Final judgment in this case was signed on October 6, 1991, and filed with the Clerk of Superior Court . . . on October 7, 1991.
>
> 2. This case was heard by the undersigned Judge at the session of Pitt County District Court commencing February 25, 1991, with some of the issues being tried before the Court without a jury and with some of the issues being tried before the Court with a jury. The counterclaim of the defendants Bradshaw was tried to the Court without a jury, and the Court rendered its judgment with respect to such counterclaim during that week of Court. No written order respecting such counterclaim was entered other than the judgment signed by this Court and filed on October 7, 1991.
>
> 3. After the return of the jury's verdict at the aforementioned session of Court, the Court met on several occasions with counsel respecting the fashioning of injunctive relief and the proposed findings of fact and conclusions of law, and counsel for both the plaintiffs and the appealing defendants were involved in this process throughout the period of time between the week of February 25, 1991 and October 6, 1991, the date the judgment was signed.
>
> 4. There is no evidence in the record, nor was any evidence offered at the hearing, that notice of filing was mailed by

the Clerk to the parties pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, nor does the judgment itself exhibit a time of mailing notice.

5. The best recollection of the undersigned Judge is that on October 7, 1991, the date of filing of the judgment, he carried the original of such judgment to the office of the Clerk of Superior Court of Pitt County and directed that it be filed. His further best recollection is that he directed his secretary to deliver personally copies of the judgment on that same date to all Greenville counsel and instructed her to mail to Mr. Harmon, who resides in New Bern, his copy of such judgment.

6. At oral argument, counsel for defendants acknowledged that they then had actual notice of the filing of the judgment on or about October 7, 1991.

* * * *

8. The notice of appeal filed herein bears the file stamp of the Pitt County Clerk of Superior Court dated November 7, 1991, at 4:59 o'clock p.m.

* * * *

10. The Court finds as a fact that the stamped time shown on the notice of appeal is the correct time of filing . . . .

11. During the entire process of drafting the judgment, all Greenville counsel were diligent in working with the Court in order to obtain a final judgment which accurately set forth the judgment rendered . . . . The Court specifically recalls that this judgment was revised on more than one occasion as a result of these consultations.

12. In the factual context presented by this case, the signing and filing of the judgment on October 7, 1991, is an easily identifiable point at which entry of judgment occurred, and the Court finds as a fact that the judgment was entered on that date.

* * * *

15. Judgment was not rendered on plaintiffs' claims for relief in open Court at the February 25, 1991 civil session

but was rendered outside and after the term of Court by stipulation and agreement of the parties.

The court then concluded:

1. That judgment in this cause was entered on October 7, 1991, which date, in the factual context of this case, was (1) an easily identifiable point at which entry occurred, such that (2) the parties had fair notice of the Court's judgment and the time thereof, and that (3) the matters for adjudication had been finally and completely resolved so that the case is suitable for appellate review.

Defendants contend the trial court erred by dismissing their appeal based on untimeliness, based on the trial court's finding that entry of judgment in this case occurred on 7 October 1991. Rule 3 of the Rules of Appellate Procedure states that "[a]ppeal from a judgment . . . in a civil action . . . must be taken within 30 days after its entry." Failure of an appellant to timely file the notice of appeal requires that the potential appeal be dismissed. *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683, *disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). Accordingly, if the trial court properly determined that the entry of judgment occurred on 7 October 1991, then the notice of appeal given by defendants Bradshaw and Ahuja on 7 November 1991, thirty-one days after the entry of judgment, was untimely. Furthermore, it follows that, if the notice given by defendants Bradshaw and Ahuja was untimely, then the notice given by the remaining defendants was also untimely and their appeal was properly dismissed. *See* N.C.R. App. P. 3(c). The issue which we must decide, then, is whether the trial court erred in determining that entry of judgment occurred on 7 October 1991.

Rule 58 of the North Carolina Rules of Civil Procedure provides when entry of judgment occurs. Rule 58 states:

Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these

> rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C. Gen. Stat. § 1A-1, Rule 58. The parties agree, and we concur, that paragraphs one and two of Rule 58 are inapplicable to the present case, since judgment was not rendered in open court. Defendants argue that paragraph three in Rule 58 applies to the case at bar; they contend the judgment has never been entered because the clerk has not mailed a notice to the parties. Defendants argue the 30-day period for filing notice of appeal has not been triggered. Conversely, plaintiffs assert that Rule 58 is entirely inapplicable, urging us to apply analysis set forth in *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), to determine when entry of judgment occurred.

We find the analysis in *Stachlowski* applicable in the present case. In *Stachlowski*, our Supreme Court acknowledged that in some cases, the express provisions of Rule 58 have not been satisfied, and therefore the point of entry of judgment cannot be determined by reference to the rule. Rather than declare that entry of judgment never occurred where there is a failure to comply with Rule 58, the Court stated that the point of entry of judgment must be determined by reference to the intent and purpose of the rule. *Id. See also, Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992).

The Court further explained that when Rule 58 does not apply, the entry of judgment should be determined by undertaking a separate analysis. The Court stated:

> In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. As described above, relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review.

Stachlowski, 328 N.C. at 287, 401 S.E.2d at 645. When we apply that analysis to the circumstances in the present case, we find the trial court did not err in finding the proper date for entry of judgment to have been 7 October 1991. The 7 October date constitutes "an easily identifiable point at which entry of judgment occurred," and neither party can be said to be unfairly surprised by entry of judgment on that date. Defendants admitted in open court that they had "actual notice of the filing of the judgment on or about October 7, 1991." We conclude the trial court properly dismissed the appeals taken more than thirty days after entry of judgment.

We affirm the order dismissing the joint appeal, making unnecessary any review of plaintiffs' cross-assignment of error.

Affirmed.

Judges WELLS and JOHN concur.

JAMES A. BOWERS, JR., JAMES A. BRANSON, BENJAMIN BROCKMAN, VAUGHN W. CRABB, BILLY R. GANT, HENRY L. JONES, LYMAN F. LANCE, JR., LARRY R. PENDRY, BILLY W. RICH, JERRY T. RICH, LINDSAY P. ROYAL, DAVID F. THOMPSON, PAUL D. WOOD, JR., AND MORRIS J. YANDLE, PLAINTIFFS v. CITY OF HIGH POINT, DEFENDANT

No. 9218SC732

(Filed 6 July 1993)

1. **Municipal Corporations § 219 (NCI4th)— former law enforcement officers—retirement benefits—authority of city to enter into oral contract**

Defendant city had the authority to enter into an oral contract with plaintiffs, former law enforcement officers employed by defendant city who accepted early retirement, promising plaintiffs pension benefits, since N.C.G.S. § 143-166.42 expressly authorizes municipalities to fix the "special separation allowance" for its officers.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 493 et seq.

2. **Municipal Corporations § 219 (NCI4th)— Assistant City Manager—authority to calculate benefits for retiring employees—contract binding on city**

The Assistant City Manager had the authority to enter into a contract fixing the rate of the "special separation allowance" for defendant city, since defendant had adopted the council-manager form of government; as a duly appointed officer of the city, the Assistant City Manager's duties consisted of "assisting the City Manager in a variety of assignments relating to the planning, direction, control and evaluation of the operations and programs of the personnel, police, fire and transportation departments"; pursuant to these provisions, the Assistant City Manager assumed responsibility for implementing the "special separation allowance" for the law enforcement personnel; the calculation required for implementation of the allowance was performed properly in the distribution of administrative duties called for by a council-manager form of government; and the Assistant City Manager's promise of benefits to plaintiffs was therefore a binding contract on defendant city.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 493 et seq.

3. Municipal Corporations § 234 (NCI4th)— computation of severance pay—contract by Assistant City Manager—contract not ultra vires the city

There was no merit to defendant's contention that the Assistant City Manager made a "mistake" when he advised plaintiff former law enforcement officers that their statutorily required severance pay would be based upon their regular salary plus vacation, longevity, and overtime, nor was there merit to defendant's contention that such a promise, regardless of who made it, was *ultra vires* the city because the legislature specified the basis for the payment as being the "base rate of compensation" and no one in the city had authority to calculate the separation allowance otherwise, since there was no fixed legal definition of "base rate of compensation" from which the Assistant City Manager was to compute the allowance; the applicable statutes gave the city broad statutory authority to interpret "base rate of compensation" in determining the "special separation allowance"; the Assistant City Manager clearly researched the matter, consulted with various knowledgeable people, and made a reasoned judgment which was within his authority to do; and even if there was a question with respect to whether the Assistant City Manager had the authority to enter this contract, the city would be estopped to deny the validity of the contract it made to provide plaintiffs with a "special separation allowance" based on twelve months' salary including longevity, vacation, and overtime pay.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 523.

Appeal by defendant from judgment entered 20 May 1992 in Guilford County Superior Court by Judge Thomas W. Ross. Heard in the Court of Appeals 3 June 1993.

Plaintiffs instituted this action against the City of High Point seeking recovery of the reductions in the amount of the "special separation allowance" which plaintiffs are allegedly entitled to pursuant to an oral contract with defendant City. The forecast of evidence presented is as follows: Plaintiffs are all former law enforcement officers employed by defendant City and who accepted

early retirement after 1 January 1987. N.C. Gen. Stat. § 143-166.42, effective 15 July 1986, requires defendant City to pay a "special separation allowance" or pension to all eligible law-enforcement officers employed by it who retire on or after 1 January 1987. It is undisputed that plaintiffs are qualified for and entitled to such "special separation allowance."

Prior to accepting early retirement, plaintiffs were promised by Mr. Randall Spencer, who was, at that time, the Assistant City Manager for Personnel and Public Safety, that they were entitled to the "special separation allowance" which would be computed by using their final twelve months' compensation, including longevity pay, accrued vacation pay, and overtime pay. Plaintiffs were paid the "special separation allowance" so computed until 16 March 1990. Since that time, defendant City has reduced the allowance being paid to plaintiffs by calculating the allowance upon the officers' final twelve months' compensation excluding longevity, overtime and accrued vacation compensation. Defendant City asserts that the prior payments did not reflect the "base rate of compensation" as designated under N.C. Gen. Stat. § 143-166.41.

Both plaintiffs and defendant City filed motions for summary judgment. The trial court allowed plaintiffs' motion for summary judgment and denied defendant City's motion. Defendant City appeals.

Byerly & Byerly, by W. B. Byerly, Jr., for plaintiffs-appellees.

Fred P. Baggett, High Point City Attorney; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr.; for defendant-appellant.

WELLS, Judge.

The sole question before us is whether the trial court erred in granting plaintiffs' summary judgment motion and in denying defendant's summary judgment motion. Defendant City argues that because G.S. § 143-166.41 specifically states that the "special separation allowance" is to be calculated using the "base rate of compensation," the City had no authority to provide plaintiffs with an allowance which, the City contends, exceeded the statutory "mandate," and any attempt to do so was *ultra vires* the City. We disagree.

Plaintiffs' breach of contract claim is based upon the express oral contract by defendant City, through its Assistant City Manager.

The law enforcement officers contend they were promised a pension which would be based upon their final twelve months' salary, including longevity pay, accrued vacation pay, and overtime pay. This "special separation allowance" was made available to plaintiffs for the purpose of encouraging early retirement, and plaintiffs relied upon defendant City's promise to pay such allowance, when they agreed to retire early. Plaintiffs maintain the City is bound by its oral contract.

[1] The first question is whether defendant City had the authority to enter into an oral contract with plaintiffs, promising them pension benefits. The legislature has expressly authorized municipalities to fix the "special separation allowance" for its officers under G.S. § 143-166.42. That section provides "the governing body for each unit of local government shall be responsible for making determination of eligibility for their local officers . . . and for making payments to their eligible officers . . . according to the provisions of G.S. 143-166.41." The City, therefore, had the authority to enter into this type of contract fixing compensation.

[2] Defendant City contends that Randall Spencer, in his capacity as Assistant City Manager, did not have the authority to enter into a contract fixing the rate of the "special separation allowance" under G.S. § 143-166.42 because he was not the "governing body" for the City of High Point. This argument has no basis in law or fact.

