

NORTH CAROLINA
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REPORTS

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 3. Appointed and sworn in 18 February 1994.
 4. Appointed and sworn in 1 February 1994 to replace James M. Long who retired 31 January 1994.
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 6. Appointed and sworn in 16 March 1994.

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1. Resigned 12 February 1994.
 2. Appointed and sworn in as superior court judge 25 March 1994.
 3. Retired 28 February 1994.
 4. Transferred from District 17A to new District 9A 14 February 1994.
 5. Transferred from District 9 to new District 9A 14 February 1994.
 6. Appointed and sworn in as Chief Judge 14 February 1994 to replace Robert R. Blackwell who moved to District 9A.
 7. Appointed and sworn in as superior court judge 1 February 1994.
 8. Appointed and sworn in as superior court judge 31 January 1994.
 9. Appointed and sworn in 4 March 1994 to replace Jerry C. Martin who went to superior court.
 10. Appointed and sworn in 25 February 1994.
 11. Appointed and sworn in 18 March 1994.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS

OF
NORTH CAROLINA
AT
RALEIGH

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, AND MARGUERITE KAPLAN AS GUARDIAN AD LITEM FOR JACOB M. KAPLAN AND DAVID S. KAPLAN, PLAINTIFFS v. PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, JOHN DOES I THROUGH XXV, AND JANE DOES I THROUGH XXV, DEFENDANTS

No. 9218SC459

(Filed 20 July 1993)

1. Appeal and Error § 109 (NCI4th) — abortion picketing — doctor's residence — preliminary injunction — appeal allowed

An appeal was allowed from a preliminary injunction restricting abortion picketing around a doctor's residence because of the important First Amendment principles at issue.

Am Jur 2d, Appeal and Error §§ 47 et seq.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 ALR3d 403.

2. Injunctions §§ 5, 45 (NCI4th) — preliminary injunction — appeal — standard of review

The decision of a trial court to issue an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence is conflicting. However, the findings and other proceedings of the trial court which hears the application for a preliminary injunction are not bind-

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ing at a trial on the merits. In determining whether a preliminary injunction was properly issued, the appellate court must examine the trial court's two stage inquiry: whether the plaintiff is able to show likelihood of success on the merits and whether plaintiff is likely to sustain irreparable loss or whether issuance is necessary for the protection of plaintiff's rights during litigation. It is not necessary that irreparable injury be beyond the possibility of repair or compensation, but that the injury be one to which the complainant should not be required to submit or the other party permitted to inflict and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. The judge must balance the potential harm to the plaintiff against the potential harm to the defendant.

Am Jur 2d, Injunctions §§ 23 et seq., 341 et seq.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 ALR3d 403.

3. Trespass § 2 (NCI3d)— abortion picketing—preliminary injunction—intentional infliction of emotional distress—likelihood of success on merits

Plaintiffs seeking a preliminary injunction against abortion picketing at a doctor's residence did not establish a likelihood of success on the merits on an intentional infliction of emotional distress claim where the record was devoid of any indication of the existence of any medical documentation of plaintiffs' alleged severe emotional distress or of any other forecast of evidence of severe and disabling psychological problems within the meaning of the test laid down in *Johnson v. Ruark*, 327 N.C. 283.

Am Jur 2d, Injunctions § 286; Trespass §§ 113-116.

Injunction against repeated or continuing trespasses on real property. 60 ALR2d 310.

4. Nuisance § 5 (NCI4th)— abortion picketing—doctor's residence—private nuisance

There was ample competent evidence to support the trial court's decision that there is a reasonable likelihood that plaintiffs will prevail on their private nuisance claim on the merits where plaintiff-doctor sought a preliminary injunction to restrict

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abortion picketing at his residence; defendants contended that there could be no private nuisance because they did not misuse any property under their control but the two cases cited by defendants do not preclude plaintiffs' private nuisance claim; and the trial court did not err in its balancing of the utility of defendants' conduct against the gravity of the harm to plaintiffs. While peaceful picketing is protected by the First Amendment, numerous opinions have examined the substantial concerns regarding the captive audience that a home provides. Defendants' reasonable opportunity to be heard exists through ample alternative channels of communication.

Am Jur 2d, Nuisances §§ 143-153.

5. Constitutional Law § 126 (NCI4th) — abortion picketing at doctor's residence—targeted residential picketing—evidence sufficient

There was sufficient competent evidence in an action for a preliminary injunction to support the trial court's finding that defendants had engaged in targeted residential picketing where defendant William Winfield stated that he and the Pro-life Action League would stop coming to plaintiffs' neighborhood only when Dr. Kaplan stopped performing abortions; defendants demonstrated on Waycross Drive in groups as large as approximately twenty-five people; signs used by the demonstrators specifically named Dr. Kaplan; literature disseminated by the Pro-life Action League listed Dr. Kaplan as one of the "major abortionists from Greensboro that go to the clinics where we are praying"; defendants made similar demands in picketing the residences of other Women's Pavilion staff members; and the street in front of plaintiffs' home marks approximately the halfway point of the path of defendants' marches.

Am Jur 2d, Constitutional Law §§ 526-532.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised. 2 ALR4th 1241.

Peaceful picketing of private residence. 42 ALR3d 1353.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment—Supreme Court cases. 101 L. Ed. 2d 1052.

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6. Constitutional Law § 126 (NCI4th)— abortion picketing at doctor's residence— preliminary injunction— finding that activities coercive

The trial court did not err by finding that defendants' conduct was coercive in granting a preliminary injunction against abortion picketing at a doctor's residence where the order does not refer to defendant's intent to exercise a coercive impact as being the basis for injunctive relief and specifically emphasizes that the court granted injunctive relief to protect plaintiffs from targeted picketing and other threatening conduct, and defendants conceded in their affidavits and their appellate briefs that they intended to stop Dr. Kaplan and others from performing abortions.

Am Jur 2d, Constitutional Law §§ 526-532.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised. 2 ALR4th 1241.

Peaceful picketing of private residence. 42 ALR3d 1353.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment—Supreme Court cases. 101 L. Ed. 2d 1052.

7. Constitutional Law § 126 (NCI4th)— abortion picketing at doctor's residence— preliminary injunction— scope of relief

Restrictions on abortion picketing at a doctor's house in a preliminary injunction were content-neutral where the injunction prohibits picketing within a limited protected zone near plaintiff's residence without referring to the subject matter of the picketers' expression; the injunction makes no mention of abortion or any other substantive issue; it does not flatly ban picketing throughout residential areas nor does it prohibit anti-abortion picketing while permitting residential picketing having other aims; and the injunction provides no invitation to subjective or discriminatory enforcement. The trial court did not focus on the effect or impact of defendants' message on potential users, but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home.

Am Jur 2d, Constitutional Law §§ 526-532.

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Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised. 2 ALR4th 1241.

Peaceful picketing of private residence. 42 ALR3d 1353.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment—Supreme Court cases. 101 L. Ed. 2d 1052.

8. Constitutional Law § 126 (NCI4th)— abortion picketing at doctor's residence—preliminary injunction—narrowly tailored restriction

A preliminary injunction against abortion picketing at a doctor's residence met the constitutionally mandated requirement that the injunctive relief be narrowly tailored. The governmental interest in the protection of residential privacy from the devastating effect of targeted picketing on the quiet enjoyment of the home was established by *Frisby v. Schultz*, 487 U.S. 474 and a restriction is narrowly tailored if it targets and eliminates no more than the exact source of evil it seeks to remedy. Defendants' argument that this injunction is an impermissible prior restraint fails because plaintiffs have shown a demonstrable threat of a private wrong (private nuisance); defendants' state constitutional argument was not made before the trial court and may not be made on appeal; defendants' conclusion that they have acted within the permissible bounds of the Greensboro ordinance against picketing, deduced summarily from the observation that they have not been cited for a violation nor arrested, does not preclude a preliminary injunction where plaintiffs have demonstrated the likelihood of a tort by defendants under state law; and the limited protected zone, encompassing 300 feet of each side of the center line of Waycross Drive, which is approximately two and one-half blocks long, does not offend defendants' First Amendment rights.

Am Jur 2d, Constitutional Law §§ 526-532.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised. 2 ALR4th 1241.

Peaceful picketing of private residence. 42 ALR3d 1353.

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Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment—Supreme Court cases. 101 L. Ed. 2d 1052.

9. Constitutional Law § 126 (NCI4th)— abortion picketing at doctor's residence—preliminary injunction—alternative channels of communication

A preliminary injunction prohibiting abortion picketing at a doctor's residence left open ample alternate channels of communication where plaintiffs' lawsuit did not seek to limit or preclude defendants' right to continue their demonstrations at Dr. Kaplan's business premises or to limit or preclude defendants' other activities, such as leafletting, and the order leaves open ample alternative places and channels of communication, including Dr. Kaplan's private medical office, the Women's Pavilion in Greensboro, demonstrations at other public sites, door-to-door solicitations, the distribution of literature, telephone calls, and mailings.

Am Jur 2d, Constitutional Law §§ 526-532.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised. 2 ALR4th 1241.

Peaceful picketing of private residence. 42 ALR3d 1353.

Governmental regulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment—Supreme Court cases. 101 L. Ed. 2d 1052.

10. Injunctions § 32 (NCI4th)— abortion picketing at doctor's residence—preliminary injunction—organization subject to injunction

The trial court did not err by enjoining the Pro-life Action League even though defendants argued that the League is not an entity subject to injunction. Although not organized in a corporate or partnership form, it distributes literature, has its own mailing address, engages in correspondence, produces a monthly newsletter notifying interested persons of upcoming pro-life events such as meetings, pickets, and speeches, organizes demonstrations, and one defendant in her affidavit refers to herself as a director of the Pro-life Action League.

Am Jur 2d, Injunctions §§ 247 et seq.

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11. Injunctions § 32 (NCI4th)— abortion picketing at doctor's residence—preliminary injunction—threatening conduct

The trial court did not err by enjoining defendants from engaging in threatening conduct where there was evidence that defendant Benfield was convicted of a violation of N.C.G.S. § 14-277.1 for threatening Dr. Kaplan, that defendants Mr. and Mrs. Winfield counseled Benfield before and after the threat was made, and defendants' other actions could be reasonably perceived as threatening as well. However, the Court adopted a cautionary admonition restricting the focus of the injunction to the location and manner of expression rather than the content.

Am Jur 2d, Injunctions §§ 247 et seq.

Appeal by defendants from order signed 20 February 1992 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 14 April 1993.

On 20 February 1992, the trial court granted plaintiffs' motion for a preliminary injunction by entering the following order:

The Court has heard the plaintiffs' motion for a preliminary injunction under N.C. Gen. Stat. § 1-485(1)-(2). In connection with this motion, it has reviewed the plaintiffs' verified complaint, the affidavits of Mark Anderson, M.D., Nancy Cable-Wells, Maurice A. Cawn, Susan Gillet, R.N., Kay Lynne Inman, R.N., Joan Marsh, Sue P. Meschan, Joan Osborne, R.W. Saul, Jesse L. Warren, Linda B. Winfield, and William H. Winfield, Jr., and the briefs presented by the plaintiffs and by defendants Linda B. Winfield, William H. Winfield, Jr., and the Prolife Action League of Greensboro. The Court has heard this motion after giving notice to all parties, and has given all parties an opportunity to present arguments. Defendant Ronald W. Benfield failed to appear for the hearing on this motion, despite being properly served with the verified complaint and an order giving notice of the hearing. After considering the evidence, briefs, and arguments presented by the parties, the Court hereby grants the plaintiffs' motion for a preliminary injunction.

Pursuant to [G.S. 1A-1,] Rule 65(d) of the North Carolina Rules of Civil Procedure, the Court makes the following findings:

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1. Dr. Richard Kaplan, one of the plaintiffs, is an obstetrician and gynecologist, who as one aspect of his medical practice performs abortions. Under North Carolina law and federal law, abortions are lawful medical procedures. *See, e.g.*, N.C. Gen. Stat. § 14-45.1 (1986).

2. The defendants have carried out activities designed to coerce Dr. Kaplan to stop performing abortions.

3. The defendants' activities have included at least twelve instances of targeted picketing at the home of Dr. Kaplan and his family. On these occasions, groups including defendants Linda Winfield, Bill Winfield, and other defendants have walked up and down the Kaplans' street, Waycross Drive, carrying signs that name Dr. Kaplan. Although these moving pickets go beyond the frontage of the Kaplans' house, they remain largely in sight of the Kaplans' house. The circumstances make clear that the defendants are targeting the Kaplans and are harming the Kaplans by manifesting a physical presence just outside their house. These circumstances include, among other things, statements by defendant William Winfield that he and the Prolife Action League of Greensboro will stop coming to the Kaplans' neighborhood only when Dr. Kaplan stops performing abortions.

4. Defendant Ronald Benfield has made a direct threat on Dr. Kaplan's life. In addition, the other defendants have engaged in conduct toward the Kaplans that the Kaplans have reasonably interpreted as threatening.

5. The Kaplans are likely to prevail on the merits of this case under their claims for intentional infliction of emotional distress and private nuisance.

6. The Kaplans will suffer irreparable harm unless the Court enjoins the defendants from carrying out targeted residential picketing against them and from threatening them.

7. The defendants have picketed against Dr. Kaplan's performance of abortions not only at the Kaplans' house, but at several other locations as well. These locations include the edge of the Kaplans' neighborhood, Dr. Kaplan's private medical office, and the Women's Pavilion in Greensboro. The defendants' own actions show that they have many alternative forums

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and means of communicating their concerns, other than picketing in the Kaplans' immediate neighborhood.

8. Since the defendants have ample alternative means of communicating their views, the First Amendment allows the Court to enter a narrowly tailored, content-neutral injunction to protect the Kaplans' residential peace, privacy, and security. Under the analysis stated by the U.S. Supreme Court in *Frisby v. Schultz*, 487 U.S. 47 [4, 101 L.Ed.2d 420] (1988), the Court may enter an injunction to uphold these important interests by prohibiting targeted residential picketing, even if that targeted picketing goes beyond just one house. The Court specifically relies on the reasoning in several post-*Frisby* decisions that recognize that the First Amendment allows such an injunction. See *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 65-68, 71 (3d Cir. 1991); *Boffard v. Barnes*, [248 N.J. Super. 501,] 591 A.2d 699, 702 (N.J. Super. Ct. Ch. Div. 1991); *Klebanoff v. McMonagle*, [380 Pa. Super. 545,] 552 A.2d 677, 678, 682 (Pa. Super. Ct. 1988), *appeal denied*, [522 Pa. 620,] 563 A.2d 888 (Pa. 1989); *Valenzuela v. Aquino*, 800 S.W.2d 301, 304-06 (Tex. Ct. App. 1990), *petition for review granted* (Tex. May 1, 1991), [*aff'd in part, rev'd in part*, No. D-0740, 853 S.W.2d 512 (1993)].

9. Given the defendants' repeated actions against Dr. Kaplan and his family over the last year, the Court finds that it should grant equitable relief to protect the Kaplans from targeted picketing and other threatening conduct, while at the same time tailoring that relief to protect the defendants' exercise of their First Amendment rights. The defendants' conduct in the Kaplans' neighborhood, and the physical characteristics of that neighborhood, indicate that without an injunction prohibiting picketing and similar activities on the Kaplans' street and within 300 feet of that street, the interest in upholding residential peace, privacy, and security would go unserved. An injunction of this sort will be narrowly tailored to serve the interest in protecting residential peace, privacy, and security.

10. An injunction to stop targeted residential picketing in the Kaplans' neighborhood is based not on the content of any would-be picketers' speech, but on the effects caused by the picketers' physical presence.

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WHEREFORE, based on these findings, THE COURT ENJOINS AND RESTRAINS the defendants, their officers, agents, servants, and employees, and all persons in active concert or participation with them who receive actual notice of this order:

A. from picketing, parading, marching, or demonstrating anywhere on Waycross Drive in Greensboro, North Carolina;

B. from picketing, parading, marching, or demonstrating anywhere within 300 feet of the center line of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive;

C. from threatening or communicating threats to any of the plaintiffs, at their home or elsewhere; and

D. from personally confronting any of the plaintiffs in a threatening manner, at their home or elsewhere.

The Court orders copies of this order to be served on the identified defendants in this action, and on the other defendants as soon as they are identified. A person will have actual notice of this order when he or she has personally received a true copy of it.

This injunction will take effect as soon as the plaintiffs jointly post a \$2,000 cash or secured bond, pursuant to [G.S. 1A-1.] Rule 65(c) of the North Carolina Rules of Civil Procedure. Unless earlier modified by consent or by the Court, this injunction will remain in effect until this manner is resolved by a final judgment.

This injunction was entered in open court, 10 February 1992, at 1:55 p.m.

As evidenced by the attached bond filing, the plaintiffs posted the required bond on 10 February 1992, at 4:53 p.m.

The undersigned Judge Presiding retains jurisdiction of this matter for purposes of any further proceedings in this case; including any matters pertaining to this Preliminary Injunction Order.

This written order is entered this 20[th] day of February, 1992 at 11:00 a.m.

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From the trial court's 20 February 1992 order granting the preliminary injunction, defendants appeal.

Smith Helms Mulliss & Moore, by Alan W. Duncan and Matthew W. Sawchak, for plaintiff-appellees.

Arthur J. Donaldson and Walter M. Weber for defendant-appellants Prolife Action League of Greensboro, William H. Winfield, Jr., and Linda Winfield.