As stipulated by the parties, the City of High Point has adopted the council-manager form of government, as provided by N.C. Gen. Stat. § 160A-147, *et seq.* Under this system, the City of High Point has assumed a "centralized personnel system under the direction of the city manager." High Point City Code, Art. A, § 4-2-1. At the time plaintiffs were promised their pension, H. Lewis Price was the duly appointed and acting City Manager, and Randall Spencer was the duly appointed and acting Assistant City Manager for Personnel and Public Safety, whose responsibilities included personnel administration for the City's work force including the police department. As a duly appointed officer of the City, Assistant City Manager Spencer's duties consisted of "assisting the City Manager in a variety of assignments relating to the planning, direction, control and evaluation of the operations and programs of the personnel, police, fire and transportation departments." (Emphasis added) (Plaintiffs' Exhibit C).

Pursuant to these provisions, the Assistant City Manager assumed responsibility for implementing the "special separation allowance" for the law enforcement personnel under his supervisory authority of the personnel and police departments. Far from being an unlawful exercise of discretionary authority, the calculation required for implementation of the "special separation allowance" was performed properly in the distribution of administrative duties called for by a council-manager form of government. The Assistant City Manager's promise of benefits to plaintiffs was therefore a binding contract on the City. Furthermore, we note that the City Manager, under whose supervision the Assistant City Manager acts, accepted and ratified the retirement benefits compensation package by sending a letter of appreciation and confirmation to retiring law enforcement personnel.

[3] Defendant City next contends that the Assistant City Manager made a "mistake" when he advised the appellees that their statutorily required severance pay would be based upon their regular salary plus vacation, longevity and overtime. Defendant City further asserts that such a promise, whether made by the Assistant City Manager, the City Council or any governing body of the City, is *ultra vires* the City, because the legislature specified the basis for the payment as being the "base rate of compensation" and no one in the City had authority to calculate the separation allowance otherwise. We disagree.

After carefully reviewing the record, we find no facts which would indicate that the Assistant City Manager's calculated "special separation allowance" was in any way the result of a mere "mistake." According to his affidavit, the Assistant City Manager calculated the allowance owed to plaintiffs under G.S. § 143-166.42 without the benefit of any written guidelines, statutory directive or legal interpretation of that section. There was no fixed legal definition of "base rate of compensation" from which he was to compute the allowance. In addition, G.S. §§ 143-166.41 and 143-166.42 of the North Carolina General Statutes give the City broad statutory authority to interpret "base rate of compensation" in determining the "special separation allowance."

In making his determination, the Assistant City Manager indicated in his affidavit the following:

> 4. . . . [T]he affiant relied on his own reading of G.S. 143-166.42, informal consultations with other local government

personnel administrators in the State, the High Point City Attorney at that time, and the North Carolina League of Municipalities for assistance in interpreting the requirements of G.S. 143-166.42.

5. Based on the best information available to the affiant at the time he interpreted the requirements of G.S. 143-166.42, the affiant concluded that the components of the special separation allowance would include longevity pay, overtime pay, and accrued vacation, in addition to base rate of compensation. This conclusion was consistent with the calculation of benefits in the N.C. Local Governmental Employees Retirement System and with the opinions of those with whom the affiant consulted at that time.

Mr. Spencer's statements reveal that he clearly researched the matter, consulted with various knowledgeable persons, and made a reasoned judgment which was, as discussed above, within his authority to do. Therefore, his promise to pay the "special separation allowance" including vacation, longevity and overtime was not *ultra vires* the City.

Our Court in *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 598 (1986), addressed a factually similar situation and set forth the applicable rules under these circumstances in a suit against a municipality:

> It is true that, generally, a municipality cannot be made liable for breach of an express contract for services when the official making the contract has exceeded his or her authority by entering into such a contract. 56 Am Jur. 2d *Municipal Corporations* Sec. 504. And the city will not ordinarily be estopped to assert the invalidity of a contract made by an officer of limited authority when that authority has been exceeded. *Id.* Sec. 528.
>
> > *However, such a contract may become binding and enforceable upon the corporation through the doctrine of estoppel* based upon the acts or conduct of officers of the corporation having authority to enter into the contract originally, as by receiving the benefits of the contract, or other grounds of equitable estoppel. *A municipality cannot escape liability on a contract within its power to*

> *make, on the ground that the officers executing it in its behalf were not technically authorized in that regard, where they were proper officers to enter into such contracts.*

Id. at 585-86 (footnotes omitted and emphasis added).

Applying these principles to the case at bar, even if there were a question with respect to whether the Assistant City Manager had the authority to enter this contract, the City would be estopped to deny the validity of the contract it made to provide plaintiffs with a "special separation allowance" based upon twelve months' salary including longevity, vacation and overtime pay.

It appearing that the materials before the trial court did not present any disputed issues of fact but only questions of law, summary judgment was an appropriate disposition.

For the reasons stated, the order below is hereby

Affirmed.

Judges COZORT and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 JULY 1993

BELL v. ALLERGAN, INC. No. 9218SC346	Guilford (89CVS8026)	Affirmed
BERRYMAN v. BERRYMAN No. 9219DC694	Rowan (91CVD399)	Dismissed & Remanded
C. A. HOWARD & ASSOC. REALTY v. FWB DEVELOPMENT ASSOC. No. 921SC115	Currituck (89CVS88)	Reversed & Remanded
CHAVIS v. HALL No. 9212SC933	Cumberland (91CVS4769)	No Error
CHOATE v. JOHNSON No. 9223SC190	Alleghany (90CVS80)	Dismissed
GAMBILL v. GAMBILL No. 9223SC509	Wilkes (91CVS1956)	Affirmed
GILBERT v. GREAT AMERICAN INS. CO. No. 9213SC464	Brunswick (85CVS714)	Affirmed
GRIFFIN v. MOORE No. 9130SC751	Jackson (90CVS50)	No Error
GUERIN v. SITCOMM, INC. No. 923SC853	Carteret (90CVS867)	Affirmed
HARDEE v. REYNOLDS METAL CO. No. 9210IC1243	Ind. Comm. (034471)	Affirmed
HILE v. HILE No. 9228DC1232	Buncombe (91CVD2825)	Affirmed
IN RE BERRY No. 9226DC829	Mecklenburg (91J791)	Affirmed
IN RE HAYES No. 9222DC809	Iredell (88J123)	Affirmed
IN RE FORECLOSURE OF HOPKINS No. 9214SC670	Durham (92SP88)	Affirmed
IN RE LAYNE No. 9210DC187	Wake (91J302)	Affirmed

INTERSTATE CASUALTY INS. CO. v. INTERSTATE INSURORS, INC. No. 9210SC324	Wake (91CVS10051)	Affirmed
LANCASTER v. CITY OF GOLDSBORO No. 928SC1119	Wayne (92CVS526)	Appeal dismissed; petition for writ of certiorari denied
LOWDER v. ALL STAR MILLS No. 9120SC1291	Stanly (79CVS015)	The decision of the trial court is therefore affirmed & the portion of defendant William Lowder's appeal assigning error to the July 1990 order is dismissed.
MORRIS v. INGRAM No. 9221DC580	Forsyth (91CVD2346)	Vacated & Remanded
POWELL v. PUBLIC SERVICE CO. OF N.C. No. 9228SC738	Buncombe (91CVS2472)	No Error
REBARCO, INC. v. McDEVITT & STREET CO. No. 9226SC254	Mecklenburg (89CVS12155)	No Error
RHYNE v. VELSICOL CHEMICAL CORP. No. 925SC236	New Hanover (91CVS3375)	Affirmed
STATE v. BENNETT No. 924SC447	Onslow (89CRS13752)	No Error & Remanded
STATE v. BRADY No. 9219SC772	Randolph (91CRS142) (91CRS143)	No Error
STATE v. BROWN No. 9211SC1074	Harnett (91CRS10533) (91CRS10534) (91CRS10535) (91CRS10536)	No Error
STATE v. BRUINGTON No. 9228SC773	Buncombe (91CRS17291) (91CRS17292) (91CRS17293) (91CRS17294) (91CRS17295)	No Error

	(91CRS17296) (91CRS17297) (91CRS17298) (91CRS17299) (91CRS17300) (91CRS17301) (91CRS17302) (91CRS17303) (91CRS17304) (91CRS17305) (91CRS17306) (91CRS17307) (91CRS59549) (91CRS59550) (91CRS59552)	
STATE v. CONNER No. 9227SC1345	Gaston (91CRS7240)	No Error
STATE v. DAVIS No. 9122SC1197	Mecklenburg (90CRS4412)	No Error
STATE v. GORE No. 9213SC714	Brunswick (91CRS703) (91CRS704)	No Error
STATE v. HALL No. 9210SC1256	Wake (91CRS64312)	No Error
STATE v. HARRIS No. 9223SC1347	Yadkin (92CRS770)	No Error
STATE v. KIRKLAND No. 9230SC260	Swain (91CRS527) (91CRS529)	No Error
STATE v. LOCKLEAR No. 9216SC608	Robeson (90CRS2105)	No Error
STATE v. MATTHEWS No. 9221SC1138	Forsyth (92CRS50459)	Affirmed
STATE v. MILES No. 9126SC1139	Mecklenburg (91CRS48407) (91CRS48409) (91CRS48410)	Affirmed
STATE v. MIZELLE No. 926SC1297	Bertie (92CR981)	No Error
STATE v. MOORE No. 9221SC1205	Forsyth (91CRS50460)	Affirmed

STATE v. PENNELL No. 9221SC1130	Forsyth (91CRS8516)	No error; motion for appropriate relief denied
STATE v. POWELL No. 9225SC1113	Catawba (90CRS8897)	No Error
STATE v. POWELL No. 9219SC818	Randolph (91CRS90)	Affirmed
STATE v. TACKETT No. 9219SC1091	Rowan (91CRS11541) (91CRS11542)	No Error
STATE v. THOMPSON No. 9210SC920	Wake (91CRS26795) (91CRS26796) (91CRS39674)	No Error
STATE v. WILLIAMS No. 9221SC1136	Forsyth (91CRS50461)	Affirmed
STATE v. WYATT No. 9211SC1240	Johnston (90CRS6227)	No Error
WILNOTY v. CROWE No. 9230SC775	Jackson (91CVS183)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 67 (NCI4th). Applicability of "whole record" test

The Court of Appeals considered the whole record to determine whether the superior court judge was correct as a matter of law in an action arising from the dismissal of an NCSU professor. **In re Dismissal of Huang**, 683.

§ 68 (NCI4th). Review of agency's exercise of discretionary powers

A proceeding against a university professor for assaultive behavior from 1973 through 1985 which resulted in his discharge was patently in bad faith, arbitrary and capricious. **In re Dismissal of Huang**, 683.

§ 69 (NCI4th). Procedure on review; review of facts; sufficiency of evidence to support findings or decision

The evidence in the record did not substantiate a finding that a university professor was unfit to continue as a member of the faculty at NCSU. **In re Dismissal of Huang**, 683.

Substantial evidence existed in the record to justify the State Personnel Commission's decision to reject the administrative law judge's opinion and dismiss a State employee who used a van for personal business while taking O'Berry Center residents on a field trip. **Davis v. N.C. Dept. of Human Resources**, 730.

ANIMALS, LIVESTOCK, OR POULTRY

§ 19 (NCI4th). Cruelty to animals; animal fighting exhibitions

There was sufficient evidence that defendant acted willfully to support his conviction for cruelty to an animal where a mare owned by defendant had to be euthanized because of its emaciated condition. **State v. Talley**, 180.

APPEAL AND ERROR

§ 10 (NCI4th). Proof of service

An appeal was dismissed where the record contained a notice of appeal but nothing in the notice showed that plaintiff was given notice through service as required by App. R. 26(b). **Hale v. Afro-American Arts International**, 621.

An appeal from a directed verdict for defendants on their counterclaim was dismissed where there was no proof of service of the notice of appeal on the other parties to the appeal as required by the Rules of Appellate Procedure. **Spivey and Self v. Highview Farms**, 719.

§ 75 (NCI4th). Appeal by defendant entering plea of guilty

The Court of Appeals was without jurisdiction to consider the merits of defendant's direct appeal from a judgment entered upon defendant's plea of guilty. **State v. Hawkins**, 837.

§ 95 (NCI4th). Appealability of discovery orders; production of documents

An order denying discovery of documents was not immediately appealable where the record failed to disclose what evidence was being sought. **N.C. Farm Bureau Mutual Ins. Co. v. Wingler**, 397.

§ 99 (NCI4th). Appealability of order denying motion to amend pleadings

When the trial court's ruling involves an amendment to add a compulsory counterclaim, the denial of the motion to amend affects a substantial right and is immediately appealable. **N.C. Farm Bureau Mutual Ins. Co. v. Wingler**, 397.

APPEAL AND ERROR — Continued

§ 156 (NCI4th). Effect of failure to make motion, objection, or request in civil actions

An assignment of error to the denial of a motion to dismiss for lack of subject matter jurisdiction because proper parties were not joined failed where plaintiffs failed to make a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) and the trial court was denied the opportunity to rule on that motion. **Powell v. Omli**, 336.

§ 191 (NCI4th). Effect of appeal on power of trial court; scope of stay of judgment; security limited for fiduciaries

The trial court lacked jurisdiction to enter an order granting summary judgment where defendants had already filed notice of appeal from an order denying motions to dismiss. Although G.S. 1-294 permits the trial court to proceed upon other matters in the action not affected by the judgment appealed from, the issues and arguments in the summary judgment hearing here were virtually identical to those relating to the motion to dismiss. **Woodard v. Local Governmental Employees' Retirement Sys.**, 83.

For the reasons stated in *Woodard v. Local Governmental Employees' Retirement System*, 110 N.C. App. 83, the trial court lacked jurisdiction to go forward with the summary judgment hearing in light of the stay resulting from defendants' appeal of the denial of their motion to dismiss. **Faulkenbury v. Teachers' & State Employees' Retirement Sys.**, 97.

§ 233 (NCI4th). Criminal actions; appeal by state from magistrate or district court

The State's notice of appeal from district to superior court was inadequate where defendant was charged with misdemeanor death by vehicle and driving left of center, defendant pled responsible for the driving left of center infraction, the district court dismissed the misdemeanor death by vehicle charge on double jeopardy grounds, the State gave notice of appeal in open court, defendant offered to draft the notice of appeal and include it with the order dismissing the charges, no separate written notice of appeal was filed by the State, and the basis for the appeal was not specified. **State v. Hamrick**, 60.

§ 294 (NCI4th). Availability of writ of certiorari in particular criminal cases

Although no statute explicitly gives the superior court authority to issue a writ of certiorari to preserve a party's right to an appeal from district court, the State has the right to appeal a district court order dismissing a charge, the term "appeal" includes appellate review upon writ of certiorari, and the General Rules of Practice give the superior court the authority to grant the writ of certiorari in proper cases. **State v. Hamrick**, 60.

§ 340 (NCI4th). Assignments of error generally; form and record references

Appellant failed to comply with Rule 10 of the North Carolina Rules of Appellate Procedure where appellant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law and correctly referenced the assigned errors to the excepted findings, but failed to direct the Court of Appeals to specific findings, arguing instead the general denial of its claim for contribution and indemnification. **Jones v. Shoji**, 48.

APPEAL AND ERROR — Continued

§ 342 (NCI4th). Cross-assignments of error by appellee

Plaintiff appellees' purported cross-assignments of error were ineffectual where they did not present an alternative basis to support the trial court's decision. **Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth.**, 607.

§ 421 (NCI4th). Form and content of appellant's brief

Plaintiffs could not argue on appeal that testimony and an exhibit constituted the improper opinion of a lay witness where they had made a specific objection at trial based upon the allegedly speculative and self-serving nature of the exhibit and testimony. **Powell v. Omli**, 336.

§ 422 (NCI4th). Appellee's brief; presentation of additional questions

Where defendant appellee added several cross-assignments of error to the record, defendant is not entitled to file an "appellant's" brief containing arguments supporting its cross-assignments of error as well as an "appellee's" brief, and plaintiff's motion to strike defendant's "appellant's" brief is allowed and defendant's cross-assignments of error will not be considered. **Aetna Casualty and Surety Co. v. Continental Ins. Co.**, 278.

Arguments made by plaintiff in support of its contentions are not properly presented as "cross-assignments of error" because they do not present "an alternate basis in law for supporting the judgment" from which defendant appealed. **Spivey and Self v. Highview Farms**, 719.

§ 476 (NCI4th). Appealability of summary judgment

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. **Ragan v. Hill**, 648.

ARREST AND BAIL

§ 64 (NCI4th). Circumstances showing probable cause; informer's tip

The warrantless arrest of defendant for possession of cocaine was based on probable cause and was lawful where officers independently corroborated information received from confidential informants. **State v. Trapp**, 584.

ARSON AND OTHER BURNINGS

§ 19 (NCI4th). Indictment generally

An indictment was sufficient to charge defendant with the crime of second degree arson although it incorrectly referred to the statute defining the crime of first degree arson of a mobile home used as a dwelling. **State v. Jones**, 289.

ASSAULT AND BATTERY

§ 100 (NCI4th). Situations in which self-defense instruction not required

The evidence in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury did not require the trial court to instruct the jury on self-defense. **State v. Wills**, 206.

ATTORNEYS AT LAW

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — Continued

§ 286 (NCI4th). Effective assistance of counsel generally

A trial court may not use a harmless error analysis to determine whether a criminal defendant who had ineffective assistance of counsel when he pleaded guilty is entitled to have the plea set aside and to have a jury trial. **State v. May**, 268.

CONTEMPT OF COURT

§ 38 (NCI4th). Compensation; costs; attorney's fees

An order finding the Employment Security Commission in contempt and ordering the payment of petitioner's attorney's fees was remanded where the evidence was sufficient to support the trial court's ruling holding the Commission in contempt, but attorney's fees are not properly awarded in contempt cases. **Gilliam v. Employment Security Commission of N.C.**, 796.

CONTRACTS

§ 11 (NCI4th). Actions by unlicensed general contractors

The trial court properly denied defendants' motion for a directed verdict on the ground that plaintiff lacked a general contractor's license in an action arising from defendants' failure to pay plaintiff for work performed in building a golf course. **Spivey and Self v. Highview Farms**, 719.

§ 77 (NCI4th). Construction contracts not involving buildings

The trial court erred by directing a verdict for plaintiff in an action to collect amounts owed for construction work on a golf course. **Spivey and Self v. Highview Farms**, 719.

§ 114 (NCI4th). Parties; plaintiffs

The general contractor had no standing to assert a claim for additional payment against an airport authority on behalf of a grading subcontractor. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

§ 118 (NCI4th). Who does not qualify for third party beneficiary status

Summary judgment was properly granted for plaintiff insurance company as to a breach of contract counterclaim where the insurance company had given erroneous information to defendant's husband concerning the beneficiary of one of his life insurance policies but defendant was neither a party to the contract nor a third party beneficiary. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 194.

§ 148 (NCI4th). Sufficiency of evidence as to breach of contract

The trial court properly denied defendant's motions for a directed verdict, judgment notwithstanding the verdict, or a new trial in a breach of contract action arising from the liquidation of plaintiffs' S&P 500 stock index futures on 20 October 1987. **Moss v. J.C. Bradford and Co.**, 788.

§ 172 (NCI4th). Construction contracts not involving buildings

Undercut work performed by plaintiff contractor in constructing an airport taxiway extension was not "extra work" where it is clear from the contract language that undercut work was to be treated as unclassified excavation. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

Plaintiff contractor's evidence indicating potential errors in defendant airport authority's measurements of the amount of unclassified excavation by using the

average end area method specified in the contract was sufficient to raise a genuine issue of material fact with respect to the amount of unclassified excavation and entitled plaintiff to present evidence of the measurements it obtained using the load count method. **Ibid.**

Plaintiff contractor was not entitled to recover for extra erosion control work it performed on an airport taxiway extension project under a breach of implied warranty theory based on its contention that defendant airport authority's plans and specifications contained inadequate erosion control measures and were thus not suitable for the purpose for which they were intended. **Ibid.**

The no-damages-for-delay clause of an airport taxiway extension contract prohibited plaintiff contractor from recovering increased costs allegedly caused by delays from unanticipated undercut and erosion control work. **Ibid.**

CORPORATIONS

§ 5 (NCI4th). Application of alter ego or instrumentality doctrine

The trial court erred by concluding that a corporate entity should be disregarded where plaintiff contracted with the corporation, not the individual, plaintiff presented no evidence that the individual used the corporation to conduct personal business or for personal benefit, plaintiff's bare assertion that the corporation was used to defraud plaintiff, without supporting evidence, does not support the conclusion that the individual exercised excessive control to escape liability, and the determination that the individual's second corporation was used to escape liability was contrary to the law because plaintiff's contracts were with the first corporation. **Statesville Stained Glass v. T.E. Lane Construction & Supply**, 592.

§ 126 (NCI4th). Fiduciary responsibility of majority shareholder

Plaintiff minority shareholder's evidence was sufficient for the jury on the issue of defendant director-majority shareholder's breach of fiduciary duty by repaying himself loans he made to the corporation, preferentially repaying a corporate debt that he guaranteed, and repaying debts to a company he predominantly owned while the corporation was experiencing financial difficulties. **Freese v. Smith**, 28.

§ 227 (NCI4th). Disposition of assets upon liquidation

The trial court's determination that Temple Construction was a successor corporation to Lane Construction and is therefore liable for Lane's debts was not supported by the evidence where there was no evidence of any transfer of assets from Lane Construction to Temple Construction. **Statesville Stained Glass v. T.E. Lane Construction**, 592.

COSTS

§ 36 (NCI4th). Attorney's fees; nonjusticiable cases

The trial court's award of costs and attorney's fees to defendant pursuant to G.S. 6-21.5 is vacated where the appellate court held that plaintiff's evidence was sufficient for the jury on issues of fraud, breach of contract and breach of fiduciary duty so that justiciable issues did exist. **Freese v. Smith**, 28.

COURTS

§ 14 (NCI4th). Grounds for personal jurisdiction

When personal jurisdiction is alleged to exist pursuant to G.S. 1-75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process. **Murphy v. Glafenhein**, 830.

§ 84 (NCI4th). Review of rulings of another superior court judge; motion for summary judgment

Where plaintiff's first motion for summary judgment was denied by one superior court judge, another superior court judge did not have authority to allow plaintiff's second motion for summary judgment on identical issues. **Taylorsville Savings and Loan Assn. v. Keen**, 784.

CRIMINAL LAW

§ 181 (NCI4th). Miscellaneous matters affecting capacity to plead or stand trial

The trial court did not err in denying defendant's motion for appropriate relief on the ground that defendant was under the influence of a controlled substance throughout her trial. **State v. Harding**, 155.

§ 253 (NCI4th). Continuance for illness or incapacitation of accused's relative

The trial court did not err in denying defendant's motion to continue because of the death of her "common law husband" of 17 years. **State v. Harding**, 155.

§ 304 (NCI4th). Consolidation of multiple drug charges

The trial court did not err in joining for trial fifteen drug charges against defendant. **State v. Harding**, 155.

§ 327 (NCI4th). Joinder of charges against multiple defendants; miscellaneous offenses

The trial court properly permitted joinder of the trials against defendant and his companion even though defendant was not charged with one of the crimes with which his companion was charged. **State v. Roddey**, 810.

§ 360 (NCI4th). Removal and custody of witnesses

The trial court did not abuse its discretion by limiting the testimony of a defense witness who violated a sequestration order. **State v. Williamson**, 626.

§ 375 (NCI4th). Miscellaneous comments and actions by trial court

Defendant was not prejudiced by the trial judge's statement to the jury that he was speaking loudly because he understood that defense counsel was hard of hearing or by the trial judge's statement, after the jury returned to the courtroom, that everyone was waiting for defense counsel and his client. **State v. Talley**, 180.

§ 425 (NCI4th). Argument of counsel; comment on failure to call particular witnesses or offer particular evidence

The prosecutor did not impermissibly comment on defendant's failure to take the stand when he spoke about defendant's failure to offer rebuttal or alibi evidence. **State v. Thompson**, 217.

§ 481 (NCI4th). Communications between jurors

The trial court did not err in a prosecution for rape and indecent liberties by denying defendant's motion for appropriate relief where the trial court concluded

§ 976 (NCI4th). Motion for appropriate relief; standard of review on appeal

The trial court's summary denial of defendant's motion for appropriate relief is not reviewable on appeal where the record on appeal does not include the motion or any supporting documents. **State v. Talley**, 180.

§ 980 (NCI4th). Effect of arrest of judgment

Judgment predicated upon defendant's plea of guilty to an invalid habitual felon indictment is arrested, and where this indictment was consolidated with the underlying substantive felonies for judgment, the case must be remanded for proper judgment on the valid convictions even though those convictions would support the judgment entered. **State v. Hawkins**, 837.

§ 1025 (NCI4th). Authorized sentences; retaliation for notice of appeal

Defendant failed to show that the trial court improperly imposed an active sentence for cruelty to an animal because he gave notice of appeal. **State v. Talley**, 180.