William G. Simpson, Jr., Legal Director, North Carolina Civil Liberties Union Legal Foundation, and Tharrington, Smith & Hargrove, by Burton Craige, for Amicus Curiae North Carolina Civil Liberties Union Legal Foundation.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey, and Ann E. Allen, General Counsel, The American College of Obstetricians & Gynecologists, for Amicus Curiae The American College of Obstetricians & Gynecologists.

EAGLES, Judge.

I. Background

This appeal arises from the trial court's grant of a preliminary injunction which restrained the manner and place in which defendants could protest in the streets adjoining plaintiffs' home. Defendants bring forward eleven assignments of error challenging several of the trial court's findings and the constitutionality of the order granting the preliminary injunction. Upon careful consideration of the briefs, transcript, and record, we affirm.

Initially, we note that this case presents a direct confrontation of fundamental Constitutional principles. On the one hand, it is well established that "a bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 105 L.Ed.2d 342, 360 (1989) (citations omitted); U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech"); U.S. Const. Amend XIV (providing that the provisions of the First Amendment are applicable to the states); N.C. Const. Art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse");

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Carey v. Brown, 447 U.S. 455, 460, 466-67, 65 L.Ed.2d 263, 269, 273 (1980) (“There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, . . . expressive conduct that falls within the First Amendment’s preserve [is regulated]”; and noting that public issue picketing “has always rested on the highest rung of the hierarchy of First Amendment values”); *Corum v. University of North Carolina*, 330 N.C. 761, 781, 413 S.E.2d 276, 289, *cert. denied, sub nom. Durham v. Corum*, --- U.S. ---, 121 L.Ed.2d 431 (1992) (“The words ‘shall never be restrained’ [in N.C. Const. Art. I, § 14] are a direct personal guarantee of each citizen’s right of freedom of speech”). On the other hand, “[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education.” *United States v. Orito*, 413 U.S. 139, 142, 37 L.Ed.2d 513, 517 (1973) (citations omitted); *Carey*, 447 U.S. at 471, 65 L.Ed.2d at 276 (“Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. . . . The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society”); *Frisby v. Schultz*, 487 U.S. 474, 485, 101 L.Ed.2d 420, 432 (1988) (“[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom”).

It is significant that plaintiff Dr. Kaplan neither maintains a medical office at his residence nor treats any patients there. See *Frisby*, 487 U.S. at 488, 101 L.Ed.2d at 434. “[T]he North Carolina General Assembly has made a ‘clear and deliberate choice’ regarding the competing values at issue by choosing to make those abortions performed in accordance with the provisions of N.C. Gen. Stat. § 14-45.1 lawful.” *State v. Thomas*, 103 N.C. App. 264, 267, 405 S.E.2d 214, 216, *disc. rev. denied*, 329 N.C. 792, 408 S.E.2d 528 (1991); see *Azzolino v. Dingfelder*, 315 N.C. 103, 113, 337 S.E.2d 528, 535 (1985), *cert. denied*, 479 U.S. 835, 93 L.Ed.2d 75 (1986), *reh’g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987). As the trial court correctly noted, our General Assembly has provided that abortions are lawful medical procedures when “performed by a physician licensed to practice medicine in North Carolina . . .” G.S. 14-45.1(a), (b). See *Planned Parenthood v. Casey*, --- U.S. ---, ---, ---, 120 L.Ed.2d 674, 694, 716 (1992). Dr. Kaplan is a licensed

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physician engaged in a lawful occupation under the laws of our State. The freedom to engage in a lawful occupation comes within those liberties protected by the Fourteenth Amendment to the United States Constitution. *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045 (1923); *Nova University v. The Board of Governors*, 305 N.C. 156, 164, 287 S.E.2d 872, 878 (1982); *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979). In sum, here we are presented with a situation in which

[c]onflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of . . . speech . . . guaranteed by the Fourteenth Amendment, and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can [sic] intrude into the consciences of men . . . but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech . . . and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind.

Jones v. Opelika, 316 U.S. 584, 593-94, 86 L.Ed. 1691, 1699-1700 (1942) (footnotes omitted), *vacated on other grounds*, 319 U.S. 103, 87 L.Ed. 1290 (1943); *see Casey*, --- U.S. at ---, 120 L.Ed.2d at 697 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code"); *see also Hague v. C.I.O.*, 307 U.S. 496, 515-16, 83 L.Ed. 1423, 1436-37.

With these important competing principles in mind, we proceed with an examination of the preliminary injunction before us.

II. Appealability of the Order Granting a Preliminary Injunction

[1] On 20 February 1992, the trial court issued an order granting plaintiffs' motion for a preliminary injunction. Defendants appealed from that order. Since defendants elected to appeal before the ultimate questions raised by the pleadings are decided at a trial

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on the merits, the sole question before us is whether the trial court erred in its issuance of the preliminary injunction.

“As a general rule, a preliminary injunction ‘is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation.’” *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). G.S. 1-485 provides:

A preliminary injunction may be issued by order . . . :

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff

G.S. 1-485. See G.S. 1A-1, Rule 65. Regarding the appealability of preliminary injunctions, our Supreme Court has stated:

A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. G.S. § 1A-1, Rule 65. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination. As we recently stated in *State v. School*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807 (1980):

The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate

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review before final judgment. If no such right is endangered, the appeal cannot be maintained. (Citations omitted.)

See *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978); *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975).

A.E.P. Industries, 308 N.C. at 400-01, 302 S.E.2d at 759. Thus, in addressing the "threshold question" presented by this appeal, *id.* at 400, 302 S.E.2d at 759, we conclude that given the important First Amendment principles at issue, substantial rights of the defendants have been affected. *Cf. Frisby*, 487 U.S. at 479, 101 L.Ed.2d at 428 (appeal from order granting a preliminary injunction against town seeking to enforce ordinance against residential picketers presented a question of "substantial importance"); *Elrod v. Burns*, 427 U.S. 347, 373, 49 L.Ed.2d 547, 565 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Accordingly, we address the issues presented by defendants in this appeal.

III. *The Standard of Review for Preliminary Injunctions*

[2] In our review of the trial court's order granting a preliminary injunction, "a decision by the trial court to issue . . . an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Wrightsville Winds Homeowners' Assn. v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990), *disc. rev. denied*, 328 N.C. 275, 400 S.E.2d 463 (1991) (*citing Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984)). See *Edmisten, Attorney General v. Challenge, Inc.*, 54 N.C. App. 513, 516, 284 S.E.2d 333, 335-36 (1981) ("there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error"); *Conference v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962); *Lance v. Cogdill*, 238 N.C. 500, 78 S.E.2d 319 (1953).

In determining whether a preliminary injunction was properly issued, we examine the trial court's inquiry, which is a two stage process. "The first stage of the inquiry is . . . whether plaintiff is able to show likelihood of success on the merits." *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 760. The second stage of the inquiry considers whether "'plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion

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of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.' " *Id.* at 401, 302 S.E.2d at 759-60 (quoting *Investors, Inc.*, 293 N.C. at 701, 239 S.E.2d at 574). "To constitute irreparable injury it is *not* essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949) (emphasis added) (citations omitted); *A.E.P. Industries*, 308 N.C. at 407, 302 S.E.2d at 763; *Wrightsville Winds Homeowners' Assn.*, 100 N.C. App. at 535, 397 S.E.2d at 347. Additionally, "[t]he judge in exercising his discretion should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160, *disc. rev. denied, appeal dismissed*, 295 N.C. 471, 246 S.E.2d 12 (1978) (citing *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E.2d 703 (1967)). Finally, we note that the findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits. *Schloss v. Jamison*, 258 N.C. 271, 276-77, 128 S.E.2d 590, 594 (1962); *Huskins v. Hospital*, 238 N.C. 357, 362, 78 S.E.2d 116, 120-21 (1953).

IV. *Analysis of Plaintiffs' Claims as a Basis for the Preliminary Injunction*

In their fifth assignment of error, defendants contend that the trial court "erred by concluding that the Kaplans were likely to prevail on the merits of their claims for private nuisance and intentional infliction of emotional distress."

"The burden is on the plaintiffs to establish their right to a preliminary injunction." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975) (citing G.S. 1A-1, Rule 65(b); *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975); *Board of Elders v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968)). Plaintiffs' complaint alleged seven separate causes of action: 1) private nuisance, *see* G.S. 1-539; 2) public nuisance, *see* G.S. 1-539; 3) intentional infliction of emotional distress; 4) invasion of privacy; 5) violations of the

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North Carolina Racketeer Influenced and Corrupt Organizations Act, *see* G.S. Chapter 75D; 6) violations of the federal Racketeer Influenced and Corrupt Organizations Act (later dismissed by plaintiffs on 21 January 1992 pursuant to G.S. 1A-1, Rule 41(a)(1)), and 7) violations of G.S. 99D-1 (interference with civil rights). Accordingly, plaintiffs offered six legal theories to support their preliminary injunction motion. After a hearing on 10 February 1992, the trial court specifically referred to two of plaintiffs' claims (intentional infliction of emotional distress and private nuisance, *see* finding of fact No. 5) in determining that the preliminary injunction should be granted. We now examine each of these claims.

A. *Intentional Infliction of Emotional Distress*

[3] Defendants argue that plaintiffs have failed to show a likelihood of success on their intentional infliction of emotional distress claim at a trial on the merits. We agree.

In their complaint, plaintiffs' claim for the intentional infliction of emotional distress was set forth in the following paragraphs.

37. By organizing and executing their campaign of intimidation and harassment against the Kaplans, particularly Jacob and David Kaplan, the defendants have engaged and are engaging in outrageous conduct. The defendants intend that this conduct cause the Kaplans severe emotional distress. The defendants' campaign, indeed, seeks to use exactly this emotional distress to drive Dr. Kaplan out of part of his medical practice.

38. This intentional conduct is causing the Kaplans, especially Marguerite Kaplan and the Kaplans' children, Jacob and David Kaplan, severe and irreparable fear, embarrassment, and humiliation.

In *Dickens v. Puryear*, 302 N.C. 437, 446-47, 276 S.E.2d 325, 331-32 (1981), our Supreme Court stated:

The tort of intentional infliction of mental distress is recognized in North Carolina. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). "[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" *Id.* at 196, 254 S.E.2d at 622, *quoting* Prosser [Law of Torts], § 12, p. 56 [(4th Ed. 1971)]. . . .

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The tort alluded to in *Stanback* is defined in the Restatement § 46 as follows:

“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

The holding in *Stanback* was in accord with the Restatement definition of the tort of intentional infliction of mental distress. We now reaffirm this holding.

Our Supreme Court then pronounced in *Dickens* that the essential elements of the tort of the intentional infliction of emotional distress are “(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another.” *Dickens*, 302 N.C. at 452, 276 S.E.2d at 335; *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). See also Restatement (Second) of Torts § 46(1) (1965).

Later, in *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992), our Supreme Court adopted the following definition of the “severe emotional distress” element of the tort of the intentional infliction of emotional distress:

[T]he term “severe emotional distress” means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Id. (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990) (emphasis added)). Our Supreme Court then proceeded to further discuss the element of “severe emotional distress” and the rationale for its high standard of proof:

Support for a high standard of proof on the severe emotional distress element can also be found in the second Restatement of Torts, from which we have derived most of our present standards for the remaining elements of intentional infliction of emotional distress.

The rule stated in this section applies only where the emotional distress has in fact resulted, and where it is

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severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises.* Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Restatement (Second) of Torts § 46 cmt. j (1965) (emphasis added). *See also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989) (applying Ohio law); *Polk v. Yellow Freight System, Inc.*, 801 F.2d 190 (6th Cir. 1986) (applying Michigan law); and *Hubbard v. United Press Internat'l, Inc.*, 330 N.W.2d 428 (Minn. 1983).

As the drafters of the Restatement point out, the rationale for limiting or restricting liability for intentional infliction of emotional distress is simple:

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 and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

Restatement (Second) of Torts § 46 cmt. d (1965).

Waddle, 331 N.C. at 83-84, 414 S.E.2d at 27-28 (emphasis in original). Citing our Supreme Court's discussion of the element of "severe emotional distress" set forth in *Waddle*, 331 N.C. at 83-85, 414 S.E.2d at 27-28, defendants argue that

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The Kaplans have not even encountered “rough language” from the Winfields. Instead, the Kaplans face a peaceful but pointed public protest on a highly emotional public issue—abortion. The Kaplans may be angry, upset, or irritated at the Winfields’ pro-life marching, but putting up with such protest is no more than the price of freedom in a contentious society.

The Kaplans allege in conclusory fashion that they have suffered “severe and irreparable fear, embarrassment, and humiliation.” The Kaplans, however, have alleged no specific facts whatsoever to show that any of them have acquired the type of “severe and disabling emotional or mental condition” required [by *Waddle*] to establish a claim of intentional infliction of emotional distress.

Plaintiffs argue that “[t]he decision defendants cite as setting a new standard for emotional distress, *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992), came down after the conduct [which began in 1991], the complaint [filed 14 January 1992], and the preliminary injunction [entered 10 February 1992] in this case. Even if this standard applies retroactively, the record supports the conclusion that the Kaplans will prove severe emotional distress.” We disagree. First, the standard for severe emotional distress discussed in *Waddle* was applied to the *Waddle* plaintiffs, who filed their complaint in that action on 20 April 1988, over two years prior to the conduct complained of here. *Id.* at 76, 414 S.E.2d at 23. Accordingly, we too must apply *Waddle* here to determine whether plaintiffs have established a likelihood of success on the merits.

We conclude that plaintiffs have not established a likelihood of success on the merits as to their intentional infliction of emotional distress claim. The record is devoid of any indication of the existence “of any medical documentation of plaintiffs’ alleged ‘severe emotional distress’” or of “any other forecast of evidence of ‘severe and disabling’ psychological problems within the meaning of the test laid down in *Johnson v. Ruark*, 327 N.C. at 304, 395 S.E.2d at 97.” *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. Instead, as support for their argument, plaintiffs merely point to: 1) the allegations of the verified complaint stating that the plaintiffs were “frightened,” “intimidated,” and “upset” and have suffered “severe and irreparable fear, embarrassment, and humiliation” and; 2) affidavits from plaintiffs’ “friends and colleagues [showing that they] have observed the [plaintiffs’] distress” essentially supporting the

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complaint's allegations. This evidence does not indicate a likelihood of meeting the "high standard of proof" required by *Waddle. Id.* at 83, 414 S.E.2d at 27. On the record now before us, we conclude that there is not sufficient competent evidence to support the trial court's decision that there is a likelihood that plaintiffs will succeed on their intentional infliction of emotional distress claim at a trial on the merits. *Wrightsville Winds Homeowners' Assn.*, 100 N.C. App. at 535, 397 S.E.2d at 346.

B. *Private Nuisance*

[4] Defendants contend that "[t]he Winfields [defendants] did not misuse any property under their control. Therefore, there can be no private nuisance." We disagree. To support this argument, defendants cite excerpts from two cases from our Supreme Court. *Watts v. Manufacturing Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 813 (1962) ("The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another"); *Morgan v. Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) ("[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor"). "The essence of a private nuisance is an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." Prosser and Keeton on the Law of Torts, § 87, p. 619 (5th ed. 1984) (footnote omitted). Regarding the tort of private nuisance and the issuance of injunctive relief based upon a claim of private nuisance, this Court has stated:

A private nuisance action may arise from the defendant's intentional and unreasonable conduct. . . . *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977); Restatement (Second) of Torts Sec. 822 (1979); see Prosser and Keeton on the Law of Torts Sec. 87, at 622-23 (W. Keeton 5th ed. 1984) (elements of intentional nuisance). . . . [W]e must apply the law of intentional private nuisance in evaluating plaintiffs' claim for injunctive relief.

The degree of unreasonableness of the defendants' conduct determines whether damages or permanent injunctive relief

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is the appropriate remedy for an intentional private nuisance. Unreasonable interference with another's use and enjoyment of land is grounds for damages. *Pendergrast v. Aiken*; see *Kent v. Humphries*, 303 N.C. 675, 281 S.E.2d 43 (1981). To award damages, the defendant's conduct, in and of itself, need not be unreasonable. Prosser, *supra*, Sec. 87, at 623. In contrast, injunctive relief requires proof that the defendant's conduct itself is unreasonable; the gravity of the harm to the plaintiff must outweigh the utility of the conduct of the defendant. *Pendergrast v. Aiken*. "[I]t is necessary to show that defendant's conduct in carrying on the activity at the place and at the time the injunction is sought is unreasonable." Prosser, *supra*, Sec. 88A, at 631 (footnote omitted). The *Pendergrast* Court set forth the criteria for injunctive relief:

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. . . . Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.

293 N.C. at 217, 236 S.E.2d at 797 (citations omitted); see also Prosser, *supra*, Sec. 89, at 640-41.

Mayer v. Tabor, 77 N.C. App. 197, 199-200, 334 S.E.2d 489, 490-91 (1985). In addressing the intentional interference requirement of a private nuisance claim, Prosser emphasizes that the interest protected is the use and enjoyment of a plaintiff's property and further explains that the fact that a defendant stands upon property other than his own does not preclude a claim for private nuisance:

When the defendant engages in an activity with knowledge that this activity is interfering with the plaintiff in the use and enjoyment of his property, and the interference is substan-

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tial and unreasonable in extent, the defendant is liable, and the monetary recovery is simply a cost of engaging in the kind of activity in which the defendant is engaged. *This is so whether the conduct is committed in the air (as by low-flying airplanes), on the highways, or on private property.*

§ 87, p.625 (emphasis added) (footnote omitted); *Morgan*, 238 N.C. at 193, 77 S.E.2d at 689 (“the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that *any* substantial nontrespassory invasion of another’s interest in the private use and enjoyment of land by *any* type of liability forming conduct is a private nuisance”). See *Women’s Health Care Services v. Operation Rescue*, 773 F.Supp. 258, 269 (D.Kan. 1991) (holding that plaintiffs had shown a substantial likelihood of ultimately demonstrating the existence of a claim of private nuisance against defendants who protested on streets). See *generally*, Nuisances, 66 C.J.S. § 88(a) (“It is not necessary in order to charge a person with liability for a nuisance that he should be the owner of the property on which it is created, but it is sufficient if he created it”). We conclude that the two cases cited by defendants do not preclude plaintiffs’ private nuisance claim: the excerpt from *Watts*, 256 N.C. at 617, 124 S.E.2d at 813, refers to the historical origins of private nuisance, and the excerpt from *Morgan*, 238 N.C. at 193, 77 S.E.2d at 689, states one manner, but *not the only* manner, in which a private nuisance claim may arise.