§ 1039 (NCI4th). Entry of judgment; finality of judgment

The trial court erred by imposing a suspended sentence of six months imprisonment where defendant was convicted of communicating threats, given a PJC on conditions which included continued mental health treatment and not contacting the victim, the State subsequently moved that defendant be held in contempt for contacting the victim, and the six month sentence was imposed. The condition that defendant continue psychiatric treatment went beyond his obligation to obey the law and was thus punishment, so that the first entry was a judgment rather than a PJC, and violation of that judgment was contempt punishable by imprisonment up to thirty days, or a fine, or any combination of the two. **State v. Brown**, 658.

§ 1054 (NCI4th). Continuance of sentencing hearing

The trial court's failure to continue prayer for judgment from 3 June 1991 until a later specified time did not divest the trial court of jurisdiction to sentence defendant at a later session of court, a delay of sixty days between defendant's guilty plea and the sentencing was not unreasonable, and it was immaterial that the sentence was entered by a trial judge different from the judge who presided over the taking of the guilty plea. **State v. Degree**, 638.

§ 1075 (NCI4th). Classes of felonies within Fair Sentencing Act

The trial court did not err by failing to find certain mitigating factors in sentencing defendant for cruelty to an animal since this offense is a misdemeanor punishable by a maximum term of one year and is not within the scope of the Fair Sentencing Act. **State v. Talley**, 180.

§ 1092 (NCI4th). Fair Sentencing Act; appellate review generally

Defendant did not preserve for appellate review the alleged error by the trial court in finding as a nonstatutory aggravating factor that defendant intended to kill when he assaulted the victims. **State v. Degree**, 638.

§ 1098 (NCI4th). Aggravating factors under Fair Sentencing Act; prohibition on use of evidence of element of offense

The trial court erred when sentencing defendant for indecent liberties and second degree sexual offense by considering the age of the victim as an aggravating factor. Evidence of the victim's age is necessary to establish the offense of taking indecent liberties with children and second degree sexual offense was a joined crime. **State v. Farlow**, 95.

CRIMINAL LAW — Continued

The trial court did not err when sentencing defendant for involuntary manslaughter arising from an automobile collision with a pedestrian by finding in aggravation that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The conviction for driving while impaired was arrested and defendant's reckless driving in a neighborhood where he was likely to injure a number of people is not an element of involuntary manslaughter. **State v. Garcia-Lorenzo**, 319.

§ 1145 (NCI4th). Aggravating factors; heinous, atrocious, or cruel offense generally

The trial court erred in finding the heinous, atrocious or cruel aggravating factor for a second degree murder where defendant struck the victim on the head with a stick two or three times during an argument and the victim was rendered unconscious immediately. **State v. Stanley**, 87.

§ 1165 (NCI4th). Aggravating factors; mental or physical infirmity of victim generally

The trial court erred in finding as an aggravating factor for second degree murder that the victim was particularly vulnerable because he was a fallen victim where defendant struck the victim with a stick during an argument and struck the victim at least one more time after the victim fell. **State v. Stanley**, 87.

§ 1184 (NCI4th). Aggravating factors; prosecutor's unsworn allegation of prior conviction

The trial court's finding of the statutory aggravating factor of prior convictions was not supported by competent record evidence where a computer printout of defendant's record of prior convictions was attached to a notice of intent to use defendant's record of prior convictions at trial, defendant admitted on cross-examination that he had been convicted of assaulting his wife in 1982, and the prosecutor referred to defendant's prior convictions at the sentencing hearing, but there was no evidence indicating whether the assault conviction was for a simple or an aggravated assault and thus whether the offense was punishable by imprisonment for more than sixty days, and the printout list of convictions was not offered as evidence. **State v. Mixion**, 138.

§ 1216 (NCI4th). Mitigating factors; duress, coercion, threat, or compulsion generally

Although evidence that a murder victim was armed with a pistol and initiated the confrontation with defendant would support a finding of duress as a mitigating factor for defendant's murder of the victim, the trial court did not err in failing to find duress where this same evidence was the basis for a finding of the strong provocation mitigating factor. **State v. Mixion**, 138.

§ 1238 (NCI4th). Mitigating factors; strong provocation or extenuating relationship generally

Although strong provocation and an extenuating relationship are listed in the same statutory subsection, they are separate mitigating factors, and the court's finding of the strong provocation factor does not have the same effect as finding the factor of an extenuating relationship. **State v. Mixion**, 138.

CRIMINAL LAW — Continued

§ 1242 (NCI4th). Strong provocation or extenuating relationship; antagonistic relationship between defendant and victim, generally

The trial court did not err in failing to find strong provocation as a statutory mitigating factor for assault with a deadly weapon with intent to kill inflicting serious injury where there was a lapse of time between the crime and a previous encounter between defendant and the victim. **State v. Wills**, 206.

§ 1245 (NCI4th). Strong provocation or extenuating relationship; marital relationship

Evidence of past difficulties and a stormy relationship between defendant and his estranged wife for which both were at fault did not require the trial court to find an extenuating relationship as a mitigating factor for defendant's second degree murder of his wife. **State v. Mixion**, 138.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

An habitual felon indictment was invalid where it failed to allege any of the underlying substantive felonies with which defendant was currently charged. **State v. Hawkins**, 837.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

An attempt to break into a coin-operated machine is a misdemeanor and cannot serve as a felony prosecution to which an habitual felon proceeding can attach as an ancillary proceeding. **State v. Sullivan**, 779.

§ 1497 (NCI4th). Conditions of probation; consent to warrantless searches

The presence and participation of police officers in a search conducted by a probation officer pursuant to a condition of probation did not render the search invalid. **State v. Church**, 569.

§ 1524 (NCI4th). Powers of court on violations of conditions of probation; reduction of activated sentence

Defendant is entitled to a new probation revocation hearing where the trial judge at the probation revocation hearing erroneously believed that he had no discretion to reduce defendant's sentence by ordering that his two terms run concurrently rather than consecutively as originally ordered. **State v. Partridge**, 786.

§ 1686 (NCI4th). Resentence after appeal; resentence on trial de novo distinguished

Defendant's rights were not violated by the imposition of a more severe sentence upon trial de novo in superior court than the sentence imposed in the district court. **State v. Talley**, 180.

§ 2407 (NCI4th). Experts appointed by court

The trial court properly denied defendant's post-trial motion for a fingerprint expert since the fingerprints at the crime scene were not used by the prosecution to link defendant to the crime. **State v. Thompson**, 217.

DAMAGES

§ 60 (NCI4th). Effect of provision for liquidated damages

A liquidated damages clause in an airport taxiway construction contract was valid and enforceable when undercut work did not constitute extra work and defend-

ant airport authority thus did not contribute to a delay in the project by ordering such work to be performed, but plaintiff contractor was entitled to an increase in the contract time if undercut work exceeded the proposal estimate. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

122 (NCI4th). Loss of earnings or profits generally

The trial court did not err by denying plaintiffs' motion for a judgment notwithstanding the verdict in an action arising from the liquidation of their margin accounts where they contended that the jury must have considered a "window of reentry" of less than one business day in calculating damages. **Iron Steamer, Ltd. v. Trinity Restaurant**, 843.

§ 125 (NCI4th). Loss of earnings or profits; contract cases

The trial court erred in an action for breach of a commercial lease when, sitting without a jury, it made findings and an award for defendant restaurant based on lost profits. **Iron Steamer, Ltd. v. Trinity Restaurant**, 843.

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

An award of $100,000 for plaintiff's injuries in an automobile accident and $20,000 for her parents' health care services was not excessive. **Jones v. Hughes**, 262.

DIVORCE AND SEPARATION

§ 117 (NCI4th). Distribution of marital property; court's duty to classify property

Defendant was not entitled to one-half of the increased value of the marital interest in a corporation formed by plaintiff during the marriage where the corporation increased in value due to a contract signed after the separation but for which negotiations had begun while the parties were married. **Edwards v. Edwards**, 1.

§ 119 (NCI4th). Marital property, generally

The trial court did not err by finding that defendant's partner's capital account deficit in a realty partnership was a marital debt, by distributing it to defendant, and by giving him a dollar for dollar credit as if it were a debt. **Godley v. Godley**, 99.

The trial court did not err in an equitable distribution action by classifying a debt incurred to paint a rental house as marital where defendant argued that the debt was incurred for plaintiff's benefit because he lived in the house for several months after separation. **Edwards v. Edwards**, 1.

§ 121 (NCI4th). Distribution of marital property; inheritances and gifts

The trial court did not err in finding that defendant's father made gifts of stock in the family corporation to defendant during the marriage. **Godley v. Godley**, 99.

The evidence supported the trial court's finding that housing partnership options were gifts from defendant's father and not bargained for consideration. **Ibid.**

§ 123 (NCI4th). Increase in value of separate property

The trial court did not err in finding that defendant husband's family business stock had no active appreciation during the marriage. **Godley v. Godley**, 99.

§ 124 (NCI4th). Income derived from separate property

The trial court did not err in failing to find that post-separation rental income was marital property. **Godley v. Godley**, 99.

DIVORCE AND SEPARATION — Continued

§ 127 (NCI4th). Property acquired after separation

The trial court erred in holding that property commissions received between the date of separation and the date of trial were marital property. **Godley v. Godley**, 99.

§ 129 (NCI4th). Pension, retirement, and other deferred compensation rights

The trial court did not err in an equitable distribution action by finding that bonuses were not marital property where defendant did not direct the appellate court to any evidence indicating that plaintiff's or defendant's right to receive a bonus was vested on or before the date of separation. **Edwards v. Edwards**, 1.

§ 135 (NCI4th). Court's duty to value property

The trial court did not err in failing to find the value of housing partnership options since plaintiff failed to carry the burden of presenting evidence from which the court could classify, value and distribute the property. **Godley v. Godley**, 99.

§ 136 (NCI4th). Measure of value of property

The trial court did not err in refusing to consider the negative value of three companies when determining what award would be equitable since the evidence showed that the shares of stock which the court was valuing would not have a negative value. **Godley v. Godley**, 99.

The valuation of two parcels of land in an equitable distribution action was remanded for clarification or recalculation where the court relied upon an appraiser who determined that each parcel had a forty-year economic life, the court used that formula but substituted a thirty-year economic life, and plaintiff did not direct the appellate court to any supporting exhibits or transcript pages. **Edwards v. Edwards**, 1.

§ 144 (NCI4th). Distribution factors generally

The trial court properly considered the factor that plaintiff was medically impaired in making a distribution of marital property, but the court erred in considering the fact that the parties' twenty-two-year-old son and eighteen-year-old daughter lived with plaintiff and in considering defendant's income from prior years instead of income at the time of distribution. **Godley v. Godley**, 99.

§ 145 (NCI4th). Income and earning potential as distribution factors

The trial court erred in failing to find that post-separation income was a distributional factor. **Godley v. Godley**, 99.

Only those commissions for a sum certain which is ascertainable, realized between the date of separation and the date of the equitable distribution order, should be used as a distributional factor. **Ibid.**

§ 148 (NCI4th). Distribution factors; post-separation payments on marital debts

Defendant did not meet her burden of establishing error in an equitable distribution action where she contended that the court failed to factor into the final distribution a credit for paying certain marital debts. **Edwards v. Edwards**, 1.

The trial court correctly ruled in an equitable distribution action that defendant was not entitled to credit for payment of certain debts incurred after separation where defendant claimed that the debts were incurred for necessities. **Ibid.**

The trial court did not abuse its discretion in an equitable distribution action by treating defendant's post-separation payments toward mortgages as a distributional factor rather than a credit. **Ibid.**

DIVORCE AND SEPARATION — Continued

§ 155 (NCI4th). Maintenance or development of property after separation as distribution factor

The trial court did not err in treating defendant's post-separation expenditures made to preserve marital property as distributional factors. **Godley v. Godley**, 99.

§ 158 (NCI4th). Distribution factors; other factors

An equitable distribution action was remanded for clarification where defendant contended that she was entitled to one-half the appreciation of two parcels of land but it was not clear from the judgment whether the court considered the appreciation of one parcel as a distributional factor. **Edwards v. Edwards**, 1.