We also conclude that the trial court here did not err in its balancing of the utility of defendants’ conduct against the gravity of the harm to plaintiffs. *Mayes*, 77 N.C. App. at 200, 334 S.E.2d at 490-91; *Pendergrast*, 293 N.C. at 217, 236 S.E.2d at 797. While peaceful picketing is protected by the First Amendment, *Thornhill v. Alabama*, 310 U.S. 88, 95, 104, 84 L.Ed. 1093, 1098, 1103 (1940), peaceful residential picketing is not “beyond the reach of uniform and nondiscriminatory regulation.” *Carey*, 447 U.S. at 470, 65 L.Ed.2d at 275, and, as discussed *infra* Part VII.C., ample alternative channels of communication exist for defendants to express their views. Numerous opinions have examined the substantial concerns regarding the captive audience that a home provides. See *Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 25 L.Ed.2d 736, 744 (1970) (“That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere”); *Frisby*, 487 U.S. at 486, 487, 101

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L.Ed.2d at 433, 433 (“The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech” and emphasizing that “[t]he devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt”); *Klebanoff v. McMonagle*, 380 Pa. Super. 545, 549-50, 552 A.2d 677, 679 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989) (“The home serves to provide, among other things, a refu[gl]e from today’s complex society where we are inescapably captive audiences for many purposes. Normally, outside of the home, consonant with the Constitution, we expect individuals to avoid unwanted speech, ‘simply by averting [their] eyes.’ But such avoidance within the walls of one’s own house is not required”); *Trojan Elec. & Mach. Co. v. Heusinger*, 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, 758-59 (1990); *Murray v. Lawson*, 264 N.J. Super. 17, 30, 624 A.2d 3, 10 (App. Div. 1993), *petition for cert. granted*, 133 N.J. 445, 627 A.2d 1149 (1993); *Boffard v. Barnes*, 248 N.J. Super. 501, 506, 591 A.2d 699, 701 (Ch. Div. 1991). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 748, 57 L.Ed.2d 1073, 1093, *reh’g denied*, 439 U.S. 883, 58 L.Ed.2d 198 (1978); *Kovacs v. Cooper*, 336 U.S. 77, 86-87, 93 L.Ed. 513, 522, *reh’g denied*, 336 U.S. 921, 93 L.Ed. 1083 (1949); *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 542, 65 L.Ed.2d 319, 331 (1980). *Compare Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11, 45 L.Ed.2d 125, 131-32 (1975); *Spence v. Washington*, 418 U.S. 405, 412, 41 L.Ed.2d 842, 848 (1974); *Cohen v. California*, 403 U.S. 15, 21, 29 L.Ed.2d 284, 291-92, *reh’g denied*, 404 U.S. 876, 30 L.Ed.2d 124 (1971). The First Amendment is not the guarantor of a captive audience; rather, the First Amendment ensures the reasonable opportunity to be heard. *Bering v. SHARE*, 106 Wash.2d 212, 232, 721 P.2d 918, 930 (1986), *cert. dismissed*, 479 U.S. 1050, 93 L.Ed.2d 990 (1987); *Frisby*, 487 U.S. at 487, 101 L.Ed.2d at 433 (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech”); *Heffron v. Int’l Soc. for Krishna Consc.*, 452 U.S. 640, 647, 69 L.Ed.2d 298, 306 (1981) (“the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired”). Defendants’ reasonable opportunity to be heard exists through the ample alternative channels of communication available to defendants.

We conclude that there is ample competent evidence to support the trial court’s decision that there is a reasonable likelihood that

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plaintiffs will prevail on their private nuisance claim at a trial on the merits. *Compare N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1361-62 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947, 109 L.Ed.2d 532 (1990) (public nuisance claim brought on behalf of the City of New York); *Women's Health Care Services*, 773 F.Supp. at 269 (D.Kan. 1991) (holding that plaintiffs had shown a substantial likelihood of ultimately demonstrating the existence of a claim of public nuisance as well as private nuisance against defendants who protested on streets). Given the substantial disruption of plaintiffs' residential privacy due to defendants' actions, we also conclude that the trial court correctly concluded that plaintiffs would likely sustain irreparable loss unless the injunction was issued at the time of the hearing, *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759, in that "the injury is one to which the complainant[s] should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier*, 231 N.C. at 50, 55 S.E.2d at 925 (citations omitted); *see Franklin Chalfont Associates v. Kalikow*, 392 Pa. Super. 452, 467, 573 A.2d 550, 558 (1990) (privacy interest in one's own home is "an interest which could be vindicated only by restoring it through injunctive relief"; *citing Klebanoff v. McMonagle*, 380 Pa. Super. 545, 552 A.2d 677 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989)).

C. Summary

In sum, although the trial court erred as to plaintiffs' likelihood of success with the intentional infliction of emotional distress claim, we conclude that plaintiffs are likely to succeed on at least one of their claims (private nuisance) at a trial on the merits and that this claim warrants injunctive relief. "Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (*citing Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989); *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956)). Accordingly, we consider defendants' other assignments of error concerning the trial court's findings and the specific injunctive relief ordered.

V. Trial Court's Finding Regarding Targeted Residential Picketing

[5] In their third, sixth, ninth, and tenth assignments of error, defendants contend that the trial court "erred by finding that the

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Winfields have engaged in targeted residential picketing.” We disagree.

Here, we conclude that defendants’ activities are narrowly directed at plaintiffs’ household, not at the public. *Frisby*, 487 U.S. at 486, 101 L.Ed.2d at 433. The record includes *inter alia* the following evidence showing defendants’ targeted picketing of plaintiffs’ home: a statement by defendant William Winfield that he and the Prolife Action League of Greensboro would cease coming to the Kaplans’ neighborhood only when Dr. Kaplan stopped performing abortions; evidence that on twelve separate occasions defendants have demonstrated on Waycross Drive in groups as large as approximately twenty-five people; evidence that signs used by the demonstrators specifically name Dr. Kaplan; literature disseminated by the Prolife Action League listing Dr. Kaplan as one of the “major abortionists from Greensboro that go to the clinics where we are praying”; evidence that defendants made similar demands in picketing the residences of other Women’s Pavilion staff members, including an affidavit from Dr. Mark Anderson stating that “Mr. Winfield [defendant] told me that they would stop when I stopped ‘killing babies.’ . . . Because I wished these activities to stop, and based upon my conversation with Mr. Winfield, I have stopped performing abortions at the Women’s Pavilion,” and; evidence (including defendants’ own admission) that the street in front of plaintiffs’ home marks approximately the halfway point of the path of defendants’ marches. All this evidence tends to support the trial court’s finding that defendants engaged in targeted residential picketing. Since there is sufficient competent evidence to support the trial court’s finding that defendants have engaged in targeted residential picketing, it is conclusive on appeal. Accordingly, these assignments of error fail.

VI. *Trial Court’s Findings Regarding Defendants’ Activities*

[6] In their second assignment of error, defendants contend that the trial court “erred by finding that the Winfields’ activities are coercive,” specifically taking exception to the finding in paragraph No. 2 of the order that “[t]he defendants have carried out activities designed to *coerce* Dr. Kaplan to stop performing abortions.” (Emphasis added.) We disagree.

It is well established in First Amendment jurisprudence that one’s mere claim that another’s “expressions were intended to exercise a coercive impact . . . does not remove them from the reach

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of the First Amendment.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 29 L.Ed.2d 1, 5 (1971); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 73 L.Ed.2d 1215, 1234, *reh’g denied*, 459 U.S. 898, 74 L.Ed.2d 160 (1982). The trial court’s order does not refer to defendant’s intent to exercise a coercive impact as being the basis for injunctive relief; rather the order specifically emphasizes that the court granted injunctive relief “to protect the Kaplans [plaintiffs] from targeted picketing and other threatening conduct.” Furthermore, defendants concede in their affidavits and in their appellate brief that “[t]he Winfields admittedly aim to stop Dr. Kaplan and others from performing abortions.” Since there is sufficient evidence to support this finding, it is conclusive on appeal. Accordingly, this assignment of error is overruled.

VII. *Injunctive Relief*

[7] Having determined that the trial court’s decision to grant an injunction was appropriate and that the trial court’s challenged findings were supported by the evidence, our inquiry now focuses on the scope of the relief granted. In scrutinizing the relief afforded by the preliminary injunction, we adopt the analysis utilized in *Frisby v. Schultz*, 487 U.S. 474, 101 L.Ed.2d 420 (1988). In *Frisby*, the United States Supreme Court upheld as constitutional a town ordinance which proscribed “the following flat ban on all residential picketing: ‘It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.’” *Id.* at 477, 101 L.Ed.2d at 426-27. The constitutionality of the City of Greensboro ordinance is not at issue here. See Greensboro, N.C. Code of Ordinances § 26-157(b). However, we find the *Frisby* analysis appropriate and helpful in our inquiry regarding the constitutionality of the trial court’s preliminary injunction. This inquiry essentially mirrors the approach utilized by federal appellate courts in analyzing injunctions against picketers in factual situations similar to that presented here, see *Northeast Women’s Center, Inc. v. McMonagle*, 939 F.2d 57, 63 (3rd Cir. 1991), and has been adopted by other state courts as well, see *Klebanoff v. McMonagle*, 380 Pa. Super. 545, 548, 552 A.2d 677, 678 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989); *Dayton Women’s Health Ctr. v. Enix*, 68 Ohio App.3d 579, 588, 589 N.E.2d 121, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women’s Health Center, Inc.*, --- U.S. ---, 120 L.Ed.2d 903 (1992).

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The streets of Greensboro are traditional public fora, *Frisby*, 487 U.S. at 481, 101 L.Ed.2d at 429, *Hague v. C.I.O.*, 307 U.S. 496, 515, 83 L.Ed. 1423, 1436 (1939), and accordingly, *Frisby* provides that the preliminary injunction

must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

“In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”

Frisby, 487 U.S. at 481, 101 L.Ed.2d at 429 (quoting *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 804 (1983)) (alteration in original).

A. Content-Neutral Requirement

The first inquiry in *Frisby*, 487 U.S. at 481, 101 L.Ed.2d at 429, is whether the restriction is content-neutral. In their tenth assignment of error, defendants contend that the trial court “erred by concluding that its injunction is not a content-based restriction on speech.” We disagree.

“Content-based regulations are presumptively invalid.” *R.A.V. v. St. Paul*, --- U.S. ---, ---, 120 L.Ed.2d 305, 317 (1992) (citations omitted). However, the preliminary injunction here is content-neutral.

Content-neutral regulations of expression are “those that ‘are justified without reference to the content of the regulated speech.’” *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). The primary concern of content-neutrality is that no speech or expression of a “particular content” is “single[d] out” by the government for better or worse treatment. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771, 96 S.Ct. at 1830, *see also*

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Young v. American Mini Theaters, Inc., 427 U.S. 50, 67, 96 S.Ct. 2440, 2450-51, 49 L.Ed.2d 310 (1976) (government regulation of expression may not be sympathetic or hostile toward communicator's message). The test is neutrality.

N.Y. State Nat. Organization for Women v. Terry, 886 F.2d 1339, 1363 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947, 109 L.Ed.2d 532 (1990) (emphasis in original) (alteration in original).

A close examination of the preliminary injunction here reveals that the injunction is content-neutral. The trial court's injunction prohibits picketing within a limited protected zone near plaintiffs' residence without referring to the subject matter of the picketers' expression. The injunction makes no mention of abortion or any other substantive issue. It does not flatly ban picketing throughout residential areas nor does it prohibit anti-abortion picketing while permitting residential picketing having other aims. *Dayton Women's Health Ctr. v. Enix*, 68 Ohio App.3d 579, 588, 589 N.E.2d 121, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, --- U.S. ---, 120 L.Ed.2d 903 (1992). The injunction provides no invitation to subjective or discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 113, 33 L.Ed.2d 222, 230 (1972). We conclude that the trial court did not focus on the effect or impact of defendants' message on potential listeners, *Boos v. Barry*, 485 U.S. 312, 321, 99 L.Ed.2d 333, 344-45 (1988), but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home. *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 62-63 (3rd Cir. 1991). *See also Horizon Health Center. v. Felicissimo*, 263 N.J. Super. 200, 214, 622 A.2d 891, 898 (App. Div. 1993). Accordingly, this assignment of error fails.

B. Narrowly-Tailored Requirement

[8] The next inquiry examines whether the restriction "is 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication.'" *Frisby*, 487 U.S. at 482, 101 L.Ed.2d at 430 (quoting *Perry Education Assn.*, 460 U.S. at 45, 74 L.Ed.2d at 804) (alteration in original). Initially, we note that *Frisby* established that the "protection of residential privacy" from the "devastating effect of targeted picketing on the quiet enjoyment of the home" is a significant government interest. *Frisby*, 487 U.S. at 484, 486, 101 L.Ed.2d at 431, 433.

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See generally *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, cert. denied, 484 U.S. 970, 98 L.Ed.2d 406 (1987) ("The sanctity of the home is a revered tenet of Anglo-American jurisprudence. The law recognizes the special status of the home And the law has consistently acknowledged the expectation of and right to privacy within the home"). A restriction "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 101 L.Ed.2d at 432 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10, 80 L.Ed.2d 772, 789-90 (1984)).

In their seventh, eighth, ninth, and eleventh assignments of error, defendants challenge the manner in which the injunctive relief was tailored by contending that the trial court erred "by enjoining the Winfields from 'picketing, parading, marching, or demonstrating' along the entire length of a street [Waycross Drive] plus 300 feet in any direction from that street."

1. *Prior Restraint*

First, defendants argue that *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L.Ed.2d 1 (1971) "bars injunctive relief here" and that the injunction is an unlawful prior restraint. We find *Keefe*, 402 U.S. 415, 29 L.Ed.2d 1, readily distinguishable. The *Keefe* Court rejected the state court's injunction (prohibiting the defendants' distribution of literature in a residential neighborhood) because it would have operated to suppress public expression without any demonstrable threat of a private wrong. *Id.* at 418-19, 29 L.Ed.2d at 5. Here, the fact that plaintiffs have shown a demonstrable threat of a private wrong (private nuisance, see Part IV.B. *supra*) shows that defendants' reliance on *Keefe* is misplaced.

. . . [W]e must tread gingerly in the area of prior restraints (*Nebraska Press Association v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976)):

The thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.

But this is not at all the classic prior restraint case. It does not involve an injunction against publication of the communication of ideas: an anti-Semitic newspaper (*Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)) or government documents (*New York Times v. United States*,

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403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)) or public record information about criminal trials (*Nebraska Press Association* [supra]).

What this case rather involves is prevention of a private wrong: invasion of [plaintiffs'] privacy. As to that, *Near*, 283 U.S. at 709, 51 S.Ct. at 628, [75 L.Ed. at 1364,] *Nebraska Press Association*, 427 U.S. at 557-58, 96 S.Ct. at 2801-02[, 49 L.Ed.2d at 696-97] and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1[, 5] (1971) all suggest an injunction to prevent private wrongs stands on a very different footing from injunctions that suppress the communication of information as such.

Huskey v. National Broadcasting Co., Inc., 632 F. Supp. 1282, 1294, (N.D.Ill. 1986) (footnote omitted). See *Bering v. SHARE*, 106 Wash.2d 212, 235-37, 721 P.2d 918, 932-33, cert. dismissed, 479 U.S. 1050, 93 L.Ed.2d 990 (1987); *Trojan Elec. & Mach. Co. v. Heusinger*, 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, 758 (App. Div. 1990); see also *Austin Congress Corp. v. Mannina*, 46 Ill.App.2d 192, 196 N.E.2d 33 (1964). Accordingly, we reject defendants' prior restraint argument.

2. State Constitutional Argument

Since defendants' contention regarding the constitutionality of the injunction under Article I, Section 14 of the North Carolina Constitution was not made before the trial court, this contention may not be raised for the first time on appeal. *Johnson v. Highway Commission*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963) ("It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below"); *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972); *Bland v. City of Wilmington*, 278 N.C. 657, 660, 180 S.E.2d 813, 816 (1971); *Lane v. Insurance Co.*, 258 N.C. 318, 322, 128 S.E.2d 398, 400 (1962); *Pinnix v. Toomey*, 242 N.C. 358, 367, 87 S.E.2d 893, 901 (1955).

3. The Scope of the Trial Court's Ban

Next, defendants argue that

[a] municipality may ban "focused picketing taking place solely in front of a particular residence," *Frisby*, 487 U.S. at 483. But Greensboro already has a *Frisby*-type antipicketing or-

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dinance, and the Winfields have obeyed this ordinance. The superior court's ban on all marching and picketing along more than an entire street went far beyond both the Greensboro ordinance and *Frisby*.

Given this argument, a brief discussion of pertinent additional information is necessary. As noted *supra*, the City of Greensboro passed an ordinance pertaining to residential picketing pursuant to G.S. 160A-174, the statute which delegates and limits the general ordinance-making powers of cities and towns:

(a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizen and the peace and dignity of the city, and may define and abate nuisances.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

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Pursuant to this statute, section 26-157(b) of the Greensboro Code of Ordinances was enacted on 19 November 1990 and provides as follows: "*Individual Residence Picketing Prohibited*. Provided, in order to promote residential privacy and tranquility, it shall be unlawful for any person to picket solely in front of, before or about the residence or dwelling of any individual." Compare *Frisby*, 487 U.S. at 477, 101 L.Ed.2d at 426-27 (where the Town Board of Brookfield, Wisconsin enacted "the following flat ban on all residential picketing: 'It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.'"). Compare *Boffard v. Barnes*, 248 N.J. Super. 501, 503, 591 A.2d 699, 700 (Ch. Div. 1991) (granting the issuance of a preliminary injunction even in the absence of a public ordinance; granting doctor's action for a preliminary injunction "based upon common law tort: deprivation of the use and enjoyment of property, and mental and emotional pain and anguish"); *Murray v. Lawson*, 264 N.J. Super. 17, 31, 624 A.2d 3, 11 (App. Div. 1993), *petition for cert. granted*, 133 N.J. 445, 627 A.2d 1149 (1993) (affirming permanent injunction and rejecting "the notion that courts are powerless to protect residential privacy simply because there is no local ordinance regulating focused or targeted residential picketing"). The record contains affidavits from a Greensboro Police Department detective, the Greensboro Police Department attorney, and the city attorney stating that defendants have not violated the department's or the city's interpretation of the ordinance.

Defendants' conclusion that they have acted within the permissible bounds of an ordinance, deduced summarily from the observation that they have not been cited for a violation nor arrested, does not preclude a trial court's issuance of a preliminary injunction where plaintiffs have demonstrated the likelihood of a tort by defendants under state law. G.S. 160A-174(b) specifically provides that "An ordinance is not consistent with State or federal law when: . . . (3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law." The necessary implication of G.S. 160A-174(b)(3) is that the General Assembly intended to allow the issuance of a preliminary injunction upon a showing by plaintiffs of a likelihood of success on the merits of a tort claim and some type of irreparable harm, *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759-60, *Wrightsville Winds Homeowners' Assn.*, 100 N.C. App. at 535, 397 S.E.2d at

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346, even where an ordinance has not been enforced by local authorities or where an ordinance might permit one to pursue a course of action that otherwise would constitute a potential tort claim under state law. *Cf. Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975); *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973). Accordingly, this argument is overruled.

Additionally, defendants argue that the trial court's ban "on all marching and picketing along more than an entire street went far beyond . . . *Frisby*." Specifically, the injunction enjoined and restrained defendants "from picketing, parading, marching, or demonstrating anywhere within 300 feet of the centerline of Waycross Drive, including any parts of any other street that fall within 300 feet of the center line of Waycross Drive." Plaintiffs' residence is located at 500 Waycross Drive. Dr. Kaplan does not maintain a medical office or treat patients at his residence. *See Frisby*, 487 U.S. at 488, 101 L.Ed.2d at 434. Waycross Drive is a non-thoroughfare residential street on which plaintiffs' home lies approximately at the midpoint and has no sidewalks. Waycross Drive begins from the south at a cul-de-sac just to the south of Staunton Drive, runs approximately two and one-half city blocks (going across Staunton Drive, Calverton Drive, Kenbridge Drive, and Monmouth Drive), and dead ends to the north at a golf course just north of Monmouth Drive. Plaintiffs' residence is located on Waycross Drive near the Calverton Drive cul-de-sac and is located approximately midway of the block between Staunton Drive (to the south) and Kenbridge Drive (to the north). The total area governed by the injunction is a protected zone encompassing 300 feet of each side of the center line of Waycross Drive, which as noted *supra* runs approximately two and one-half city blocks long.

This limited protected zone clearly does not offend defendants' First Amendment rights. *Compare Frisby*, 487 U.S. 474, 101 L.Ed.2d 420 (1988) (ruling on constitutionality of an ordinance of general applicability, prohibiting anyone, not just named defendants, from "picketing before or about the residence or dwelling of any individual"); *see Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 67 (3rd Cir. 1991) ("Of course, we are dealing with a remedial injunction and not an ordinance of general application. Hence, *Frisby* may not strictly apply to the instant injunction"). Decisions from other jurisdictions have upheld injunctions enjoining similar activities within similarly expansive boundaries. *Klebanoff v. McMonagle*, 380 Pa. Super. 545, 546, 552 A.2d 677, 677, *appeal*

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denied, 522 Pa. 620, 563 A.2d 888 (affirming injunction permanently barring defendants “from picketing or demonstrating in the street directly in front of the home” of a doctor; where the trial court’s final decree provided that defendants “are hereby enjoined and restrained from demonstrating, picketing or patrolling on Rogers Road, and any intersection with Rogers Road from Chelton Mills Drive to Serpentine Lane”); *Northeast Women’s Center, Inc.*, 939 F.2d at 67 & n.14, 71 (3rd Cir. 1991) (upon remanding for further findings regarding trial court’s chosen distances for permanent injunction, specifically noting that “[i]t may even be appropriate for the district court to retain the 2500 foot restriction if unusual or extraordinary circumstances are found” and in the interim establishing boundary prohibiting “congregating, picketing, patrolling, or demonstrating within five hundred (500) feet of the residence of any of plaintiff’s employees, staff, owners or agents, or using bullhorns or other sound amplification equipment within twenty-five hundred (2500) feet of the residence of any of plaintiff’s employees, staff, owners or agents”); *Dayton Women’s Health Ctr. v. Enix*, 68 Ohio App.3d 579, 585-86, 588, 589 N.E.2d 121, 125, 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton Women’s Health Center, Inc.*, --- U.S. ---, 120 L.Ed.2d 903 (1992) (affirming order prohibiting “[p]icketing in any form including parking, parading, or demonstrating which is *limited* to the homes of patients, employees, staff or volunteers of the Dayton Women’s Health Center of the physicians performing services at the Dayton Women’s Health Center.’ (Emphasis added).”). Given the significant interest in protecting the use and enjoyment of one’s own home, *Frisby*, 487 U.S. at 484, 101 L.Ed.2d at 431, this injunction does no more than address the exact source of the ‘evil’ it seeks to remedy. *Id.* at 485, 101 L.Ed.2d at 432. Accordingly, we conclude that this protected zone meets the constitutionally mandated requirement that the injunctive relief be narrowly tailored.

C. Ample Alternative Channels of Communication

[9] We conclude that in all respects “the order is content-neutral and sufficiently narrow to protect the interests of those who are presumptively unwilling to receive this form of speech and have the right not to, while leaving open ample alternative channels of communication.” *Dayton Women’s Health Ctr. v. Enix*, 68 Ohio App.3d at 588, 589 N.E.2d at 127 (1991), *appeal dismissed*, 62 Ohio St.3d 1500, 583 N.E.2d 971, *cert. denied sub nom. Sorrell v. Dayton*

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Women's Health Center, Inc., --- U.S. ---, 120 L.Ed.2d 903 (1992). We note that plaintiffs' lawsuit does not seek to limit or preclude defendants' right to continue their demonstrations at Dr. Kaplan's business premises, which are "generally a more effective forum to disseminate their views, unless the picketers' objective is only to harass or intimidate an individual." *Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990); *Boffard*, 248 N.J. Super. at 506, 591 A.2d at 701. The record further discloses that plaintiffs do not seek to limit or preclude defendants' right to continue other activities such as leafletting. See *Martin v. Struthers*, 319 U.S. 141, 145-49, 87 L.Ed. 1313, 1318-20 (1943). The order leaves open ample alternative places and channels of communication, including *inter alia* Dr. Kaplan's private medical office, the Women's Pavilion in Greensboro, demonstrations at other public sites, door-to-door solicitations, the distribution of literature, telephone calls, and direct mailings. In sum, here defendants "have many outlets for their expressive activity, while the privacy and home life which is rightfully due [plaintiffs] can only be realized in one place, their home." *Klebanoff*, 380 Pa. Super. at 555, 552 A.2d at 682, *appeal denied*, 522 Pa. 620, 563 A.2d 888.

D. *Portion of the Order Enjoining the Prolife Action League*

[10] In their first assignment of error, defendants contend that the trial court "erred by enjoining Prolife Action League of Greensboro when there is no finding of its separate legal identity or existence." We disagree.

Defendants' argument that Prolife Action League is not an entity subject to an injunction is meritless if not frivolous. First, defendants offer no authority for this argument in their brief. Although the Prolife Action League is not organized in a corporate or partnership form, evidence in the record indicates that it distributes literature, has its own mailing address, engages in correspondence, produces a monthly newsletter notifying interested persons of upcoming pro-life events such as meetings, pickets, and speeches, and organizes demonstrations. In her own affidavit, defendant Linda B. Winfield refers to herself as a director of the Prolife Action League. This assignment of error fails. *N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1352 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 109 L.Ed.2d 532 (1990); *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1423 (W.D.N.Y. 1992).

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E. Portion of Order Enjoining Defendants' Threatening Conduct

[11] In their fourth, sixth, ninth, and eleventh assignments of error, defendants contend that the trial court "erred by enjoining the Winfields from engaging in threatening conduct when there is no finding that the Winfields have engaged in any such conduct."

First, we address defendants' contention that the record is devoid of evidence of "threatening conduct" by defendants. The record shows that defendant Ronald W. Benfield (who has not personally appeared in this action) was convicted of a violation of G.S. 14-277.1 for threatening Dr. Kaplan on 8 August 1991 as follows: "You are mine. You killed my baby and I'm going to kill you. Don't fear God, fear me." The record further shows that defendants Mr. and Mrs. Winfield counselled Mr. Benfield on at least one occasion before the death threat was made and on at least two occasions after the death threat was made. The record further discloses that defendants' other actions could be reasonably perceived as threatening as well. Affidavits in the record support the trial court's finding. Sue P. Meschan, who lives in the house on Waycross Drive next to plaintiffs, stated in her affidavit that

The demonstrations have been annoying, distressing, and intimidating to me and my family. From my interactions with them, I believe that the Kaplans also have found the demonstrations emotionally distressing and intimidating.

. . . .

The presence of these picketers has impaired my family's use and enjoyment of our property. When the picketers happen to be in front of our house, it makes it difficult to get in and out of our driveway, and it makes my family less likely to be in our front yard when the demonstrations are occurring.

. . . .

The signs carried by the picketers often include gruesome pictures, which scare my children. . . .

Joan H. Osborne, who lives at the intersection of Waycross Drive and Kenbridge Drive, stated in her affidavit that defendants

carry signs making reference to the fact that Dr. Kaplan "kills babies," and naming Dr. Kaplan. . . . More recently, the signs carried by these picketers have been even more brutal than

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they were initially. They also seem to refer to Dr. Kaplan by name more frequently.

. . . .

The presence of the picketers has impaired our use of our property. It is difficult and disconcerting to try to drive through them when leaving or returning to our home. Also, I do not like to go out into my yard and do yard work when they are present. My sons normally enjoy playing football outdoors, but do not like to do so when these people are present.

I am aware through my interactions with the Kaplans that these picketers have caused the Kaplans a great deal of mental anguish.

A colleague of plaintiff Mrs. Kaplan stated that the affiant "share[d] Meg's [plaintiff's] feelings of anxiety and fear as a result of these tactics." The three affidavits from the staff members of the Women's Pavilion also support the trial court's finding that defendants have engaged in "threatening conduct." Since we find sufficient evidence to support the trial court's finding, it is conclusive on appeal.

However, we note that Paragraphs C and D of the preliminary injunction provide as follows:

WHEREFORE, based on these findings, THE COURT ENJOINS AND RESTRAINS the defendants, their officers, agents, servants, and employees, and all persons in active concert or participation with them who receive actual notice of this order:

. . . .

C. from threatening or communicating threats to any of the plaintiffs, at their home or elsewhere; and

D. from personally confronting any of the plaintiffs in a threatening manner, at their home or elsewhere.

Though it is our view that these aspects of the preliminary injunction are content-neutral, we are concerned that paragraphs C and D of the preliminary injunction be correctly construed. Accordingly, we adopt the following cautionary admonition set forth by another court with similar concerns:

"Content-based regulations are presumptively invalid."
R.A.V. v. St. Paul, --- U.S. ---, ---, 112 S.Ct. 2538, 2542,

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120 L.Ed.2d 305, 317 (1992). The . . . order . . . should not be construed to regulate the content of the demonstrator's message in any respect. As Justice Scalia said in the recent St. Paul hate-crime ordinance and cross-burning case: "[N]on verbal expressive activity can be banned because of the action it entails, but not because of the idea it expresses. . . ." --- U.S. at ---, 112 S.Ct. at 2544, 120 L.Ed.2d at 319. The "power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element. . . ." *Id.* In sum, the intellectual content of the message may not be the target of the injunction, *only the hostile method of its delivery.*

The injunction entered here may not be construed as a content-based restriction on expression. It must be construed as focusing specifically and exclusively on the *location and manner of expression.*

Horizon Health Center. v. Felicissimo, 263 N.J. Super. 200, 223-24, 622 A.2d 891, 903 (App. Div. 1993) (emphasis added).

VIII. *Conclusion*

For the reasons stated, we hold that the relief afforded in the trial court's preliminary injunction is constitutional in all respects. Except as modified with respect to plaintiffs' claim for the intentional infliction of emotional distress, the order below in all respects is

Affirmed.

Judges WELLS and MARTIN concur.

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STATE OF NORTH CAROLINA v. WILLIE MINTER

No. 9118SC1199

(Filed 20 July 1993)

**1. Indictment, Information, and Criminal Pleadings § 6 (NCI4th)—
perjured testimony before grand jury—other competent
evidence—indictment not invalid**

Assuming *arguendo* that the grand jury testimony of a co-conspirator was perjured and that this would render the witness incompetent to testify within the meaning of N.C.G.S. § 15A-955(3), the trial court properly refused to dismiss the indictment where the record failed to show that all of the witnesses were incompetent to testify before the grand jury. Furthermore, defendant's motion at trial to dismiss the indictment was not timely.

Am Jur 2d, Indictments and Informations §§ 232, 234.

**2. Conspiracy § 40 (NCI4th)— agreement with “one other
person”—erroneous instruction**

The trial court erred by instructing the jury that it could find defendant guilty of conspiracy to traffic in cocaine “if defendant agreed with one other person” rather than limiting the conspiracy to one with the co-conspirator named in the indictment where the evidence tended to show that defendant may have conspired with a number of persons to commit an unlawful act, since the instruction put defendant on trial for an offense in addition to that named in the indictment.

Am Jur 2d, Trial § 1142.

**3. Evidence and Witnesses § 3072 (NCI4th)— hostile witness—
prior grand jury testimony—use for impeachment**

Once a hostile State's witness refused to testify or claimed that parts of his earlier, sworn statements before the grand jury were false, the State could properly use his grand jury testimony for the limited purpose of impeachment. The prosecutor's introduction of the witness's grand jury testimony during his cross-examination of the witness was not a mere subterfuge to get before the jury evidence not otherwise admissible.

Am Jur 2d, Witnesses § 941.

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Mode of proof of testimony given at former examination, hearing or trial. 11 ALR2d 30.

Judge GREENE concurring in the result.

Appeal by defendant from judgment entered 26 June 1991 in Guilford County Superior Court by Judge W. Douglas Albright. Heard in the Court of Appeals 1 March 1993.

A Guilford County grand jury indicted defendant for conspiracy to commit trafficking in cocaine by the sale and delivery of more than 400 grams of cocaine. A jury convicted him of conspiracy to sell and deliver cocaine, a Class H felony under N.C. Gen. Stat. § 90-95 (Supp. 1992), for which he received a sentence of eight-years imprisonment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Assistant Public Defender John Bryson for defendant-appellant.

MCCRODDEN, Judge.

We review three questions based upon three assignments of error brought forward by defendant: (I) whether the trial court committed prejudicial error by failing to dismiss the indictment that was allegedly based on perjured testimony; (II) whether the court erred in its instructions that the jury could find defendant guilty of conspiracy by finding an agreement between him and at least one other person, without identifying specifically the co-conspirator named in the indictment; and (III) whether the court erred in allowing the State to introduce evidence of allegedly perjurious grand jury testimony of defendant's co-conspirator.

I.

[1] Defendant's first argument is that the trial court erred in denying his motion to dismiss the indictment on the grounds that it was based upon allegedly perjured testimony. On motion of the defendant, the trial court may dismiss an indictment if it determines that:

- (1) There is ground for a challenge to the array,
- (2) The requisite number of qualified grand jurors did not concur in finding the indictment, or

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(3) All of the witnesses before the grand jury on the bill of indictment were incompetent to testify.

N.C. Gen. Stat. § 15A-955 (1988). Assuming *arguendo* that the testimony was perjured and that it would render a grand jury witness incompetent to testify within the meaning of subsection (3), we cannot say, based upon the record before us, that this satisfies the requirement that “all of the witnesses” were incompetent to testify before the grand jury.

Furthermore, defendant’s reliance on *United States v. Basurto*, 497 F.2d 781, 785 (1974), for the proposition that the prosecutor has a duty “not to permit a person to stand trial when he knows that perjury permeates the indictment” is subject to the same problem. Without knowing what other evidence was before the grand jury, we cannot determine whether perjury permeated the indictment.