There was no error in an equitable distribution action in the distribution of the rental value of a house for the period between separation and distribution where defendant contended that she was entitled to one-half the fair rental value of the house during that period. **Ibid.**

Defendant wife was not entitled to a credit in an equitable distribution action for post-separation premiums which she paid on life insurance policies insuring herself and the children even though she contended that the contracts were entered into during the marriage and were continuing marital debts. **Ibid.**

An equitable distribution action was remanded for clarification where the trial court was to determine if defendant was losing rental income and consider either result as a factor in determining whether to order an equal division. **Ibid.**

§ 161 (NCI4th). Application of distribution factors in particular cases

The trial court did not rely upon vague references to distributional factors to justify an unequal division of the marital property but clearly set out the factors upon which it relied, and the factors considered by the court were sufficient to support its award even though the court failed to consider some distributional factors and improperly considered others. **Godley v. Godley**, 99.

§ 165 (NCI4th). Distributive awards generally

The trial court did not err in ordering defendant to convey to plaintiff his entire right, title, and interest in the marital residence without requiring him to convey the residence free of his current wife's marital interest. **Godley v. Godley**, 99.

A payment schedule for a distributive award in an equitable distribution action was within the six-year period established by *Lawing v. Lawing*, 81 N.C. App. 159; neither an order allowing alimony pendente lite nor a child support order constitutes a cessation of the marriage. **Edwards v. Edwards**, 1.

§ 172 (NCI4th). Filing of equitable distribution action; effect of decree of absolute divorce

The trial court properly dismissed claims for alimony and equitable distribution where plaintiff filed an action for alimony, equitable distribution, and absolute divorce, defendant filed a separate action for absolute divorce, judgment of absolute divorce was granted in defendant's action while the original claims were pending, plaintiff entered a voluntary dismissal without prejudice of her original claims, and subsequently filed a second action for alimony and equitable distribution. The claims now pursued are not the claims which were pending when judgment of divorce was entered; those claims terminated and no suit was pending thereafter when plaintiff voluntarily dismissed the original claim. **Stegall v. Stegall**, 655.

Plaintiff wife's claim against her former husband for breach of a contract to maintain lease payments on an automobile was not barred by plaintiff's failure

EVIDENCE AND WITNESSES — Continued

§ 179 (NCI4th). Motive in murder and like cases

An intended murder victim's testimony that she had been a victim of a crime committed by defendant and was prepared to testify against him was competent to show defendant's motive for soliciting an undercover agent to murder the victim. **State v. Davis**, 272.

§ 267 (NCI4th). Character testimony in form of opinion; expert testimony

A psychiatrist's opinion formed during an interview of a murder victim several months before the murder that the victim was not homicidal was inadmissible under Rule of Evidence 405(a) to show that the victim was not homicidal on the night in question and that defendant could not have been acting in self-defense when he shot the victim, but the admission of this testimony was not prejudicial error. **State v. Mixion**, 138.

§ 339 (NCI4th). Admissibility of other crimes, wrongs, or acts to show malice, premeditation, or deliberation

Nonhearsay testimony that defendant had previously threatened and assaulted his wife and damaged her property and that she had taken legal action against him was admissible to prove defendant's malice and intent in killing his wife. **State v. Mixion**, 138.

§ 362 (NCI4th). Admissibility of other crimes, wrongs, or acts to show common plan, scheme or design generally

The trial court did not commit plain error by admitting testimony tending to show defendant's drug use over a twenty-year period where the court instructed the jury that the testimony could be considered only to show plan, scheme, or design. **State v. Harding**, 155.

§ 373 (NCI4th). Admissibility of other crimes to show common plan, scheme, or design; rape and other sex offenses involving defendant's step-children or adopted children

In a prosecution of defendant for second degree rape of his stepdaughter, testimony by another stepdaughter concerning earlier rapes committed by defendant against her was admissible to show a common plan or scheme on the part of defendant to sexually assault his stepdaughters. **State v. Matheson**, 577.

§ 374 (NCI4th). Admissibility of other crimes, wrongs, or acts to show common plan, scheme, or design; rape and other sex offenses involving other's children

There no error in a prosecution for first-degree rape and indecent liberties in the admission of evidence that defendant had made young girls watch films and that he slept overnight in his locked bedroom with a child under the age of 13 where the State offered the testimony as evidence of a common plan or scheme on the part of defendant to win the trust of young girls in order to molest them. **State v. McKinney**, 365.

§ 400 (NCI4th). Identification based on sense of sight; race or skin color

The trial court did not err in refusing to allow the black defendant to inquire into the ability of a white armed robbery victim to identify black people. **State v. Roddey**, 810.

EVIDENCE AND WITNESSES — Continued

§ 437 (NCI4th). Identification from photographs generally

A robbery victim's pretrial photographic identification of defendant was not impermissibly suggestive because of the victim's out-of-court exposure to a newspaper article and photograph of defendant, and the trial court did not err in denying defendant's motion to suppress the photographic and in-court identifications. **State v. Thompson**, 217.

§ 623 (NCI4th). Form and content of pretrial motion to suppress

The trial court did not err in denying defendant's motion to suppress seized evidence because defendant failed to comply with statutory requirements where the motion was oral and not accompanied by an affidavit. **State v. Talley**, 180.

§ 732 (NCI4th). Prejudicial error in the admission of evidence; statements by defendant

A murder defendant's reply to an officer's question was not inculpatory where the officer asked defendant if he knew what was happening and defendant replied that his wife had been hurt and was being taken to the hospital and that the police believed he was responsible. **State v. Dukes**, 695.

§ 761 (NCI4th). Cure of prejudicial error by admission of other evidence; miscellaneous evidence; substantially similar evidence admitted without objection

Any error was harmless where a defendant in an action arising from the failure of a business testified from personal notes not introduced where plaintiffs did not request to see the notes, plaintiffs did not cross-examine defendant regarding the notes, plaintiffs failed to have the notes marked at trial for preservation in the record and failed to include the notes in the record on appeal, and the components largely constituting the figures read into evidence from a note had already been introduced. **Powell v. Omli**, 336.

§ 876 (NCI4th). Hearsay evidence showing state of mind of victim

Hearsay testimony that a murder victim had told others that defendant had cut off her heat and electricity, threatened to kill her, assaulted her several times, damaged her furniture, and tampered with her house, and that the police had been unable to catch him for violating a restraining order was admissible under the state of mind exception to the hearsay rule. **State v. Mixion**, 138.

§ 1026 (NCI4th). Statements against penal interest; necessity that statements subject declarant to criminal liability

Hearsay statements made by a person arrested at the same time and place as defendant to a second person arrested at the same time and place that he felt bad about defendant's having been arrested because the LSD was in fact his and not defendant's were admissible as a statement against penal interest, but the first person's statement to defendant indicating that he knew that the LSD was not defendant's but stopping short of claiming ownership was not admissible as being against the first person's penal interest. **State v. Eggert**, 614.

§ 1229 (NCI4th). Statement made to person other than police officer

Defendant's statements to an animal control officer and a veterinarian were not the result of an impermissible custodial interrogation and were properly admitted in defendant's trial for cruelty to an animal. **State v. Talley**, 180.

EVIDENCE AND WITNESSES — Continued

§ 1235 (NCI4th). Custodial interrogation defined

A murder defendant was subject to interrogation where an officer was told to stay with defendant and ensure that defendant did not wash or change his clothes and the officer asked defendant if he knew what was happening. **State v. Dukes**, 695.

§ 1239 (NCI4th). Particular statements as volunteered or resulting from custodial interrogation; statements made during general investigation at place other than crime scene; defendant's home

A murder defendant was in custody when he made a statement to an officer because a reasonable person, knowing that his wife had just been killed, kept under constant police supervision, told not to wash or change his clothing, and never informed that he was free to leave his own home would not feel free to go and would feel compelled to stay. **State v. Dukes**, 695.

§ 1245.1 (NCI4th). Warnings as to rights; public safety exception

The trial court did not err in a second degree murder prosecution resulting in an involuntary manslaughter conviction by denying defendant's motion to suppress his statement that he was alone in the car which struck the victim where the statement was made in response to a question from an officer while defendant was under arrest but before he was given his Miranda warnings. **State v. Garcia-Lorenzo**, 319.

§ 1298 (NCI4th). Matters affecting admissibility or voluntariness; nervousness or other emotional disturbance

A murder defendant's statement to an investigator at a law enforcement center was voluntary where the evidence showed that the officer had not asked defendant any questions and was trying to read defendant his rights, as well as calm him down, when defendant confessed. **State v. Dukes**, 695.

§ 1463 (NCI4th). Chain of custody of heroin

The State properly established the chain of custody of evidence in a prosecution for possession of heroin, trafficking, and conspiracy to traffic. **State v. Harding**, 155.

§ 1560 (NCI4th). Illegally or improperly obtained real evidence; good faith exception

Assuming that information which served as the basis for a search warrant was insufficient, officers reasonably relied on a search warrant that was issued by a detached and neutral magistrate and took every reasonable step to comport with the Fourth Amendment requirements. **State v. Witherspoon**, 413.

§ 1921 (NCI4th). Tests relating to blood and hair; criminal prosecutions

The trial court did not err in a second degree murder prosecution arising from an automobile striking a pedestrian which resulted in an involuntary manslaughter conviction by denying defendant's motion to suppress the results of a chemical analysis of his blood where the blood was taken after defendant had been sedated and was unconscious and without a warning that he could refuse the test. **State v. Garcia-Lorenzo**, 319.

§ 1994 (NCI4th). Parol or extrinsic evidence affecting writings; contracts, leases, and agreements generally

The trial court did not err in an action arising from the termination of a lease by considering extrinsic evidence of the parties' intent in entering a lease

The trial court erred in a rape and indecent liberties prosecution by admitting expert testimony regarding the characteristics of sexually abused children as substantive evidence; such testimony is admissible only to assist the jury in understanding the behavior patterns of sexually abused children. **Ibid.**

§ 2398 (NCI4th). Court-appointed experts

The trial court in an equitable distribution action did not err in denying plaintiff's motion for the appointment of appraisers pursuant to Rule of Evidence 706. **Godley v. Godley**, 99.

§ 2616 (NCI4th). Confidential communications induced by marital relationship

Two letters defendant wrote to his wife after they separated asking her to support his alibi were not privileged communications because both letters contained threats and offers of material reward. **State v. McKinnish**, 241.

§ 2750.1 (NCI4th). Scope of examination; when defendant "opens door"

By eliciting testimony that a probation officer's relationship with defendant was a "professional" one, defendant opened the door to questions about the nature of such relationship, even though defendant initially called the probation officer only to verify information about defendant's height, weight, and physical appearance at the time of the crime. **State v. Thompson**, 217.

§ 2803 (NCI4th). Leading questions suggesting desired response

The court's overruling of defendant's objection to the leading of a State's witness who testified concerning the location of the drug house allegedly run by defendant was not prejudicial error where the location of the house was established by other witnesses. **State v. Harding**, 155.

§ 2874 (NCI4th). Scope and extent of cross-examination; discretion of court

The trial court did not err in an assault prosecution by limiting defendant's cross-examination of a prosecution witness where the scope of cross-examination was limited by the court to protect the witness from harassment or undue embarrassment while making the interrogation effective for the ascertainment of the truth. **State v. Pharr**, 430.

§ 2917 (NCI4th). Impeachment of credibility; questions to witness on cross-examination

The State's cross-examination of defendant and his witness regarding the events surrounding defendant's gunshot wound two weeks earlier was not an improper attempt to impeach both defendant and his witness as persons of violent character since defendant's introduction of evidence of his own gunshot wound in his attempt to establish self-defense opened the door for the State's cross-examination concerning the events surrounding the gunshot wound. **State v. Wills**, 206.

§ 2931 (NCI4th). Unwilling or hostile witness

The trial court did not err by failing to declare defendant's estranged wife a hostile witness where her testimony in fact tended to support defendant's alibi. **State v. McKinnish**, 241.

§ 3088 (NCI4th). Impeachment by inconsistent or contradictory statements; letters

Where an alleged sexual offense and indecent liberties victim testified that defendant dictated letters she wrote to defendant implying that she would do things of a sexual nature for defendant if he would take her to school and lend her money, cross-examination of the victim about a letter she voluntarily wrote

HIGHWAYS, STREETS, AND ROADS

§ 2 (NCI4th). Utilities within rights-of-way

Defendant telephone company's violation of a Department of Transportation regulation prohibiting the placement of telephone booths on highway rights-of-way was not negligence per se in an action by a pedestrian who was struck by a vehicle while using a telephone booth placed on the highway right-of-way. **Baldwin v. GTE South, Inc.**, 54.

Defendant telephone company was not negligent in placing on a highway right-of-way a telephone booth plaintiff was using while struck by a vehicle where the booth was located in a grocery store parking lot and owners of the grocery store had represented to defendant's employees who installed the booth that it was located on the grocery store's property. **Ibid.**

§ 46 (NCI4th). Contractor actions for extra work

Undercut work performed by plaintiff contractor in constructing an airport taxiway extension was not "extra work" where it is clear from the contract language that undercut work was to be treated as unclassified excavation. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

Plaintiff contractor was not entitled to recover for extra erosion control work it performed on an airport taxiway extension project under a breach of implied warranty theory based on its contention that the defendant airport authority's plans and specifications contained inadequate erosion control measures and were thus not suitable for the purpose for which they were intended. **Ibid.**

§ 47 (NCI4th). Contractor actions for delay in completion

The no-damages-for-delay clause of an airport taxiway extension contract prohibited plaintiff contractor from recovering increased costs allegedly caused by delays from unanticipated undercut and erosion control work. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

HOMICIDE

§ 5 (NCI4th). Applicability of year and a day rule

An order dismissing a first degree murder indictment was vacated where defendant assaulted his wife, the N.C. Supreme Court abrogated the common law year and a day rule, defendant's wife died, and defendant was indicted. The relevant date for ex post facto purposes is the date upon which the victim died, by which time the rule had been abrogated. **State v. Robinson**, 284.

§ 73 (NCI4th). Conspiracy or solicitation to commit murder generally

The evidence was sufficient for the jury in a prosecution for solicitation to commit murder of a witness even though defendant placed the future condition of a phone call on the solicitation. **State v. Davis**, 272.

§ 99 (NCI4th). Second degree murder; physical evidence connecting defendant to crime or crime scene; circumstantial evidence

The circumstantial evidence was sufficient for the jury in a prosecution of defendant for two second degree murders committed while the victims were sitting in a parked car. **State v. Jones**, 169.

HOMICIDE — Continued

§ 218 (NCI4th). Death resulting from cause separate from but related to injury inflicted by defendant

The trial court did not err by not dismissing a charge of second degree murder where defendant drove a car down a street at a high rate of speed and struck the victim, who was standing on the side of the street talking to people, the victim suffered an injury very high in the spinal column, the injury would impair movement below the head as well as breathing capabilities, the extent of the injury was discussed with the victim's family and the medical staff, a decision was reached that the situation was not salvageable, the breathing machine was removed but oxygen was still applied, and the victim died in about twenty minutes. **State v. Garcia-Lorenzo**, 319.

§ 287 (NCI4th). Second degree murder; killing during course of altercation, argument, and the like

The State's evidence of an unlawful killing and malice was sufficient to support defendant's conviction of second degree murder committed by striking the victim with a stick during an argument. **State v. Stanley**, 87.

§ 313 (NCI4th). Second degree murder; use of deadly weapon; effect of evidence of self-defense

The State presented sufficient evidence of malice for submission to the jury of a charge against defendant for the second degree murder of his estranged wife by shooting her with a pistol, although defendant presented evidence that he acted in imperfect self-defense. **State v. Mixion**, 138.

§ 629 (NCI4th). Self-defense; amount of force permissible

The trial court in a prosecution for second degree murder did not err in failing to give defendant's requested instruction on defendant's right to increase the amount of force used in self-defense in his own home. **State v. Mixion**, 138.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 59 (NCI4th). Commitment of the mentally ill

The provision of G.S. 122C-276(d) that respondent has the same rights at his rehearing as he had at the initial hearing does not require that respondent be examined by two physicians for purposes of his inpatient commitment rehearing held pursuant to G.S. 122C-276. **In re Lowery**, 67.

The evidence supported the trial court's conclusions that respondent was mentally ill and dangerous to himself, and the trial court properly committed respondent to Broughton Hospital for inpatient treatment even though respondent's psychiatrist testified that he was suitable for outpatient treatment, where respondent refused to consider placement in a rest home and was incapable of surviving in a less structured setting. **Ibid.**

HUSBAND AND WIFE

§ 3 (NCI4th). Obligation to support

An oral agreement allegedly entered into by the parties after their marriage that plaintiff would forego her career as a veterinarian and work as a teacher in a community college to provide total financial support for their family while defendant husband attended college and law school and that defendant would thereafter

provide the family's total support so that plaintiff could devote her full time to being a wife and mother is unenforceable. **Kuder v. Schroeder**, 355.

ILLEGITIMATE CHILDREN

§ 11 (NCI4th). Conclusiveness of judgment in civil action to establish paternity

The trial court's order allowing defendant's motion to compel DNA testing to further establish paternity after paternity had been adjudicated violated the doctrine of res judicata. **State ex rel. Hill v. Manning**, 770.

INDEMNITY

§ 7 (NCI4th). Losses, damages, and liabilities covered

The trial court correctly denied the cross-claim of a church for indemnity against a YMCA arising from a van accident where the van was owned by the church and used by the church and the YMCA in an after school day care program, the YMCA and the church had entered into a joint venture to run the program, and insurance was obtained for the purpose of insuring the YMCA and its personnel who would be using the church's vans in furtherance of the joint venture. **Jones v. Shoji**, 48.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 21 (NCI4th). Effect of informalities and defects; language and form generally

The trial court did not err by denying defendant's motion to dismiss an indictment for first degree sexual offense because the indictment failed to allege that the offense was committed with force and arms. **State v. Smith**, 119.

§ 29 (NCI4th). Sufficiency of particular allegations; time

Indictments for first-degree rape which alleged that the date of the offenses was July, 1985 through July, 1987 were not fatally defective because time is not of the essence of the offense and does not constitute an element of the offense. **State v. McKinney**, 365.

§ 40 (NCI4th). Amendment of other particular matters

No material amendment of the indictment occurred when the State proceeded to trial on the charge of second degree arson while the bill of indictment still contained a reference to the statute defining first degree arson of a mobile home used as a dwelling. **State v. Jones**, 289.

§ 48 (NCI4th). Time for making motion to quash, and waiver of defects

Defendant did not waive material defects in an habitual felon indictment by entering his plea of guilty without making a motion to quash or otherwise objecting to the indictment. **State v. Hawkins**, 837.

§ 52 (NCI4th). Variance; time

Charges of first-degree rape and indecent liberties were not required to be dismissed where the indictments alleged that the offenses occurred on 15 March 1988 and the evidence at trial was that the offenses occurred in the summer of 1987. **State v. McKinney**, 365.

INFANTS OR MINORS

§ 87 (NCI4th). Basic rights; due process, generally

An order adjudicating delinquency based on acceptance of the juvenile's admission to misdemeanor assault with a deadly weapon was vacated, as was a subsequent commitment to the Division of Youth Services, where it does not affirmatively appear from the record that the provisions of G.S. 7A-633(a) were complied with and the Court of Appeals could not say that the admission was the product of an informed choice. **In re Kenyon N.**, 294.

INSURANCE

§ 528 (NCI4th). Underinsured coverage; extent of coverage

Policy language could have prevented a plaintiff from interpolicy stacking of underinsured motorist coverage where the policies which plaintiff sought to stack were not issued to the same named insured or the spouse of the named insured. **Mitchell v. Nationwide Ins. Co.**, 16.

The trial court did not err by permitting a twenty-five-year-old nonowner plaintiff to stack UIM coverages where the facts of the case support the existence of a benefit to plaintiff's mother, the owner of the policy which plaintiff sought to stack. **Ibid.**

§ 530 (NCI4th). Reduction of insurer's liability

The trial court's reasoning and mathematics were correct when it concluded that there was a total of $100,000 in underinsured motorist coverage available from stacked policies, that plaintiff had been paid $50,000 under the tortfeasor's liability policy and the policy of the driver of the car in which plaintiff was riding, and that the balance was $50,000. **Mitchell v. Nationwide Ins. Co.**, 16.

§ 728 (NCI4th). Fire and homeowner's insurance; insurable interest in property generally

A purchaser of a home on an installment basis was entitled to recover under a joint homeowner's insurance policy only the amount of his insurable interest in the home which was the amount of equity he had paid toward the purchase price. **N.C. Farm Bureau Mutual Ins. Co. v. Wingler**, 397.

§ 824 (NCI4th). Apportionment between insurers generally; proration between insurers

Although "other insurance" clauses in builder's risk policies issued to a general contractor and to an electrical subcontractor are not identical, both are "excess" clauses, and the trial court properly determined that the excess clauses are mutually repugnant, that neither will be given effect, and that the two builder's risk insurers should share payment of a fire loss covered by both policies on a pro rata basis rather than equally. **Aetna Casualty and Surety Co. v. Continental Ins. Co.**, 278.

§ 945 (NCI4th). Sufficiency of evidence to establish insurer's liability to insured generally

Summary judgment was properly granted for an insurance company on a negligent misrepresentation counterclaim where the insurance company had given defendant's husband erroneous information concerning the beneficiary of his life insurance policy but there was no evidence that the insurance company knew the information would be relied upon by defendant or that defendant did in fact rely upon the information to her harm. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 194.

JUDGES, JUSTICES AND MAGISTRATES

§ 27 (NCI4th). Disqualification from criminal proceedings

The trial judge did not err by failing to disqualify himself in a prosecution for cruelty to an animal on the ground of bias against defendant. **State v. Talley**, 180.

There was no error in a judge's denial of a DWI defendant's motion for recusal where defendant alleged that the judge could not be impartial because his wife had been seriously injured by an impaired driver. **State v. Kennedy**, 87.

JUDGMENTS

§ 36 (NCI4th). Entry out of county, district, or term generally

A disbarment order is void for lack of jurisdiction over respondent attorney where the superior court judge who issued the show cause orders was not assigned to the county where the ordered hearing was to be held. **In re Delk**, 310.

A judgment was void because it was entered out of the county and the district without defense counsel's consent, no final judgment on the merits has been rendered, and any attempt by defendants to appeal from that void judgment was inconsequential and will not prohibit defendants from designating all prior interlocutory orders in the notice of appeal when the trial court enters a proper final judgment. **Farm Credit Bank v. Van Dorp**, 759.

§ 44 (NCI4th). Sufficiency of recitals to support finding that hearing out of county and out of term was by consent

The trial court erred by denying plaintiff's motion to set aside a judgment on the grounds that it was signed out of term and out of district where consent does not appear in a writing signed by the parties or their counsel, the only evidence indicating consent is an affidavit from the trial judge, and it is apparent that the judge deciding the motion determined that plaintiff's attorney's action in drafting the judgment as directed and in not questioning the court's authority to enter the judgment constituted consent. **Smith v. Gupton**, 482.

§ 132 (NCI4th). Construction and operation of consent judgment generally

Where the parties to an action freely negotiate and enter into a consent judgment, there is no reason why they cannot bind themselves to the jurisdiction of a forum for the purpose of future litigation. **Montgomery v. Montgomery**, 234.

§ 237 (NCI4th). Persons regarded as privies; units of government

The defendants in two actions were identical for res judicata purposes where they were sued in their official capacities as members of county boards in the first action and were sued in both their official and individual capacities in the second action. **Northwestern Financial Group v. County of Gaston**, 531.

§ 313 (NCI4th). Preclusion of relitigation of zoning proceedings

Where plaintiff developers of a mobile home park sought equitable relief in a 1988 action which ultimately resulted in a permanent injunction requiring defendants to issue a permit to plaintiffs under defendant county's 1986 instead of its 1987 mobile home park ordinance, and plaintiffs subsequently brought an action in 1990 seeking monetary damages resulting from the delay, the Court of Appeals could not determine if the two actions were part of the same claim and therefore whether the second action was barred by res judicata. **Northwestern Financial Group v. County of Gaston**, 531.

LANDLORD AND TENANT

§ 35 (NCI4th). Duration and termination of tenancy; expiration or cancellation of lease

Summary judgment should not have been granted for plaintiff in an action arising from the termination of a lease where a question of the parties' intent exists and extrinsic evidence is required to determine that intent. **Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore**, 78.

§ 57 (NCI4th). Landlord's express covenant to repair premises

The trial court did not err in an action for breach of a commercial lease by finding that plaintiff, the landlord, had breached the lease by failing to replace a water heater, an exterior door, and an inadequate heating and air conditioning system. **Iron Steamer, Ltd. v. Trinity Restaurant**, 843.

§ 86 (NCI4th). Landlord's action to recover rent where there is no express agreement for payment of rent

The evidence was sufficient to support the amount awarded by the trial court to defendant as back rent for the period that plaintiff was in possession of the disputed property where defendant testified that $400 per month was the fair market rental value of the property and plaintiff failed to present any contradicting evidence. **Brickhouse v. Brickhouse**, 560.