Finally, we also reject defendant’s argument on the basis that his motion to dismiss the indictment, made at trial, was not timely. See N.C. Gen. Stat. §§ 15A-952(b)(4) (Supp. 1992), 15A-955 (1988); *State v. Phillips*, 297 N.C. 600, 605-06, 256 S.E.2d 212, 215 (1979).

II.

[2] Defendant’s argument that the trial court erred in instructing the jury that they could find the defendant guilty of conspiracy without limiting the conspiracy to one with the co-conspirator (Branch) named in the indictment has merit.

The instruction about which defendant complains included a statement that, “if you find from the evidence and beyond a reasonable doubt that on or about the alleged date that the defendant agreed with at least *one other person* . . . [to commit the offense] and that the defendant and at least *one other person* intended at the time the agreement was made that it would be carried out, then it would be your duty to return a verdict of guilty . . .” (Emphasis added). The trial court used this language to instruct the jury on the offense for which defendant was indicted and on the lesser included offense for which defendant was convicted.

The North Carolina Constitution provides that “in all criminal prosecutions every man has the right to be informed of the accusation” against him. N.C. Const. Art. I, sec. 23. In *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935), the Supreme Court dealt with

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a similar situation in which the defendant was indicted for conspiracy with two named co-conspirators to commit murder. In its charge, the trial court instructed the jury that it might find the defendant guilty if it found that he had conspired with both co-conspirators or others. The Supreme Court held that this charge put the defendant on trial for an offense additional to that named in the bill of indictment and ordered a new trial.

We believe that this case controls our decision. The evidence in this case, as in *Mickey*, tends to show that defendant may have conspired with a number of persons, not just the named co-conspirator, to commit an unlawful act. Consistent with *Mickey*, this Court has also examined the charge as a whole to determine whether the error was cured. We cannot find that it was. Consequently, we must order a new trial.

Finally, because one of the additional issues brought forward by defendant is likely to be raised at his second trial, we must address it in this opinion.

III.

[3] Defendant assigns error to the trial court's allowing the State to introduce, for impeachment purposes, the grand jury testimony of the alleged co-conspirator, Branch. The record reflects that on the day before trial Branch stated his intention not to testify at the trial. Prior to Branch's testimony before the jury, the trial court allowed a *voir dire* examination of Branch, and we quote from the prosecutor's examination the following excerpt:

Q. . . . [W]hat did you tell . . . [defendant's attorney]?

A. I told him that detective had seen me, had brought me in an office up here, and he was trying to make some kind of deals with me about early release from prison if I would testify against Minter.

Q. And what did you tell him?

A. I told him I couldn't do anything like that because I don't know really what they talking about and I already have my time. You know. That's a relative of mine. I couldn't testify against him.

Q. And you told . . . [defendant's attorney] that yesterday?

A. Yes.

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Q. You couldn't testify against him?

A. Yes.

Q. And is that your position now? You're not going to testify against him?

A. No, sir, I'm not.

. . . .

Q. . . . Are you going to tell the truth about your dealings with Mr. Minter back here in 1989 and '90?

A. Yes, I am.

Q. Is that the same thing you told the grand jury?

A. Yes.

Whatever you-all got on that document from the last time I was here in the grand jury, like you read it to me yesterday, all of it is not correct.

Q. What you're saying is that what you told the grand jury wasn't correct?

A. Not most of it.

Q. Most of it is not correct?

A. No, it's not.

Q. You mean you lied to the grand jury?

A. No. I didn't lie to them.

Q. Well, what happened? It was taken down wrong?

A. I believe so.

Shortly after this questioning, the trial judge interrupted to advise Branch about perjury and to appoint an attorney to represent him.

During Branch's testimony in the presence of the jury, Branch initially claimed that he could not "recall right offhand" if he told Detective Pendergrass that he had brought defendant to North Carolina to help him sell drugs. He did, however, deny making such a statement before the grand jury. After defense counsel's objection to the prosecutor's questions about his prior testimony

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that defendant shot another man over drugs, Branch stated, "I'll be willing to accept the facts and the punishment for false perjury. May I step down?" At the prosecutor's request, the trial court declared Branch an adverse witness.

To many of the later questions concerning his testimony about defendant before the grand jury, Branch responded "[f]alse testimony." Over defendant's objections, the prosecutor was able to recapitulate most of Branch's grand jury testimony through this questioning. The trial court later allowed the introduction of that portion of the grand jury transcript that recorded Branch's earlier testimony.

After the close of the evidence, and with the jury excused from the courtroom, Branch pleaded guilty to perjury. During the acceptance of his plea, the trial court asked Branch if there was anything he wanted to say, and Branch responded:

DEFENDANT BRANCH: Yes. It wasn't no lie.

THE COURT: What do you mean it wasn't any lie? You said it was a lie?

DEFENDANT BRANCH: I'm saying, you don't know the whole facts. That's all I'm going to say.

THE COURT: Oh. Well, what are you talking about? I don't understand what you're getting at? Stand up so I can understand you better.

DEFENDANT BRANCH: See, it wasn't no lie.

THE COURT: What are you talking about? I don't understand?

DEFENDANT BRANCH: That you just made your comment on. I told a lie.

THE COURT: Yes. You said you did.

DEFENDANT BRANCH: It wasn't no lie.

THE COURT: I'm just going by what you said yesterday under oath.

DEFENDANT BRANCH: You don't know—what I'm trying to express to you, you don't know the situation and the whole facts. The situation, the predicament that I am in.

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THE COURT: Well, I've got an open ear. I'll hear whatever you want to tell me.

DEFENDANT BRANCH: That's it.

THE COURT:

Now you went before the grand jury under oath. At the time, as I understand it, you were in prison then; is that right?

DEFENDANT BRANCH: Yes.

THE COURT: And you took the oath to tell the truth and gave testimony. Yesterday, you took the oath and gave testimony. Of which you affirmed a notion that you gave false testimony before the grand jury is what you said.

DEFENDANT BRANCH: See, when I came here in front of the grand jury, I wasn't notified that—who I was coming here before the grand jury. I was coming here for what I know of Richardson. I didn't know I was coming for Minter.

THE COURT: In other words, you tell it one way for Richardson and another way for Minter?

DEFENDANT BRANCH: No, I didn't. They asked me a few questions and I told them what I, you know—I told them what dealings I had with Richardson. I didn't know I was supposed to come to court here to be no state witness. Work for no state. It wasn't no charges brought up on me.

THE COURT: Well, you got one now. Which is totally self-inflicted. You worked hard to earn this charge and about as clearcut case as I've seen lately. Just worked your way right into it. I tried to warn you about the law. You had a lawyer appointed to tell you how important it is to tell the truth. If I didn't know the difference, I'd put money on the table saying that you are protecting somebody. Something has happened to you as a witness.

DEFENDANT BRANCH: I'm protecting my family.

THE COURT: Well, there's something going on here that's changed you around. And I'd like to know who it is that you are relying on to change your testimony. You're not going to tell me that, are you?

DEFENDANT BRANCH: My family.

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THE COURT: Has somebody threatened you?

DEFENDANT BRANCH: Yes.

THE COURT: Has somebody told you to change your testimony?

DEFENDANT BRANCH: In a way. Yes. It have not been Minter. Have not been Richardson. I was threatened in prison.

THE COURT: Well, you told your lawyer you can deal with this perjury charge, didn't you?

DEFENDANT BRANCH: Yes, I can.

THE COURT: Well—

DEFENDANT BRANCH: I also was wounded.

THE COURT: What's that?

DEFENDANT BRANCH: I also was wounded by their behalf.

The circumstances surrounding witness Branch's plea to the charge of perjury provide meaningful insight into that plea. We believe that the extraordinary facts of the case require us to reject defendant's argument that the court erred in allowing the State to introduce evidence of Branch's grand jury testimony.

In N.C. Gen. Stat. § 15A-623(e) (1988), the General Assembly mandated secrecy for grand jury proceedings and, "except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions." Subsection (h) of the same statute provides, among other things:

Notwithstanding subsection (e) of this section, the record of the examination of witnesses shall be made available to the examining prosecutor, and he may disclose contents of the record to other investigative or law enforcement officers, the witness or his attorney to the extent that the disclosure is appropriate to the proper performance of his official duties. The record of the examination of a witness may be used in a trial to corroborate or impeach that witness to the extent that it is relevant and otherwise admissible.

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N.C.G.S. § 15A-623(h). This statute implicitly leaves to the jury the determination of whether the witness is being honest in his testimony before them. (It is noteworthy that, in 1991, the legislature changed the quoted sentence in subsection (h) to omit the phrase "to corroborate or impeach that witness," suggesting that such testimony may now be introduced as substantive evidence. The effective date of that change, however, was after defendant's trial, and its effect is not before us.)

In contrast to this statute concerning sworn grand jury statements, the cases cited by defendant and other cases cited in the concurring opinion all pertain to unsworn statements of witnesses and, therefore, are distinguishable on this basis, and, in some instances, additional bases. The evidence the State sought to introduce in *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989), was unsworn testimony of a 14-year-old prostitute who denied even making a previous statement. Likewise, in *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988), the Supreme Court refused to allow the State to impeach a witness by using his prior unsworn statement which itself constituted hearsay. *Williams* also involved the witness's denial that he had ever made a prior statement. In *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971), the Court held inadmissible an earlier unsworn statement of defendant's son, finding the statement a "speculative, conjectural expression of opinion completely lacking in probative value towards establishing a material fact in the case." *Id.* at 349, 180 S.E.2d at 754-55. Again in *Cutshall*, the Court dealt with the State's attempt to elicit evidence of a statement after the witness denied making it. The case of *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969), like *Williams*, involved double hearsay. The Supreme Court held that a witness's prior unsworn statement about what the defendant had told him was incompetent. The statement was collateral because at trial the witness denied ever making it.

Relying on *Hunt* and *Williams*, the Court of Appeals determined in *State v. Jerrells*, 98 N.C. App. 318, 390 S.E.2d 722, *disc. review denied*, 326 N.C. 802, 393 S.E.2d 901 (1990), that the State could not introduce evidence of a prior unsworn statement by a witness who at trial denied making the statement.

All of these cases dealing with the admittedly complex question of collateral matters stand for the proposition that, once a witness *denies* having made a statement, the State may not impeach that

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denial by introducing evidence of the statement. While the case before us contains some instances in which the witness Branch denied making certain statements before the grand jury, in many other instances, he claimed that statements he made were false.

We believe that once Branch refused to testify or claimed that parts of his earlier, sworn statements before the grand jury were false, the State's use of that testimony was proper for impeachment purposes. It called into question his denial that he had conspired with defendant to traffic in cocaine, and it therefore went to the essence of, and was material to, the State's case. After hearing arguments of counsel, the trial judge made appropriate findings of fact and concluded that the testimony was admissible for impeachment purposes. At the time the transcript was admitted, he correctly instructed the jury about its limited purpose. We hold that, under this set of facts and given the statute cited above, the trial court properly allowed the introduction of this evidence.

We also disagree with defendant's related argument that the prosecutor acted in bad faith in introducing the transcript of Branch's grand jury testimony. From the record, one cannot tell that either the prosecutor or counsel for defendant was aware of N.C.G.S. § 15A-623(h) which limited the purpose for which the grand jury transcript could be introduced. Indeed, their arguments hinged on *State v. Hunt* which actually supports the prosecutor's actions.

In *Hunt*, the Court looked to federal cases for guidance in discerning those rare instances when the State's introduction of prior inconsistent statements by its own witness was not made solely for the purpose of putting the substance of the statements before the jury, and was not a mere subterfuge. Such exceptional circumstances include "the facts that the witness's testimony was extensive and vital to the government's case, that the party calling the witness was genuinely surprised by his reversal, or that the trial court followed the introduction of the statement with an effective limiting instruction." *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758 (citations omitted). After concluding that there was no assurance that the witness's testimony was critical to the State's case or that it was introduced altogether in good faith and followed by effective limiting instructions, *Id.* at 351, 378 S.E.2d at 758-59, the Court found that the witness's prior unsworn statement was inadmissible. In this case, however, Branch's testimony could hardly

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be more critical to the State's case. The record reflects that the prosecutor was made aware the day before trial that the witness had indicated his intention not to testify against the defendant. The prosecutor, however, had no choice but to call this witness. We believe that this is one of those rare instances in which the State's introduction of a prior inconsistent statement by its own witness was not a mere subterfuge.

Moreover, in light of the 1991 change in the statute, we cannot see that the prosecutor argued for an unreasonable extension of the law.

For the reasons set forth in section II, we hold that defendant must be granted a

New trial.

Chief Judge ARNOLD concurs.

Judge GREENE concurs in the result with separate opinion.

Judge GREENE concurring in the result.

I agree, and for the reasons stated by the majority, that the trial court properly denied defendant's motion to dismiss the indictment. Like the majority, I also believe that the trial court's conspiracy instruction was erroneous. And, because evidence was presented from which the jury could have determined that defendant conspired with someone besides Branch to sell cocaine, the instructional error was prejudicial and therefore I agree that it entitles defendant to a new trial. N.C.G.S. § 15A-1443(a) (1988).

I disagree, however, with the majority's conclusion that the trial court properly admitted Branch's grand jury testimony as "impeachment" evidence. For the reasons hereinafter set forth, I believe that defendant is also entitled to a new trial on the ground that the trial court improperly admitted Branch's grand jury testimony.

I state the facts necessary to an understanding of the issues which I feel compelled to address. Defendant was indicted in Guilford County for conspiracy to commit trafficking in cocaine by the sale and delivery of more than 400 grams of cocaine. The sole co-conspirator alleged in the indictment was William Anthony Branch

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(Branch). The evidence presented by the State at defendant's trial established that in 1988, Michael Richardson (Richardson), a resident of New York City, began a cocaine distribution network in High Point, North Carolina. Richardson testified that he arranged for Branch to move to High Point and distribute the cocaine transported in from New York. Richardson testified that defendant, who is Branch's cousin, moved from New York to High Point in 1989, but that Richardson did not have any personal drug dealings with defendant. Richardson did testify, however, that on one occasion in the summer of 1989 he had an argument with defendant regarding \$200.00 owed Branch by defendant for drugs sold by defendant.

Branch, who had earlier testified before the grand jury that he hired defendant to sell cocaine, testified at trial for the State. Prior to calling Branch, the prosecutor advised the court that "we probably ought to be heard outside the presence of the jurors before the next witness testifies." Branch then testified on voir dire that, despite the fact that he testified against defendant before the grand jury, he was not going to testify against defendant at trial, and had told SBI agents the day before that he would not testify. Branch testified that the numerous statements that he made to the grand jury regarding defendant's participation with him in the High Point drug operation were false. The court appointed counsel for Branch and subsequently issued a bench warrant charging Branch with perjury in his testimony before the grand jury, to which Branch pleaded guilty. Defendant made a motion to dismiss the indictment on the ground that Branch gave perjured testimony to the grand jury, which was denied.

Branch then testified for the State before the jury. The trial court declared Branch hostile and allowed the State to cross-examine him. Branch testified that defendant was his cousin who had come to High Point from New York, but that Branch did not hire defendant to help him sell drugs. When asked by the prosecutor whether he had told the grand jury that he brought defendant to High Point to sell drugs for him, Branch denied ever making such a statement. Branch also denied telling SBI detectives that he had brought defendant to High Point to help sell drugs. Over repeated objections by defendant, the prosecutor continued to cross-examine Branch using the portions of Branch's grand jury testimony in which he had stated that defendant worked for him in the High

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Point drug operation. Branch either denied making the statements or stated that his prior statements were "false testimony."

In response, the trial court permitted the State to call the court reporter who had transcribed Branch's grand jury testimony. Through this witness, the State attempted to introduce into evidence the full transcript of Branch's grand jury testimony, arguing at length for its admission as substantive evidence. Defendant objected to the admission of the transcript for any purpose. The trial court agreed that it was inadmissible as substantive evidence; however, the court allowed it as impeachment evidence. The court also allowed the State to pass a copy of the transcript of Branch's grand jury testimony to each member of the jury, and instructed the jury to consider it solely for the purpose of "deciding whether you're going to believe or disbelieve [Branch's] sworn testimony at this trial."

At the outset, I note my concern with the majority's reading of the amendment to N.C.G.S. § 15A-623(h), dealing generally with grand jury proceedings. The majority acknowledges that the amendment was not in effect at the time of defendant's trial and therefore has no application to the instant case. However, the majority nevertheless concludes that the amendment suggests that grand jury testimony may now be introduced as substantive evidence, a conclusion which is at odds with our Rules of Evidence, for the following reasons.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C.G.S. § 8C-1, Rule 801(c) (1992), and is not admissible except as provided by statute or by our Rules of Evidence. N.C.G.S. § 8C-1, Rule 802 (1992). Thus, in North Carolina, the prior statement of a witness, when offered for its truth, is hearsay. Federal Rule of Evidence 801(d)(1)(A) provides that a prior inconsistent statement of a declarant who testifies at trial and is subject to cross-examination concerning the statement, which prior statement was given under oath, subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition, is not hearsay and therefore is admissible as substantive evidence. Included within the concept of "other proceeding" in the federal rule is grand jury testimony. Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6711, at 446 (1992).

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However, because it “departs markedly from the common law in North Carolina,” federal Rule 801(d)(1) was deleted from the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 801(d) commentary (1992); *see also State v. Cope*, 240 N.C. 244, 249, 81 S.E.2d 773, 777 (1954) (prior inconsistent statements admissible for impeachment purposes and not as substantive evidence). In other words, the prior inconsistent statement of a witness—regardless of the circumstances under which it was made—is not admissible as substantive evidence unless it properly falls within an exception to the hearsay rule or except as provided by statute. The latter exception does, however, raise the question of whether N.C.G.S. § 15A-623(h), as amended, authorizes the admission of grand jury testimony as substantive evidence at trial.