LIMITATIONS, REPOSE, AND LACHES

§ 26 (NCI4th). Attorney and accountant malpractice

The trial court improperly dismissed a malpractice action against a law firm under Rule 12(b)(6) where defendant failed to produce documents as ordered, so that the underlying suit against the plaintiff in this action (the defendant in the underlying action) resulted in a default judgment and a money verdict against plaintiff and plaintiff alleged that defendant's negligent representation continued to the time defendant ceased to represent plaintiff. Taking plaintiff's allegations as true, the last wrongful act may have occurred within the three-year statute of limitations. **Southeastern Hospital Supply Corp. v. Clifton & Singer**, 652.

§ 27 (NCI4th). Defective goods or products generally

The statute of limitations for products liability actions was inapplicable where alleged defects in a mobile home manufactured by defendant caused neither personal injury nor damage to property other than to the manufactured product itself. **Reece v. Homette Corp.**, 462.

The proviso "unless otherwise provided by statute" in G.S. 1-52(16) rendered the statute of limitations set forth in that statute inapplicable to plaintiffs' claim for damages allegedly caused by defendant's negligent manufacture of a mobile home purchased by plaintiffs because G.S. 25-2-725 is more specifically applicable to plaintiffs' claim. **Ibid.**

Plaintiffs' claim for damages to their mobile home manufactured by defendant was barred by the one-year express warranty permitted by G.S. 25-2-725 and also by the four-year limitation of that statute. **Ibid.**

Plaintiffs' claim for injury sustained in a plane crash allegedly resulting from defendant aircraft manufacturer's negligence in preparing and producing an instruction manual to accompany the aircraft was a products liability action in which the product was the instruction manual, and the date of sale of the manual was the date which would trigger the statute of repose. **Driver v. Burlington Aviation, Inc.**, 519.

LIMITATIONS, REPOSE, AND LACHES — Continued

§ 48 (NCI4th). Accrual of causes of action; applicability of limitations to particular actions or proceedings; unfair and deceptive trade practices

Summary judgment should not have been granted for plaintiff insurance company on the basis of the statute of limitations on defendant's counterclaim for unfair practices where plaintiff erroneously informed defendant's husband that defendant was the beneficiary of a life insurance policy, the statute of limitations did not begin to run until her husband could no longer make alternative arrangements to provide for defendant, and whether the claim is barred by the statute of limitations is dependent upon the resolution of the factual issue of the husband's financial status. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 194.

§ 69 (NCI4th). Estates and wills generally; claims against estate

Plaintiff's claim against defendant administrator, whose son's negligence caused the automobile accident in which plaintiff was severely injured, was barred as a matter of law by G.S. 28A-19-3(b) except to the extent of the son's liability insurance since plaintiff did not file the claim within six months. **Ragan v. Hill**, 648.

§ 139 (NCI4th). New action after failure of original suit

Even if the trial court had the discretion to extend the time for filing a complaint, the action would have been deemed a new action since the old one had abated, and the new action would be barred by the statute of limitations. **Osborne v. Walton**, 850.

§ 145 (NCI4th). Commencement of proceedings and new action after failure of original suit; original action filed in another state or in federal court

Filing an action in federal court which is based on state substantive law tolls the statute of limitations while that action is pending. **Clark v. Velsicol Chemical Corp.**, 803.

A petition for writ of certiorari is not an appeal of right and the treatment of the case after a petition is filed is uncertain; therefore, the action is not alive for the purpose of tolling the statute of limitations while the petition is pending. **Ibid.**

The savings provision of G.S. 1A-1, Rule 41(b) did not apply to allow plaintiff extra time to file after the statute of limitations ran. Rule 41(b) requires that the dismissal order specify that a new action based on the same claim may be filed within one year. **Ibid.**

MALICIOUS PROSECUTION

§ 19 (NCI4th). Sufficiency of evidence; nonsuit and directed verdict; probable cause

The trial court properly granted summary judgment for defendant officers in their official capacities on a malicious prosecution claim where plaintiff was arrested, tried, and acquitted for sexually abusing children at his day care centers. **Messick v. Catawba County**, 707.

MASTER AND SERVANT

§ 69.1 (NCI3d). Meaning of "incapacity" and "disability"

The Industrial Commission did not err by concluding that plaintiff is temporarily totally disabled and entitled to compensation where plaintiff refused three jobs offered by defendant because he felt they were unsafe for a person with one functional arm. **Bowden v. The Boling Company**, 226.

MASTER AND SERVANT — Continued

§ 69.3 (NCI3d). Compromise settlements

The evidence was sufficient to support the Industrial Commission's finding that a Form 26 agreement for plaintiff to be paid permanent partial disability of the back for a period of forty-five weeks was not entered into by reason of misrepresentation. **Vernon v. Steven L. Mabe Builders**, 552.

The Industrial Commission properly determined that plaintiff was not entitled to have a Form 26 agreement set aside pursuant to G.S. 97-17 on the basis of mutual mistake where plaintiff alleged that neither party was aware of a Supreme Court decision allowing election of remedies. **Ibid.**

Though the Industrial Commission must determine that compromise settlements are fair and equitable and in the best interests of the parties before they are approved, there is no requirement that the Commission must determine fairness before approving a Form 26 agreement. **Ibid.**

§ 75 (NCI3d). Medical and hospital expenses

There was no error in an Industrial Commission conclusion that further surgical treatment to plaintiff's injured arm was reasonable and necessary within the terms of the Workers' Compensation Act where two doctors offered differing opinions as to the need and potential success of further treatments. **Bowden v. The Boling Company**, 226.

MORTGAGES AND DEEDS OF TRUST

§ 14 (NCI4th). Obligations secured generally

Although a person may execute a valid deed of trust for the debt of another, the deed of trust in this case was invalid because it did not properly identify the obligation secured. **In re Foreclosure of Enderle**, 773.

MUNICIPAL CORPORATIONS

§ 30.19 (NCI3d). Zoning; changes in continuation of nonconforming use

Petitioner's allegation that it was the "owner of adjoining property" did not show standing to contest the decision by respondent board of adjustment to issue a special exception permit allowing respondent landowners to add to a metal storage building at the rear of their property, and evidence that the requested construction would increase "the negative impact" on petitioner's property and "would not be visually attractive" would not support a finding that petitioner would suffer any pecuniary loss to its property due to the issuance of the permit. **Kentallen, Inc. v. Town of Hillsborough**, 767.

§ 219 (NCI4th). Formation, construction, and validity of contracts generally

Defendant city had the authority to enter into an oral contract promising pension benefits to former law enforcement officers employed by the city who accepted early retirement. **Bowers v. City of High Point**, 862.

The Assistant City Manager had the authority to enter into a contract fixing the rate of the "special separation allowance" which defendant city would pay to former law enforcement officers who accepted early retirement. **Ibid.**

§ 234 (NCI4th). Particular contracts as ultra vires

An agreement made by the Assistant City Manager that the statutorily required severance pay for former law enforcement officers who accepted early

PLEADINGS

§ 33.3 (NCI3d). Amendment introducing new cause of action; motion to amend disallowed

The trial court did not abuse its discretion in the denial of plaintiff's motion to amend his complaint in an action arising from the sale of corporate stock to add a statutory claim that would shift the burden of proof to defendant. **Freese v. Smith**, 28.

PRODUCTS LIABILITY

§ 1 (NCI4th). What constitutes products liability action

Plaintiffs' complaint does not allege a claim under the Products Liability Act where plaintiffs seek recovery for damages to a mobile home manufactured by defendant and the alleged defects in the mobile home caused neither personal injury nor damage to property other than to the manufactured product itself. **Reece v. Homette Corp.**, 462.

§ 5 (NCI4th). Strict liability

Plaintiffs' complaint was insufficient to state a claim for strict liability where plaintiffs claimed that defendant failed to provide adequate warnings and information in an instruction manual written to accompany an aircraft which crashed while one plaintiff was a passenger. **Driver v. Burlington Aviation, Inc.**, 519.

PROFESSIONS AND OCCUPATIONS

§ 1 (NCI3d). Generally

Summary judgment was properly entered for defendant on plaintiff's claim for professional malpractice by the director of her employer's Employee Assistance Program for engaging in sexual relations with plaintiff when she consulted defendant about marital and job difficulties where plaintiff failed to present evidence to establish the nature of defendant's "profession," the legal duty owed by defendant to plaintiff, and the standard of care to be observed by defendant. **Reich v. Price**, 255.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Civil liability generally; negligence

The doctrine of governmental immunity protected a forensic pathologist from liability for alleged negligence in issuing an initial autopsy report stating that plaintiffs' son died as a result of suicide when defendant was officially requested by a county medical examiner to perform the autopsy to serve the public interest. **Cherry v. Harris**, 478.

PUBLIC WORKS AND CONTRACTS

§ 57 (NCI4th). Payment to subcontractors

The general contractor had no standing to assert a claim for additional payment against an airport authority on behalf of a grading subcontractor. **APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority**, 664.

§ 172 (NCI4th). Construction contracts not involving buildings

Undercut work performed by plaintiff contractor in constructing an airport taxiway extension was not "extra work" where it is clear from the contract language

RAPE AND ALLIED OFFENSES

RIOT AND INCITING TO RIOT

ROBBERY

RULES OF CIVIL PROCEDURE

§ 3 (NCI3d). Commencement of action

Where plaintiffs failed to file their complaint until twenty-one days past the date specified in an order granting them an extension of time to file their complaint, plaintiffs' action abated, and a new action would be barred by the statute of limitations. **Osborne v. Walton**, 850.

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court did not err by refusing to impose sanctions against the Employment Security Commission where the Commission's actions were grounded in law. **Gilliam v. Employment Security Comm. of N.C.**, 796.

A case was remanded for the trial court to consider whether Rule 11 sanctions should be imposed against the Employment Security Commission for remanding a case to an appeals referee rather than issuing a final decision as ordered where petitioner's prayer for relief had requested Rule 11 sanctions but it was unclear from the record whether Rule 11 sanctions were considered by the trial court. **Ibid.**

§ 15.1 (NCI3d). Discretion of court to grant amendment to pleadings

The trial court did not abuse its discretion in the denial of defendants' motion to amend their answer to add a compulsory counterclaim for unfair trade practices. **N.C. Farm Bureau Mutual Ins. Co. v. Wingler**, 397.

§ 41.1 (NCI3d). Voluntary dismissal; dismissal without prejudice

A voluntary dismissal filed in the correct county is effective even though it recites a different county. **Robinson v. General Mills Restaurants**, 633.

§ 58 (NCI3d). Entry of judgment

The trial court did not err in finding that entry of judgment occurred on 7 October 1991 where defendants admitted in open court that they had "actual notice of the filing of the judgment on or about October 7, 1991," and the trial court properly dismissed defendants' appeals taken thirty-one days after this date. **Saieed v. Bradshaw**, 855.

§ 59 (NCI3d). New trials; amendment of judgments

The trial court did not abuse its discretion in an action to collect monies due for construction of a golf course by denying defendants' motion to amend the judgment to delete the award to plaintiff where defendants failed to raise the issue in a motion prior to trial. **Spivey and Self v. Highview Farms**, 719.

§ 60.3 (NCI3d). Relief from judgment or order; relation to other rules

A voluntary dismissal without prejudice can act as a final adjudication for purposes of relief pursuant to Rule 60(b) once the one-year period for refiling an action has elapsed and the action can no longer be resurrected. **Robinson v. General Mills Restaurants**, 633.

SANITARY DISTRICTS

§ 2 (NCI3d). Powers and functions

Evidence that respondent had discharged heavy metals into a district sewerage system provided just cause for the issuance of an ex parte administrative order prohibiting respondent metal plating business from further discharges into the sewerage system. **Dist. Bd. of Metro. Sewerage Dist. v. Blue Ridge Plating Co.**, 386.

SEARCHES AND SEIZURES — Continued

§ 11 (NCI3d). Search and seizure of vehicles

It was impermissible for officers to inventory, impound, or tow defendant's car, and items seized from the car during an inventory search should have been suppressed, where the car was parked in a lot of a club which officers searched to determine whether taxpaid liquor was being sold, and officers decided to tow the car so that it would not be vandalized. **State v. Peaten**, 749.