Section 15A-623(h), prior to the July, 1991, amendment, provided that “[t]he record of the examination of a [grand jury] witness may be used in a trial *to corroborate or impeach that witness* to the extent that it is relevant and otherwise admissible.” N.C.G.S. § 15A-623(h) (1988) (emphasis added). As a result of the amendment, the statute now provides that “[t]he record of the examination of a [grand jury] witness may be used in a trial to the extent that it is relevant and otherwise admissible.” N.C.G.S. § 15A-623(h) (Supp. 1992). One possible explanation for the deletion of the phrase “to corroborate or impeach that witness” is simply that it was surplusage, because the statute already stated, as it does now, that the record may be used only to the extent that it is relevant *and otherwise admissible*. In other words, the admissibility of the record of the examination of a grand jury witness, like all evidence, is governed by our Rules of Evidence, and, as previously discussed, our Rules of Evidence preclude the admission of prior inconsistent statements of a witness—whether sworn or unsworn—as substantive evidence.

On the other hand, by deleting in Section 15A-623(h) the phrase “to corroborate or impeach that witness,” the Legislature could have intended to authorize the admission of grand jury testimony as substantive evidence as well as for corroboration or impeachment. However, because this appeal does not require that we construe Section 15A-623(h), as amended, it is unnecessary to resolve the issue raised. Under the law applicable to the instant case, there is no question that grand jury testimony is not admissible as substantive evidence.

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There remains, however, the question of whether the trial court properly admitted Branch's prior grand jury testimony as impeachment evidence. As a preliminary matter, I note that, assuming without deciding that Branch's plea of guilty to perjury before the grand jury somehow renders his grand jury testimony incompetent, evidence which is used for impeachment purposes is admissible as such notwithstanding the fact that it would otherwise be incompetent. *Cf. State v. Riddle*, 316 N.C. 152, 159, 340 S.E.2d 75, 79 (1986) (corroborative evidence admissible as such even if otherwise incompetent). Therefore, the perjury adjudication has no effect on whether the trial court properly admitted Branch's former testimony for impeachment purposes.

Defendant argues that he is entitled to a new trial because the court committed reversible error (I) in allowing the State to use portions of Branch's grand jury testimony when cross-examining Branch, and (II) in admitting the entire transcript of Branch's grand jury testimony for "impeachment" purposes.

The rule allowing the use of prior inconsistent statements for impeachment purposes is not without its exceptions. Two exceptions are raised by the facts of the instant case.

I

Defendant argues that the court erred in allowing the State to call the court reporter and to introduce through this witness the entire transcript of Branch's grand jury testimony.

Under the rules applicable to cross-examination of a witness, whether the witness is called by the opposing party or is a party's own witness who has been declared hostile, "extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues." *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). In other words, "if the inquiry on cross-examination is as to inconsistent statements about 'collateral' matters, the cross-examiner must 'take the answer' [of the witness]—he cannot bring on other witnesses to prove the making of the alleged statement." Edward W. Cleary et al., *McCormick on Evidence* § 36, at 77 (3d ed. 1984); accord 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 48, at 227-28 (3d ed. 1988) [hereinafter *Brandis*]; *State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978). As a general rule, "collateral matters" are those which are not relevant to the issues

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in the case, including immaterial matters and irrelevant facts inquired about to test observation or memory. *Brandis* at 228. Our Courts, however, have interpreted this rule of evidence as also barring (1) testimony which contradicts a witness's denial that the witness stated on a prior occasion that the defendant made an inculpatory statement to him, *State v. Moore*, 275 N.C. 198, 213-14, 166 S.E.2d 652, 662-63 (1969); *State v. Williams*, 322 N.C. 452, 454-56, 368 S.E.2d 624, 626-27 (1988); and (2) testimony which contradicts a witness's denial that the witness on a prior occasion made a statement inconsistent with his testimony at trial. *Hunt*, 324 N.C. at 348, 378 S.E.2d at 757; *State v. Jerrells*, 98 N.C. App. 318, 321, 390 S.E.2d 722, 724, *disc. rev. denied*, 326 N.C. 802, 393 S.E.2d 901 (1990); *State v. Cutshall*, 278 N.C. 334, 349, 180 S.E.2d 745, 754 (1971); *but see Green*, 296 N.C. at 193, 250 S.E.2d at 204 (alibi witness, who denied at trial that he told a detective prior to trial that he was asleep when defendant came home on the night of the murder, was properly impeached by the detective, who testified regarding the substance of the alibi witness's prior statement, on the ground that the prior statement concerned the subject matter of the alibi witness's trial testimony and the subject matter of the trial testimony was material to an issue in the case).

In the instant case, Branch denied telling the grand jury that Branch brought defendant to High Point to sell drugs for him. In response, the State with the permission of the court called as an impeaching witness the court reporter who had transcribed the grand jury testimony, and, through this witness, introduced the entire transcript of Branch's testimony, giving a copy to each member of the jury. Under the principles previously discussed, in particular those set forth in *Hunt*, *Cutshall*, and *Jerrells*, the trial court erred in admitting this evidence. The majority's effort to distinguish this line of cases from the instant case on the ground that the former involved *unsworn* prior inconsistent statements and the latter, *sworn* prior inconsistent statements, is unpersuasive. This is so because, as previously discussed, our Rules of Evidence in addressing the admissibility of prior inconsistent statements make no distinction between those that are sworn and those that are unsworn—*any* prior inconsistent statement is admissible, but only for impeachment purposes—nor have I been able to determine that our Courts have ever made such a distinction. Not in *Hunt* nor in any of the cases preceding it which I have discussed did the Court ever suggest that its holding, prohibiting the admission

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of extrinsic evidence to impeach a witness who, at trial, denies making a prior inconsistent statement, was based on the fact that the prior inconsistent statement to which the impeaching witness testifies was not given under oath.

II

Defendant argues that the court also erred in allowing the State to use portions of Branch's grand jury testimony during its cross-examination of Branch because the record reveals that the State attempted to "impeach" Branch solely for the improper purpose of putting the substance of Branch's prior testimony before the jury.

Impeachment of a witness by use of a prior inconsistent statement made by the witness is not permitted where such impeachment is "employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible." *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757 (citations omitted).

[I]t would be an abuse of [Rule 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it.

Id. at 349-50, 378 S.E.2d at 758 (quoting *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)). Only in rare cases have courts addressing the question found good faith and the absence of subterfuge on the part of the State in introducing hearsay statements to impeach its own witness. *Id.* at 350, 378 S.E.2d at 758.

A review of the record in light of *Hunt* leads me to the inescapable conclusion that the hearsay statements of Branch, who testified for the State as a hostile witness, were used by the State primarily for the purpose of putting before the jury the substance of those statements. A thorough reading of the transcript in this case reveals that the prosecutor knew prior to trial that Branch would not testify against defendant, yet Branch nonetheless was called as a witness. Moreover, the jury's consideration of the portions of Branch's grand jury testimony used by the State during cross-examination of Branch was not limited to purposes of impeachment. The State's lack of good faith is further evidenced by its strenuous argument at trial for the admission of the transcript

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of Branch's grand jury testimony as *substantive* evidence. As the following exchange reveals, only after failing to persuade the court that the testimony was admissible as substantive evidence did the State, after suggestion by the trial court, offer the evidence for "impeachment" purposes:

THE COURT: All right. Mr. [Prosecutor], I'll hear you further on this. You tender [Branch's grand jury testimony] as impeachment evidence?

[THE PROSECUTOR]: *I tender it, Your Honor, as substantive evidence. And I understand Your Honor's ruling on that.*

THE COURT: I can't—I've read everything I know to read. And I know of no authority to admit it as substantive evidence.

[THE PROSECUTOR]: *Well, Your Honor, then I tender it also as impeachment evidence.*

THE COURT: I'm going to overrule the objection and let it in as impeachment.

[Emphases added.] I can conceive of no purpose on the part of the State for introducing the entire transcript of Branch's prior testimony, and ensuring that each member of the jury was given his own copy to read, other than the improper purpose of hoping that the jury would consider the testimony as substantive evidence.

The foregoing circumstances indicate on the part of the State a lack of good faith in using Branch's grand jury testimony, *see Hunt*, 324 N.C. at 350-51, 378 S.E.2d at 758-59, especially in light of the damaging nature of the evidence, and therefore the trial court erred in allowing its use.

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STATE OF NORTH CAROLINA v. WALTER M. HARRIS

No. 914SC1032

(Filed 20 July 1993)

1. Evidence and Witnesses § 1252 (NCI4th) — Sixth Amendment right to counsel — right offense specific — subsequent interrogation as to different offense — assertion of right in earlier case inapplicable to interrogation

Invocation of the right to counsel under the Sixth Amendment acts only to prevent subsequent interrogation of a defendant on the same offense for which he has invoked his right to counsel; however, it does not work to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached. As a result, any subsequent waiver of the right to counsel during a police initiated interrogation is invalid *only* as to questioning on the same offense for which judicial proceedings have begun and for which the defendant has asserted his right to counsel.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel — Supreme Court cases. 83 L. Ed. 2d 1087.

What constitutes assertion of right to counsel following Miranda warnings — state cases. 83 ALR4th 443.

2. Evidence and Witnesses § 1252 (NCI4th) — Fifth Amendment right to counsel — right not offense specific

The Fifth Amendment requires a criminal suspect to be informed of his rights prior to a custodial interrogation by law enforcement officers, and, unlike the Sixth Amendment right to counsel, the Fifth Amendment right is not offense specific, that is, once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

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Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 1087.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

3. Evidence and Witnesses § 1252 (NCI4th)— Sixth Amendment right to counsel invoked in one case—no effect on interrogation in subsequent case

Defendant did not invoke his Fifth Amendment right to counsel rather than, or independent of, any Sixth Amendment invocation of his right to counsel, though defendant was in custody, since the record contained no evidence that his request for appointed counsel was related to any active interrogation or any expectation or fear of an impending interrogation; rather the evidence tended to show that his request for counsel was nothing more than the expression of a desire to have counsel present at formal proceedings in an earlier, independent case.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 1087.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

4. Evidence and Witnesses § 1262 (NCI4th)— inculpatory statement made in custody—defendant advised of rights—voluntary waiver—statement not suppressed—no error

The trial court did not err in denying defendant's motion to suppress his inculpatory statement made to a detective while he was in custody where the detective advised defendant of his *Miranda* rights; defendant acknowledged each right by saying he understood it, did not want an attorney present, and was willing to talk without an attorney present; and defendant therefore knowingly and voluntarily waived his Fifth

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Amendment right to have counsel present during the custodial interrogation.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 1087.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

5. Constitutional Law §§ 262, 352 (NCI4th)— right to counsel—right against self-incrimination—North Carolina Constitution not broader than U. S. Constitution

Article I, § 23 of the North Carolina Constitution does not provide broader protection than the U. S. Constitution with regard to a defendant's right to counsel and right not to be compelled to give self-incriminating evidence.

Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq., 967 et seq.

6. Constitutional Law § 367 (NCI4th)— one aggravating factor—consecutive, maximum sentences—no cruel and unusual punishment

The trial court's imposition of consecutive maximum sentences for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, based upon a finding of the aggravating factor that defendant had a prior conviction punishable by more than sixty days imprisonment, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the prior conviction was for disorderly conduct, since defendant was convicted of two serious crimes, both involving the use of deadly weapons; it was within the trial court's discretion to impose the maximum sentence for those offenses; the imposition of consecutive maximum terms did not, standing alone, constitute cruel and unusual punishment; and there was nothing so grossly disproportionate in the sentencing judgment for the offenses to represent a cruel or unusual punishment in North Carolina.

Am Jur 2d, Criminal Law § 629.

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Federal Constitutional guaranty against cruel and unusual punishment—Supreme Court cases. 33 L. Ed. 2d 932.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Appeal by defendant from judgments entered 14 May 1991 by Judge Frank R. Brown in Onslow County Superior Court. Heard in the Court of Appeals 10 June 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth N. Strickland for the State-appellee.

Raynor and Fisher, by Donald G. Walton, Jr. for defendant-appellant.

WYNN, Judge.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and for robbery with a dangerous weapon. The two charges were consolidated for trial and heard on 14 May 1991.

The State's evidence tended to show the following: On the evening of 1 November 1990 at about midnight, a man entered a Circle K store in Jacksonville, North Carolina wearing a mask and carrying a handgun. He ordered the clerk, Jeffrey Dean Cornish, to give him "the money in the till" and then to get down on the floor. Mr. Cornish gave him the eight dollars in the register and began moving toward the floor. The man struck Mr. Cornish on the head with the butt of the gun. After Mr. Cornish got on the floor, the gun went off, inflicting a wound in his upper right chest area. The robber ran out of the store. Law enforcement officials investigating the robbery did not find the robber nor any evidence in the area.

On 7 November 1990 defendant was arrested at his home by Detective Dennis Donita of the Jacksonville Police Department for the armed robbery of a Fast Fare store in Jacksonville which had occurred on 17 September 1990 (a case unrelated to the subject appeal). Defendant was taken to the police station where he was read his *Miranda* rights and after signing a waiver of rights form, was questioned about the Fast Fare robbery by Detective Donita. Defendant denied guilt. On 8 November 1990, defendant went before

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the Onslow County District Court for a first appearance on the Fast Fare charges. He declined appointed counsel and stated that he would hire his own attorney. Defendant was returned to the Onslow County jail. Pursuant to a subsequent request by defendant, on the morning of 9 November 1990, defendant was appointed counsel to represent him on the charges relating to the Fast Fare robbery.

Later in the afternoon on 9 November 1990, Detective James V. O'Malley of the Onslow County Sheriff's Department, having learned that defendant was in custody, went to the Onslow County jail and requested that defendant be brought to speak with him. Detective O'Malley was investigating the 1 November 1990 robbery of the Circle K store, for which defendant was a suspect. Detective O'Malley asked defendant if he would speak with him in his office and defendant agreed. Once in O'Malley's office, defendant was read his *Miranda* rights, he signed a waiver of counsel and rights form and agreed to talk with Detective O'Malley about other robberies that were under investigation in Onslow County, including the Circle K robbery. After making an oral statement incriminating himself in the Circle K robbery, defendant made a written statement to the same effect. During the course of the approximately two-and-a-half hours that defendant was in O'Malley's office, Detective O'Malley never asked defendant if he was represented by counsel and defendant never voluntarily offered such information. After questioning, defendant was arrested and charged with assault with a deadly weapon with intent to kill and robbery with a deadly weapon in connection with the 1 November 1990 Circle K robbery.

On 2 January 1991, Winston Grant, a jailer at the Onslow County Sheriff's Department, escorted defendant from the jail to the hospital for treatment of self-inflicted cuts on defendant's wrist. Defendant apparently overheard Mr. Grant tell hospital staff that the defendant was a dangerous person. Mr. Grant testified that defendant later questioned him as to why he had made the comment and Grant answered, "It's my understanding that you shot somebody down at the Circle K." Defendant responded, "I shot the clerk; it wasn't for the money, it was just for the thrill of watching him die." Mr. Grant had not read the defendant his *Miranda* rights.

Defendant did not present any evidence. Defendant moved to suppress the incriminating statements made to both Detective

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O'Malley and Mr. Grant. Pursuant to defendant's motion, the trial court conducted *voir dire* hearings to determine the admissibility of the statements and denied the motion with respect to the statement made to O'Malley but granted the motion with respect to the statement to Grant. The jury found defendant guilty of both charges and the trial judge entered judgment on the verdicts, sentencing defendant to 20 years imprisonment on the "assault with a deadly weapon" charge and 40 years imprisonment on the "robbery with a dangerous weapon" charge, both to run consecutively. Defendant appeals.

I.

Defendant first assigns error to the trial court's denial of his motion to suppress his inculpatory statement made to Detective O'Malley. He contends that because counsel had been appointed to represent him, the custodial interrogation by Detective O'Malley violated his federal and state constitutional rights. We address the following issues in the resolution of defendant's argument: 1) Does the invocation of the Sixth Amendment right to counsel act to automatically invoke the right to counsel guaranteed under the Fifth Amendment? 2) Did the defendant validly invoke his Fifth Amendment right to counsel independent of his Sixth Amendment invocation of the right to counsel?

[1] Defendant first argues that he invoked his Sixth Amendment right to counsel by requesting a court-appointed attorney in relation to the Fast Fare charges. He contends that the invocation of his Sixth Amendment right to counsel essentially acted to invoke his Fifth Amendment right to counsel as well, which was subsequently violated when he was questioned by Detective O'Malley in the absence of counsel.

In support of this proposition defendant relies upon the United States Supreme Court's holding in *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed.2d 631 (1986). In *Jackson*, the defendant requested appointment of counsel at his arraignment hearing on murder charges. Before defendant had an opportunity to consult with counsel, police officers approached the defendant, advised him of his *Miranda* rights, questioned him and obtained a confession to the murder. The United States Supreme Court held that the confessions were improperly obtained in violation of the Sixth Amendment. Under *Jackson*, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel,

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any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Id.* at 636, 89 L.Ed.2d at 642. *See also State v. Bromfield*, 332 N.C. 24, 40, 418 S.E.2d 491, 499 (1992). Thus, defendant in this case contends that his request, pursuant to the Sixth Amendment, for appointed counsel on the Fast Fare charges operated to preclude the subsequent police-initiated interrogation regarding the Circle K robbery, without an attorney present.

Notwithstanding our agreement that defendant presents a persuasive argument in light of *Jackson*, we are constrained by the more recent pronouncement of the United States Supreme Court in *McNeil v. Wisconsin*, 501 U.S. ---, 115 L.Ed.2d 158 (1991) wherein the Court rejected the argument that a defendant's assertion of his Sixth Amendment right to counsel automatically results in an invocation of the right to counsel for Fifth Amendment purposes. *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 166-69. The Supreme Court's holding limited the *Jackson* ruling by declaring that a defendant's right to counsel under the Sixth Amendment is "offense specific." *Id.* at ---, 115 L.Ed.2d at 166. As a result, "it cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *Id.*

The facts in *McNeil* are strikingly similar to the facts of this case. In *McNeil*, the defendant had been arrested and charged with an armed robbery in West Allis, Wisconsin. At his initial appearance on that charge he was represented by a public defender. Later, while in jail on the West Allis charge, he was questioned by police about an unrelated murder in Caledonia. After being advised of his *Miranda* rights and signing forms waiving them, the defendant made statements incriminating himself in the Caledonia murder, for which he was later charged. His pre-trial motion to suppress the statements about the murder was denied and he was subsequently convicted. As in this case, the defendant in *McNeil* argued that "although he expressly waived his *Miranda* right to counsel on every occasion he was interrogated, those waivers were the invalid product of impermissible approaches, because his prior invocation of the offense-specific Sixth Amendment right with regard to the West Allis burglary was also an invocation of the non-offense-specific *Miranda-Edwards* right." *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 168. The Supreme Court concluded that "[t]o invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda-Edwards* interest." *Id.*

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It is well-settled that a criminal defendant's right to counsel under the Sixth Amendment attaches upon the initiation of criminal judicial proceedings, be that " 'by way of formal charge, preliminary hearing, indictment, information or arraignment.' " *State v. Bauguss*, 310 N.C. 259, 267, 311 S.E.2d 248, 253, *cert. denied*, 469 U.S. 838, 83 L.Ed.2d 76 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L.Ed.2d 411, 417 (1972)); *see also State v. Nations*, 319 N.C. 318, 324, 354 S.E.2d 510, 513 (1987). The purpose of the Sixth Amendment is to " 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of [both parties] have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 168.

Recognizing that purpose, the Supreme Court in *McNeil* reasoned that just as the Sixth Amendment right to counsel is "offense specific," so too is its "effect of invalidating subsequent waivers in police-initiated interviews . . . offense-specific." *Id.* at ---, 115 L.Ed.2d at 167. Thus, invocation of the right to counsel under the Sixth Amendment acts only to prevent subsequent interrogation of a defendant on the *same offense* for which he has invoked his right to counsel. *See Jackson*, 475 U.S. 625, 89 L.Ed.2d 631. *See also State v. Tucker*, 331 N.C. 12, 34, 414 S.E.2d 548, 561 (1992). However, it does not work to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached. As a result, under the rule in *McNeil*, any subsequent waiver of the right to counsel during a police-initiated interrogation is invalid *only* as to questioning on the *same offense* for which judicial proceedings have begun and for which the defendant has asserted his right to counsel.

[2] The Supreme Court in *McNeil* pointed out the differing effect of invoking the Fifth Amendment right to counsel as opposed to the Sixth Amendment right to counsel. 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). Under the Fifth Amendment, once a suspected criminal who is the subject of custodial interrogation invokes his right to counsel, the interrogation must cease until counsel is provided, unless the suspected criminal initiates further dialogue. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed.2d 378, 386 (1981). Unlike the Sixth Amendment right to counsel, the *Edwards* rule "is not offense-specific: once a suspect invokes the *Miranda* right to counsel

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for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 168 (citing *Arizona v. Roberson*, 486 U.S. 675, 100 L.Ed.2d 704 (1988)). *Any* waiver thereafter obtained from the defendant is deemed invalid when the subsequent questioning is police-initiated and without counsel present, even if defendant is read his rights. *Id.* It does not matter "whether the subsequent police-initiated contact is conducted in good faith by officers unaware that the defendant had previously invoked her [Fifth Amendment] right to counsel." *State v. Torres*, 330 N.C. 517, 524, 412 S.E.2d 20, 24 (1992) (citing *Roberson*, 486 U.S. at 687-88, 100 L.Ed.2d at 717).

In this case, defendant argues that by his request for counsel he had invoked his Sixth Amendment right to counsel with respect to the Fast Fare robbery for which he had been formally charged and provided a first appearance. Indeed the record supports the defendant's contention that his Sixth Amendment right to counsel had attached and that he validly invoked such right by requesting and receiving appointed counsel to represent him in that action. However, at the time Officer O'Malley questioned defendant as to the Circle K armed robbery, he was merely a suspect and the State had not initiated judicial proceedings against him with respect to that crime. It is therefore undeniable that defendant's Sixth Amendment right to counsel had not attached with respect to the Circle K robbery. "Because [defendant] provided the statements at issue here before his Sixth Amendment right to counsel with respect to the [*Caledonia*] offenses had been (or even could have been) invoked, that right poses no bar to the admission of the statements in this case." *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 167.

[3] Having determined that by invoking his Sixth Amendment rights, defendant did not thereby, as a matter of course, invoke his Fifth Amendment rights, there remains the issue of whether in fact the record nonetheless shows that defendant invoked his Fifth Amendment right to counsel rather than, or independent of, any Sixth Amendment invocation of his right to counsel.

The record indicates that, at his first appearance on the Fast Fare charges, defendant stated that he would provide his own attorney. Apparently, after returning to his jail cell, he decided that he would prefer a court-appointed attorney and stated that preference. Whereas defendant was in jail, he was without question

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“in custody” at the time he made a request for appointed counsel. The record does not indicate, however, that he was the subject of “interrogation” at the time of his request. The purpose of *Miranda* rights is to “counteract the ‘inherently compelling pressures’ of custodial interrogation.” *Torres*, 330 N.C. at 523, 412 S.E.2d at 23 (quoting *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 167). Although we recognize that a person need not be “actively under interrogation” for the *Miranda* protections to apply, there should be, at a minimum, some indication of “a desire to have the help of an attorney during custodial interrogation.” *Id.* at 528, 412 S.E.2d at 26 (defendant in custody and awaiting interrogation, could anticipatorily invoke her *Miranda* rights). In determining whether a person has invoked her Fifth Amendment “right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.” *Id.* “For a request for counsel at a judicial proceeding [or thereafter] to serve as a Fifth Amendment invocation as well, there must be an indication of a desire to deal with the police only through counsel, not merely the expression of a desire to have counsel present at formal proceedings.” *Tucker*, 331 N.C. at 34, 414 S.E.2d at 561 (citing *McNeil*, 501 U.S. at ---, 115 L.Ed.2d at 169).

Although the defendant was in custody, the record contains neither evidence that his request for appointed counsel was related to any active interrogation, nor any expectation or fear of an impending interrogation. Rather, the evidence tends to show that his request for counsel was nothing more than the “expression of a desire to have counsel present at formal proceedings.” *Id.* The record being woefully devoid of any evidence indicating why counsel was appointed for defendant, we are thus without sufficient evidence in this case pointing to an assertion of the Fifth Amendment right to counsel.

Based upon the foregoing, we conclude that the record indicates that the defendant invoked his Sixth Amendment right to counsel rather than his Fifth Amendment right to counsel. We further conclude in light of *McNeil*, that the defendant’s invocation of his Sixth Amendment right to counsel with respect to his charges for robbery of the Fast Fare did not act as an automatic invocation of his Fifth nor Sixth Amendment right to counsel with respect to the charges on the subject Circle K robbery.

[4] Having determined that the record does not establish that defendant invoked his Fifth Amendment right to counsel when

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he requested appointment of an attorney, and thus that the *Edwards* rule regarding the invocation of the Fifth Amendment counsel rights is inapplicable, our next inquiry is whether under the totality of the circumstances, the defendant's statement to Detective O'Malley was the result of a voluntary, knowing and intelligent waiver of his Fifth Amendment rights. *State v. Reese*, 319 N.C. 110, 127, 353 S.E.2d 352, 361 (1987).¹ The effective waiver of the right to counsel is a prerequisite to the admissibility of any statement made by a defendant during a custodial investigation. *Miranda*, 384 U.S. 436, 16 L.Ed.2d 694.

Following *voir dire* to determine the admissibility of the statement made to Detective O'Malley, the trial judge made the following pertinent findings of fact:

That the officer advised the defendant of his *Miranda* rights, and the defendant acknowledged each right by saying he understood it and said that he did not want an attorney and was willing to talk without an attorney being present. That the defendant was extremely cooperative and had to be cautioned not to make any statement until he had been advised of his rights. That the defendant was not handcuffed. That other officers came in and out of the room during the interview. That the defendant was not intoxicated and did not appear confused. That he never asked to be allowed to call an attorney nor did he ask for an attorney. That his mother was allowed to visit him while he was in O'Malley's office. That the officer never made any statement to the defendant regarding a reduction in prison time or regarding the arrest of his mother. That the defendant made an oral statement regarding the incident under investigation herein and thereafter made a written statement, and that the defendant was with the officer approximately one-and-a-half to one-and-three-quarter hours.

Based on these findings, the trial court denied defendant's motion to suppress, concluding:

1. In his brief, defendant does not argue that his statement was given involuntarily or unintelligently, nor does he specifically assign error to the trial court's findings and conclusions with respect thereto. However, in the interest of justice we have reviewed the record to determine whether the statement was in fact the result of an intelligent and knowing waiver of defendant's *Miranda* rights during a custodial interrogation.

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1. [T]hat there were no threats or promises to the defendant to persuade him to make a statement.
2. That no offers of hope, reward or inducement were made to the defendant to persuade him to make a statement.
3. That the defendant was fully advised of his constitutional rights pursuant to *Miranda* and formally made a statement while fully understanding his right to remain silent, to stop answering questions at any time, and to have counsel present to advise him.
4. That the defendant's invocation of his right to counsel on the unrelated charge for which he was arrested on November 7, 1990 [was] not an invocation of his right to have counsel present when questioned about the robbery and assault under investigation here.

The trial court's findings of fact concerning the admissibility of an inculpatory statement are binding and conclusive on the appellate courts when supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). The conclusions drawn therefrom however, are not binding and are reviewable. *Id.*

Competent evidence supports the trial judge's finding that Detective O'Malley "advised the defendant of his *Miranda* rights, and the defendant acknowledged each right by saying he understood it and said that he did not want an attorney and was willing to talk without an attorney present." It is evident from the findings of fact summarized above that the defendant fully understood his constitutional rights and the written waiver of those rights which he signed. During the interrogation by O'Malley, defendant, with full knowledge of his Fifth Amendment rights, chose not to invoke them. The trial court's conclusions are based upon and supported by findings of fact that are well supported by the *voir dire* testimony. Whereas the defendant did knowingly and voluntarily waive his Fifth Amendment right to have counsel present during the custodial interrogation by Detective O'Malley, the trial court did not err in denying the defendant's motion to suppress the statement made to Detective O'Malley.

[5] In his final argument regarding his right to counsel, defendant asserts that his rights pursuant to Article 1, Section 23 of the North Carolina State Constitution were violated. That provision

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provides that "every person charged with a crime has the right to have counsel for defense and not be compelled to give self-incriminating evidence." N.C. Const. art. 1, § 23. Defendant has suggested that even if we decide, as we have, that his statement should not be suppressed based on the pertinent amendments to the United States Constitution, our State Constitution may be read to provide broader protection than that afforded by the United States Constitution. We recognize that our State Constitution has on occasion been read to provide broader rights than those required by the United States Constitution. *See State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988) (N.C. Supreme Court refused to adopt good faith exception to illegal searches and seizure). However, defendant has cited no authority, and we have found none, wherein our Courts have elected to address these issues under Article 1, Section 23. *But see Torres*, 330 N.C. at 531, 412 S.E.2d at 28 (Justice Martin's concurring opinion adopts the Fifth Amendment procedural safeguards insured by *Miranda* as those afforded under Article 1, Section 23). We find no basis, in this situation, for applying the State Constitution in a manner differently from the United States Constitutional Amendments discussed previously and therefore hold that the trial judge properly denied defendant's motion to suppress his inculpatory statement.

II.

[6] By defendant's second assignment of error he contends that the trial court's imposition of the maximum punishment, based upon a finding of the aggravating factor that defendant had a prior conviction punishable by more than sixty days imprisonment, constitutes cruel and unusual punishment in violation of the Eighth Amendment, where the prior conviction was for disorderly conduct.

On appellate review, our task is to determine whether the trial judge abused his discretion in imposing a sentence greater than the presumptive sentence. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983). The proper test for determining whether an abuse of discretion has occurred is the rational basis test. This grants the trial judge a great deal of discretion in finding factors in aggravation and mitigation, as well as in sentencing. It is only in exceedingly unusual non-capital cases that a sentence imposed by a trial court will be so disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment. *State v. Ysaquire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). A trial

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judge is not required to justify the weight he attaches to any one factor and it is within his discretion to determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983); *see also State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986) (trial judge found that a single aggravating factor outweighed seven mitigating factors). The sentencing judge also retains the discretion to impose multiple sentences to run consecutively or concurrently. *Ysaquire*, 309 N.C. at 785, 309 S.E.2d at 440. When the sentence is supported by the evidence introduced at trial, it will not be disturbed on appeal. *State v. Ruffin*, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

In the subject case, defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. Assault with a deadly weapon with intent to kill inflicting serious injury is a class F felony carrying a presumptive sentence of six years and a maximum sentence of twenty years. Robbery with a dangerous weapon is a class F felony which carries a mandatory minimum sentence of fourteen years and a maximum sentence of forty years. The trial judge found as an aggravating factor that defendant had a record of criminal offenses involving punishment of more than sixty days confinement, based upon a prior conviction for disorderly conduct. The court, upon finding no mitigating factors, determined that the aggravating factors outweighed mitigating factors and sentenced defendant to consecutive terms of 20 years imprisonment on the assault with a deadly weapon conviction and 40 years imprisonment on the robbery with a deadly weapon conviction.

The imposition of consecutive maximum terms does not, standing alone, constitute cruel and unusual punishment. "A defendant may be convicted of and sentenced for each specific criminal act which he commits." *Ysaquire*, 309 N.C. at 786, 309 S.E.2d at 441. Defendant was convicted of two serious crimes, both involving the use of deadly weapons. It was within the trial court's discretion to impose the maximum sentence for those offenses and we find nothing so grossly disproportionate in the sentencing judgment for these criminal offenses to represent a cruel or unusual punishment in North Carolina.

For the foregoing reasons, defendant failed to show prejudicial error in his trial and sentencing and the judgment is therefore affirmed.

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[111 N.C. App. 72 (1993)]

No Error.

Judges JOHNSON and JOHN concur.

STATE OF NORTH CAROLINA v. MARY RUTH WEBSTER

No. 9111SC1101

(Filed 20 July 1993)

1. Constitutional Law § 327 (NCI4th)— delay between arrest and trial—no speedy trial violation

Defendant's constitutional right to a speedy trial was not violated by a delay of sixteen months between her arrest on 30 November 1989 and her trial for murder beginning on 8 April 1991 where the case was calendared but not tried several times during the summer of 1990 but no explanation was given for those delays; jury selection began in September 1990 but the case was continued because of scheduling conflicts of the trial judge; the case was not heard in December 1990 because of concerns about trying the case piecemeal over the Christmas holidays; in January 1991 a new district attorney needed time to become familiar with defendant's case; defendant did not file her demand for a speedy trial until 28 January 1991; and all of defendant's witnesses were still available and she failed to show any loss of evidence caused by the delay. U.S. Const. amend. VI; N.C. Const. art. I, § 19.

Am Jur 2d, Criminal Law §§ 652-656.**Accused's right to speedy trial under Federal Constitution — Supreme Court cases. 71 L. Ed. 2d 983.****2. Constitutional Law § 325 (NCI4th)— delays in trying case—no due process violation**

Defendant was not denied due process by the prosecutor's calendaring of her murder case for trial ten times before it actually went to trial where there was no evidence that the prosecution purposefully caused the delays in order to obtain any advantage over defendant, and defendant failed to show that the delays resulted in actual prejudice to the defense of her case.

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Am Jur 2d, Criminal Law §§ 655, 656, 856, 859, 860, 863.

Accused's right to speedy trial under Federal Constitution — Supreme Court cases. 71 L. Ed. 2d 983.

3. Homicide § 304 (NCI4th) — second-degree murder — sufficient evidence to support submission

The evidence supported the trial court's submission to the jury of a charge of second-degree murder of her husband after the court dismissed the charge of first-degree murder where the State's evidence tended to show that the victim was shot at close range but there were no fingerprints on the gun and no traces of lead, barium or antimony on the victim's hands; the wound was atypical of a self-inflicted wound; no handwipings were taken from defendant because she had been to the bathroom where she might have washed her hands; defendant was the beneficiary of the victim's life insurance policies; defendant and the victim argued about another woman and financial matters on the night in question; and the victim had told his mother that he was moving out of the trailer he shared with defendant. The jury could have found from the evidence that defendant intentionally and unlawfully killed her husband but that she acted without premeditation and deliberation.

Am Jur 2d, Homicide §§ 470, 472; Trial §§ 723, 725.

4. Criminal Law § 571 (NCI4th) — absence of defendant during jury deliberations — mistrial not required

The trial court did not err by failing to declare a mistrial when defendant was absent during the final two hours of the jury deliberations because her son had been killed in an automobile accident where the court informed the jury that defendant had been excused from the day's proceedings for good cause shown.