§ 21 (NCI3d). Application for warrant; hearsay; tips from informers

Information from a concerned citizen that defendant was growing marijuana in the crawl space of his house was sufficiently reliable to provide probable cause for a search warrant where the magistrate was presented a sworn affidavit signed by two officers which stated that a third officer had been told of the marijuana by a concerned citizen who wished to remain confidential. **State v. Witherspoon**, 413.

Information from a concerned citizen that 100 marijuana plants had been seen growing in the crawl space of defendant's house "within the last 30 days" was not stale at the time the search warrant was issued. **Ibid.**

§ 33 (NCI3d). Plain view rule

Inadvertence is not a necessary condition of a lawful search pursuant to the "plain view" doctrine, and officers who went to defendant's property without a warrant but with suspicion that marijuana was grown there could properly seize marijuana which they found growing in the yard pursuant to the plain view doctrine. **State v. Church**, 569.

SHERIFFS AND CONSTABLES

§ 2 (NCI3d). Deputies sheriff

The two deputies who arrested plaintiff for sexually abusing children in his day care centers were performing discretionary duties and are public officers entitled to immunity from negligence claims. **Messick v. Catawba County**, 707.

§ 4 (NCI3d). Civil liabilities to individuals

The trial court correctly denied a motion for summary judgment by a sheriff and jailer as to plaintiffs' statutorily based negligence cause of action because the General Assembly specifically provided for a cause of action against a sheriff or other officer and their surety with the enactment of G.S. 58-76-5. **Slade v. Vernon**, 422.

The trial court improperly denied a motion for summary judgment by a sheriff and jailer as to their individual liability for injuries suffered by a prisoner. While plaintiffs alleged that defendants' negligence amounted to malice, mere allegations of malice alone are not sufficient to withstand a motion for summary judgment. **Ibid.**

A sheriff and other officers sued in their official capacities after plaintiff was arrested, tried, and acquitted for sexually molesting children in his day care centers were not immune because the statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity where the surety is joined as a party to the action. **Messick v. Catawba County**, 707.

The trial court properly granted summary judgment for defendants in their official capacities where plaintiff was arrested, tried, and acquitted of molesting children in his day care centers and brought an action which included a claim for negligent investigation. **Ibid.**

SHERIFFS AND CONSTABLES — Continued

A sheriff was immune from suit in his individual capacity on plaintiff's cause of action for negligence and negligent infliction of emotional distress arising from plaintiff's arrest for sexually abusing children in his day care centers. **Ibid.**

STATE

§ 1.2 (NCI3d). Public records

Papers and items generated by the Low-Level Radioactive Waste Management Authority's contractors and consultants become public records only when they are received by the Authority. **Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth.**, 607.

§ 4 (NCI3d). Actions against the State; sovereign immunity

Defendant county did not waive its sovereign immunity by the purchase of liability insurance where plaintiff alleged that defendant county commissioner made defamatory statements about plaintiff's resignation from his county job and that the commissioner's actions constituted a willful violation of G.S. 153A-98 and the county personnel ordinance since the county's liability policy excluded coverage for claims arising from defamation and claims arising from the willful violation of a statute or ordinance. **Dickens v. Thorne**, 39.

§ 4.1 (NCI3d). Actions against officers of state

Plaintiff's allegations of malicious actions by defendant county commissioner did not preclude entry of summary judgment in favor of defendant commissioner on the ground of sovereign immunity where the commissioner was being sued only in his official capacity. **Dickens v. Thorne**, 39.

Defendant county did not waive its sovereign immunity by entering into an employment contract with plaintiff where plaintiff is suing the county for defamation and not for breach of the contract. **Ibid.**

§ 12 (NCI3d). State employees

The State Personnel Commission did not commit an error of law by holding that appellant's excessive mileage was a misuse of State property which constituted just cause for dismissal. **Davis v. N.C. Dept. of Human Resources**, 730.

STATUTES

§ 2.7 (NCI3d). Constitutional prohibition against local acts; acts relating to schools

An act to consolidate school administrative units in Guilford County or to provide for two administrative units in that county, subject to a referendum, was not a local act even though it dealt with education only in Guilford County rather than throughout the state. **Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections**, 506.

An act to consolidate the school administrative units in Guilford County did not violate Art. IX, § 2(1) of the N. C. Constitution providing for a uniform system of free public schools. **Ibid.**

The N. C. Constitution does not deny the General Assembly the power to provide a minimum funding level for merging school systems during the transition to a consolidated system, and does not require that funding of public schools in all counties in the state be identical or addressed through a single uniform law. **Ibid.**

TAXATION

§ 25.3 (NCI3d). Property subject to discovery

The house belonging to appellee taxpayers could not be considered "discovered property" where the taxpayers listed their property, including their house, on a tax listing form signed by taxpayer husband, and the portion of the tax listing form which contained a listing of the house was inadvertently removed and destroyed in the assessor's office. **In re Appeal of Dickey**, 823.

§ 25.4 (NCI3d). Assessment and levy of ad valorem taxes; valuation and assessment

The Property Tax Commission did not err by ruling that 7.14 acres of undeveloped land held by a corporation licensed to operate a perpetual care cemetery was not tax exempt. **In re Appeal of Lee Memory Gardens**, 541.

Although the taxpayer contended that the Property Tax Commission erred in approving the appraisal method used by the County when it valued the taxpayer's undeveloped cemetery property, the findings of the Property Tax Commission were supported by competent, material, and substantial evidence. **Ibid.**

Failure by the assessor, due to an administrative error, to include on the taxpayers' 1989 tax bill an assessment for the improvements to their lot was an immaterial irregularity and did not invalidate the tax owed by them on their house. **In re Appeal of Dickey**, 823.

§ 25.5 (NCI3d). Time for valuation

The statute prohibiting retroactive increases in appraised property values, G.S. 105-287, did not preclude the county assessor's office from levying the challenged 1989 tax on taxpayers' house in 1990 where the portion of the taxpayers' 1989 tax listing form which contained the listing of the house was inadvertently removed and destroyed, and the assessor was unaware of any improvements to the lot which had previously been appraised. **In re Appeal of Dickey**, 823.

§ 25.11 (NCI3d). Assessment and levy of ad valorem taxes; judicial redress

The scope of review in cases that have been appealed from the Property Tax Commission is the same as under the Administrative Procedure Act; the Commission's findings are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence. **In re Appeal of Lee Memory Gardens**, 541.

§ 32 (NCI3d). Tax on solvent credits and intangibles

The taxable percentage provision of the statute levying an intangibles tax on ownership of corporate stock violates the Commerce Clause of the U.S. Constitution and will be stricken from the statute, and the revised statute will apply prospectively to the 1994 tax year. **Fulton Corp. v. Justus**, 493.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Plaintiff's forecast of evidence was insufficient to establish a genuine issue of material fact as to her claim against the director of her employer's Employee Assistance Program for intentional infliction of emotional distress based on evidence that the director engaged in sexual intercourse with plaintiff while she was consulting him about marital and employment difficulties. **Reich v. Price**, 255.

Alleged actions by defendant employer and its president after plaintiff was subpoenaed by a former co-worker to testify against defendant employer did not

TRESPASS — Continued

rise to the level of extreme and outrageous conduct so as to support plaintiff's claim for the intentional infliction of emotional distress. **Daniel v. Carolina Sunrock Corp.**, 376.

Summary judgment was properly granted for defendants in their official capacities on a claim for intentional infliction of emotional distress arising from plaintiff's arrest for sexually abusing children at his day care centers. **Messick v. Catawba County**, 707.

§ 3 (NCI3d). Continuing and recurring trespass and limitation of actions

The trial court properly granted summary judgment for defendant in an action arising from contamination of plaintiff's wells where defendant discovered that an underground pipeline at its facility was leaking. **Ammons v. Wysong & Miles Co.**, 739.

TRIAL

§ 38 (NCI3d). Requests for instructions

The trial court did not err in a breach of contract action arising from the liquidation of plaintiffs' margin account in S&P 500 stock index futures by refusing to give requested jury instructions. **Moss v. J.C. Bradford and Co.**, 788.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices, in general

Summary judgment was inappropriate where there was no question that an insurance company had given the deceased erroneous information about the beneficiaries of his life insurance policies and the evidence was that he could not have changed the beneficiary and could not have procured other insurance after his cancer was diagnosed, but there was an issue of fact as to his financial ability to procure other insurance before the diagnosis and make other arrangements for his wife's financial well being. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 194.

The trial court properly voided the fuel purchase provisions of an agreement by which defendant furnished plaintiff equipment and fuel for a marina and plaintiff agreed to pay defendant 5 cents per gallon on fuel sold and to buy fuel exclusively from defendant. This was neither a requirements contract nor an exclusive dealing contract. **Roanoke Properties v. Spruill Oil Co.**, 443.

UNIFORM COMMERCIAL CODE

§ 10 (NCI3d). Warranties in general

Plaintiffs were not entitled to assert claims for breach of express and implied warranties arising out of the sale of an instruction manual to accompany an aircraft which crashed and injured plaintiffs since the manual was sold to the pilot of the aircraft and the seller's warranty did not extend to plaintiffs. **Driver v. Burlington Aviation, Inc.**, 519.

§ 11 (NCI3d). Express warranties

Plaintiffs' claim for damages to their mobile home manufactured by defendant was barred by defendant's one-year express warranty as permitted by G.S. 25-2-725. **Reece v. Homette Corp.**, 462.

UNIFORM COMMERCIAL CODE — Continued

§ 43 (NCI3d). Secured transactions; transfer of security interest or collateral

Where plaintiff sold kitchen appliances to defendant contractor for an apartment project and retained a security interest in the appliances, language in the security agreement providing that the contractor represented "that the products sold hereunder . . . will be resold only as a part of the building project or a unit thereof" constituted at least an implied authorization by plaintiff for the appliances to be sold as part of the apartment project, and plaintiff's security interest in the appliances was terminated under G.S. 25-9-306(2) when the contractor sold the apartment complex to the developer. **Whirlpool Corp. v. Dailey Construction, Inc.**, 468.

VENUE

§ 5.1 (NCI3d). Actions involving real property

Defendant was entitled to a change of venue to the county where a nursing home facility was located where plaintiff alleged that it entered into an option agreement with defendant giving plaintiff the opportunity to purchase outright at a discount the note and deed of trust on the facility held by defendant's trustee and that legal title to the facility would transfer from the trustee to plaintiff if it exercised the option, and plaintiff sought a judgment declaring that the option was still in effect and could be exercised by plaintiff. **Neil Realty Co. v. Medical Care, Inc.**, 776.

§ 7 (NCI3d). Motions to remove as matter of right

The trial court did not err by denying defendant's motion for a change of venue as of right in an action arising from the provision of equipment and fuel for a marina in Dare County where the complaint, viewed in its entirety, reveals that the action does not directly affect title to land or a right or interest therein. **Roanoke Properties v. Spruill Oil Co.**, 443.

§ 8 (NCI3d). Removal for convenience of parties and witnesses

The trial court did not abuse its discretion by denying defendant's motion for a change of venue from Wake to Dare County for convenience of witnesses where several of plaintiff's affiants reside in Wake County and defendant's principal place of business is in Bertie County. **Roanoke Properties v. Spruill Oil Co.**, 443.

WATERS AND WATERCOURSES

§ 3.2 (NCI3d). Pollution

The trial court properly granted summary judgment for defendant in an action for negligence, nuisance, trespass, and strict liability under G.S. 143-215.75 arising from contamination of plaintiffs' wells where causation was a common element in each claim asserted by plaintiffs and plaintiffs failed to show that the potential sources of contamination from defendant's property caused them damage. **Ammons v. Wysong & Miles Co.**, 739.

WILLS

§ 3.1 (NCI3d). Attested wills; signing by witnesses

There is no requirement that the attesting witness must "intend" to witness the will of the testator. **Brickhouse v. Brickhouse**, 560.

WILLS — Continued

The fact that an attesting witness witnessed testator's mark and signed the will in a location different from the other two witnesses did not preclude the witness from being considered an attesting witness. **Ibid.**

§ 44 (NCI3d). Representation and per capita and per stirpes distribution

Where testatrix left two holographic wills dated the same day, one will left the residuary estate to her brothers and sister and their children, and the second will provided that the residuary estate should go to her brothers and sister and their children and also that it should go "First to Brothers Sisters then to their children," the testatrix intended to effect a per stirpes distribution of her residuary estate so that the estate should be divided into one share for each of her brothers and sister, and the issue of any deceased sibling will take in equal parts the share of their ancestor. **In re Will of Moore**, 73.

WORD AND PHRASE INDEX

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