Am Jur 2d, Trial §§ 1708, 1717.

5. Constitutional Law § 345 (NCI4th) — jury verdict in defendant's absence — error not prejudicial

Any violation of defendant's right to be present at every stage of her trial by the trial court's acceptance of the jury's verdict in a second-degree murder case in the absence of defendant was not prejudicial where the court explained that

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defendant was absent for good cause shown, and defendant's counsel was present and adequately represented her. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

Am Jur 2d, Criminal Law § 921.

6. Evidence and Witnesses § 2411 (NCI4th)— limiting number of character witnesses

The trial court did not err in limiting the number of defense character witnesses to eight in a prosecution of defendant for the murder of her husband even though defendant contended that the issue of her truthfulness was crucial since she was the only witness who could testify concerning the events during the evening in question. N.C.G.S. § 8C-1, Rules 611(a) and 403.

Am Jur 2d, Trial § 336.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses. 17 ALR3d 327.

7. Criminal Law § 1085 (NCI4th)— presumptive sentence— findings of aggravating and mitigating factors not required

The trial court is not required to make findings of aggravating and mitigating factors when the presumptive sentence is imposed. N.C.G.S. § 15A-1340.4(b).

Am Jur 2d, Criminal Law §§ 598, 599.

Judge WELLS dissenting.

Appeal by defendant from judgment entered 10 May 1991 by Judge Robert H. Hobgood in Johnston County Superior Court. Heard in the Court of Appeals 1 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Norma S. Harrell, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale and Jacquelyn L. Lee, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted of second degree murder and given the presumptive sentence of fifteen years. She now appeals, alleging a violation of her right to a speedy trial and other errors.

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Defendant presented evidence tending to show that the deceased, Melvin Braxton Webster, committed suicide. Defendant and Mr. Webster had been married for 23 years. In the weeks before his death, Mr. Webster had received two warnings at work and was concerned about losing his job. He had consulted a doctor one week prior to death regarding swollen lymph nodes in his neck. On the evening in question, a phone call from their son Dennis precipitated an argument between the Websters concerning whether or not defendant would go to Florida to visit him. They continued to argue until retiring for bed. Defendant slept on the couch while her husband went into the bedroom. According to defendant, upon being awakened a short time later by a thumping noise, she went into the bedroom, and discovered that her husband had been shot.

Defendant called her next door neighbor, Gary Wheeler, who went to the Webster residence, saw Mr. Webster, and had his wife call the authorities. He observed no blood on defendant's clothing or person.

Detective Kenneth Eatman arrived at the scene about 45 minutes after defendant first called Mr. Wheeler. He found a .38 caliber pistol on the bed near defendant's head. He did not take hand wipings from defendant because he had seen her go to the bathroom, where she could have washed her hands. No fingerprints were found on the gun. No significant amounts of barium, antimony, or lead were found on handwipings taken from Mr. Webster. The State's pathologist testified that the gunshot wound was atypical of a self-inflicted wound. Another expert testified that Mr. Webster's death could have been either a suicide or an accident.

Defendant testified that she did not shoot her husband, and presented several character witnesses who testified to her good reputation for truth and honesty. On 19 April 1991 defendant's son was killed in an automobile accident, necessitating her absence from the final hours of jury deliberation. The court denied defendant's motions for a mistrial.

The State presented evidence that the Websters had purchased a life insurance policy on Mr. Webster, with defendant as the beneficiary, and that in early 1989 Mr. Webster enrolled for supplemental life insurance through his employment. Several witnesses testified that Mr. Webster had been in a normal mood on the day of his death. The evidence also indicated that the argument on the night in question concerned another woman as well as finan-

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cial matters. Mr. Webster's mother testified that he told her he was moving out of the trailer and would see her Saturday, 11 November. This would have been the week after his death.

I. Speedy Trial

[1] Defendant first argues she was denied her constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution, and Article 1, Section 19, of the North Carolina Constitution. About sixteen months elapsed between defendant's arrest and trial. According to defendant, the prosecution willfully caused the delay, resulting in prejudice to defendant and entitling her to a dismissal of the indictment with prejudice.

Defendant was arrested on 30 November 1989, and was indicted on 29 January 1990, two months after her arrest. Defendant requested voluntary discovery on 10 January. She filed a motion to continue in February 1990. Although the case was calendared for trial several times during the summer of 1990, no courtroom proceedings were held until 4 September 1990. No explanation was given for the summer 1990 delays. During the week of 4 September motions were heard and eight jurors were selected. Judge I. Beverly Lake, Jr., however, noted some scheduling conflicts and that the trial would probably last two weeks. Judge Lake continued the case over defendant's objection. The District Attorney testified that he was ready to proceed at that point. The case was not heard at the 10 December 1990 session due to concerns about trying the two-week case piecemeal over the Christmas holidays. In January 1991 a new District Attorney needed some time to become familiar with defendant's case. Defendant filed her demand for a speedy trial on 28 January 1991. The motion was denied and the case went to trial on 8 April 1991, two months and eleven days later. The defendant was given five days credit for time served awaiting trial.

Four factors must be weighed in analyzing speedy trial issues: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of [the] right to a speedy trial, and (4) [the] prejudice resulting from the delay." *State v. Willis*, 332 N.C. 151, 164, 420 S.E.2d 158, 163 (1992). The length of the delay is not determinative of the speedy trial issue. *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904, *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985). The appropriate length of time is initially within the discretion of the trial judge, and the State is entitled

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to an adequate period of time in which to prepare the case for trial. *Id.* The North Carolina Supreme Court has held that a delay of 22 months was not "of great significance," but merely constituted a triggering mechanism for further examination of the speedy trial issue. *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984) (quoting *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975)). The length of the delay in this case from arrest to trial was over 16 months.

Defendant has the initial burden of presenting a *prima facie* case that the delay was caused by the willful acts or negligence of the prosecution. *Pippin*, 72 N.C. App. at 391, 324 S.E.2d at 904. Defendant must show that the delay was unjustified and engaged in "for the impermissible purpose of gaining a tactical advantage over the defendant." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54 (1990). The State is not responsible for delays caused by defendant. *Pippin*, 72 N.C. App. at 393, 324 S.E.2d at 905. We note that no explanation is given for the summer 1990 delays in this case. Defendant has not presented any evidence that those delays were unjustified or purposefully engaged in by the State. Furthermore, the State was clearly not responsible for the September and December 1990 delays. They resulted from scheduling conflicts of the trial judge and the Christmas holidays. Finally, the new District Attorney was certainly entitled to familiarize himself with the case in January 1991.

The court may examine whether the right was asserted at an early stage of the proceedings, or whether it was raised merely as a matter of form at the trial. *State v. Joyce*, 104 N.C. App. 558, 569, 410 S.E.2d 516, 522 (1991), *disc. rev. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). In this case, defendant did not raise her speedy trial claim at an early stage of the proceedings, but waited more than a year after her arrest to do so.

The test used to determine whether or not defendant has been prejudiced by the delay is "whether significant evidence or testimony that would have been helpful to the defense was lost due to delay." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990). In this case defendant claims the delay disrupted her life, drained her financial resources, curtailed her association with other people in the community, and caused her anxiety as well as depriving her of liberty. As the State points out, however, all of defendant's witnesses were still available at the time of the

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hearing on her motion to dismiss, and defendant had not shown any loss of evidence.

After balancing the four factors we conclude that defendant's right to a speedy trial was not violated in this case. The length of the delay was sufficient to trigger an examination of the speedy trial issue. There is no evidence revealing the reasons for the summer 1990 delays, nor is there evidence that defendant made any oral or written demand that her case be tried during the summer of 1990. The delays after 4 September 1990 were caused by the trial judge and not by the State. It was reasonable for a new district attorney to require some time to review the case in January 1991. Finally, we note that defendant has not shown any actual prejudice to the presentation of her defense.

II. Prosecutor's Calendaring of Cases

[2] Defendant argues the district attorney improperly calendared her case for trial ten times before it actually went to trial in April 1991, and alleges that this constituted "unreasonable and unjustified conduct for the purpose of deliberately and unnecessarily gaining tactical advantage over the defendant." The defendant only asked for one continuance throughout the entire period. Furthermore, the State failed to inform her whether or not she would be tried for her life. Defendant argues such conduct amounted to a denial of due process and entitles her to a dismissal of the indictment.

As the State points out, the record does not reveal the reasons for the delays which occurred prior to September 1990. Defendant has not shown any evidence indicating the prosecution purposefully caused the delays in order to obtain any advantage over defendant. Furthermore, according to *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981), "the *sine qua non* of a due process violation is actual prejudice to the defense of the case." *Id.* at 8, 277 S.E.2d at 522. Defendant has not shown the delays resulted in actual prejudice to the defense of her case. We find no error in the trial court's denial of this motion to dismiss.

III. Dismissal of First-Degree Murder Charge

[3] Defendant argues the trial court erred in submitting the charge of second degree murder to the jury after dismissing the charge of first degree murder, claiming a violation of due process because the evidence does not support a theory of second degree murder.

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Defendant thus claims she is entitled to a dismissal of the murder charge in the indictment.

If the evidence only supports a finding of first degree murder a charge of second degree murder may not be submitted to the jury. *State v. Arnold*, 329 N.C. 128, 138-39, 404 S.E.2d 822, 829 (1991). Second degree murder is "the unlawful killing of another with malice, but without premeditation and deliberation." *State v. Spivey*, 102 N.C. App. 640, 649, 404 S.E.2d 23, 28 (1991). An indictment for murder includes both first and second degree murder. *Id.* Generally, the State's decision to abandon a first degree murder charge and proceed on the lesser included offense is not prejudicial to defendant, as long as there is evidence to support the lesser offense. *Id.* at 648-49, 404 S.E.2d at 28 (citation omitted).

Defendant relies on cases which state that a jury's possible failure to find first degree murder does not require instruction on second degree murder. *See, e.g., State v. Cummings*, 326 N.C. 298, 317, 389 S.E.2d 66, 77 (1990). The cases cited contain clear, undisputed evidence of first degree murder, such as lying in wait, *State v. Leroux*, 326 N.C. 368, 376, 390 S.E.2d 314, 321, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990), and a coldly calculated and planned killing, *Cummings*, 326 N.C. at 317, 389 S.E.2d at 77.

In the case at hand the State points out that there is no direct evidence of premeditation and deliberation. There is circumstantial evidence that the bullet wound was atypical of a self-inflicted wound, without traces of lead, barium or antimony on the deceased's hands. The deceased was shot at close range, defendant was the sole beneficiary of the life insurance proceeds, and the deceased may have been involved with another woman. While this evidence tends to show that defendant may have killed her husband, it does not necessarily lead to the conclusion that defendant first premeditated and deliberated his death. Furthermore, uncontradicted evidence indicates that defendant and the deceased argued earlier that evening. The jury could have found from the evidence presented that defendant intentionally and unlawfully killed her husband, but that she acted without premeditation and deliberation. The evidence thus supports a finding of second degree murder. We find no error in the trial court's instruction on second degree murder.

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IV. Insufficiency of Evidence

Defendant argues the trial court erred in denying her motion to dismiss at the close of all the evidence based on the insufficiency of the evidence. Defendant claims the State has not produced substantial evidence of the elements of the crime charged or that defendant was the perpetrator of the crime.

On defendant's motion to dismiss, the evidence, including circumstantial evidence, must be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Turnage*, 328 N.C. 524, 530, 402 S.E.2d 568, 572, *cert. denied*, 330 N.C. 200, 412 S.E.2d 64 (1991); *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). We find that the evidence, discussed above, was sufficient to go to the jury on the charge of second degree murder.

V. Defendant's Absence on Final Day of Jury Deliberation

A. Substantial and Irreparable Prejudice Warranting Mistrial

[4] Defendant argues the court should have declared a mistrial because of conduct occurring outside the courtroom which substantially and irreparably prejudiced her case. N.C.G.S. § 15A-1061 (1988). Defendant bases this contention on the fact that she could not be present on the final day of jury deliberations due to the accidental death of her son. She argues her "sudden absence" must have resulted in substantial and irreparable prejudice.

The State points out that the court informed the members of the jury that defendant had been excused from the day's proceedings for good cause shown, and that the prosecutor also had been excused. We cannot see how defendant's absence at this stage of the proceedings, during the final two hours of jury deliberations, could have resulted in substantial and irreparable prejudice to her case. Defendant has not presented any persuasive arguments as to why her absence that day would have somehow affected the jury's deliberations. We find this argument to be completely without merit.

B. Denial of Constitutional Right to be Present at Every Stage of Trial

[5] Defendant also argues that the court denied her the constitutional right to be present at every stage of her trial by accepting the jury's verdict in her absence and by denying her motion for

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appropriate relief. Defendant cites the Confrontation Clause from the Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, as well as Article I, Section 23 of the North Carolina Constitution, which confers upon her the right to be present at every stage of her trial. *See State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).

We agree with the State that any error here was certainly harmless. N.C.G.S. § 15A-1443 (1988). The court had already explained that defendant was absent for good cause shown. At this stage of the proceedings defendant's presence could not have made a difference to the outcome of the trial. The jury had already reached its verdict. Defendant's counsel was present and able to adequately represent her.

VI. Character Witnesses for Defendant

[6] Defendant claims the court erred in limiting the number of defense character witnesses, and that this error resulted in a denial of due process. She argues that the issue of her truthfulness was crucial since she was the only witness who could testify as to the events on the evening in question. Thus, she should have been entitled to bolster her character for truthfulness and credibility as much as possible.

The trial court may control the production of evidence in order to avoid "needless consumption of time," and may exclude relevant evidence based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rules 611(a) and 403 (1992). Our Supreme Court has specifically stated that a trial court, within its sound discretion, may limit the number of character witnesses. *State v. McCray*, 312 N.C. 519, 537, 324 S.E.2d 606, 618 (1985) (court only allowed defendant to present one of five character witnesses).

On the first day of defendant's evidence, she presented six character witnesses who testified to her reputation for truth and honesty. Upon the State's motion to exclude further character evidence, the court ruled it would allow only two more character witnesses, since any additional witnesses would be deemed cumulative. We find no error in the court's decision to limit the number of character witnesses. The court gave defendant sufficient opportunity to present character evidence through the testimony of eight witnesses.

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VII. Statutory Mitigating Factors

[7] Defendant finally argues that the court should have made findings regarding aggravating and mitigating factors even though the court imposed the presumptive sentence upon her. According to N.C.G.S. § 15A-1340.4(b) (Cum. Supp. 1992), a judge need not make findings regarding aggravating and mitigating factors if imposing the presumptive term. However, defendant argues a presumptive sentence is inflexible and “disregards the nature of the offender,” and that she should therefore be entitled to findings in mitigation. Defendant claims the judge’s failure to do so was an abuse of discretion entitling her to a new sentencing hearing.

Defendant’s argument is meritless. The court was not required to make findings in mitigation or aggravation under N.C.G.S. § 15A-1340.4(b). See *State v. Blake*, 83 N.C. App. 77, 82, 349 S.E.2d 78, 81 (1986), *aff’d*, 319 N.C. 599, 356 S.E.2d 352 (1987).

For the foregoing reasons, we find defendant received a fair trial, free from prejudicial error.

No error.

Judge COZORT concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

On the issue of speedy trial, I respectfully dissent.

Prior to the trial at which she was convicted and sentenced, defendant filed a motion to dismiss for denial of a speedy trial. That motion was heard on 12 February 1991 by Judge Wiley F. Bowen and was determined as follows:

THIS MATTER coming before the undersigned Judge of the Superior Court of Johnston County upon defendant’s motion to dismiss this cause on the grounds that she has been denied her constitutional rights to a speedy trial under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 19 of the North Carolina Constitution, the Court, following an evidentiary hearing, makes the following

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FINDINGS OF FACT:

1. The defendant was arrested on a warrant charging her with murder on or about November 13, 1989. On January 29, 1990, the defendant was indicted for first-degree murder by the Grand Jury of Johnston County.
2. The District Attorney's office placed this case on the trial calendar for the following week-long sessions of Johnston County Criminal Superior Court; February 12, 1990; March 12, 1990; April 2, 1990; July 9, 1990; July 30, 1990; August 13, 1990; September 4, 1990 and December 10, 1990.
3. Prior to February 12, 1990 session, the defendant filed a motion to continue. The defendant has filed no other motions to continue.
4. The September 4, 1990 session of criminal superior court was a special session scheduled by the Administrative Office of the Courts at the request of the District Attorney. This session began on Tuesday because Monday was Labor Day. On Tuesday, the State called this case for trial and jury selection began. On Wednesday morning, the Court, on its own motion, ordered the case continued, citing the anticipated length of the trial and the scheduling conflicts of the presiding judge, the Honorable I. Beverly Lake, Jr. The jury had not been impaneled. The case was continued over defendant's objection.
5. The former District Attorney for the Eleventh Prosecutorial District, Mr. John W. Twisdale, whose last term expired December 31, 1990, was called as a witness by the defendant and testified that he had placed this case on the calendar during the February, March, April, July and August sessions of court for the purposes of hearing pre-trial motions and in the hopes that a negotiated plea might be reached. He testified that the State was ready for trial on September 4, 1990. He further testified that after September 4, 1990, he was understaffed and did not have the personnel necessary to try this case.
6. On January 28, 1991, the defendant filed a written demand for a speedy trial. The defendant had made no demand for a speedy trial prior to that date although the defendant had objected to the continuance of this case during the September 4, 1990 session of court.

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7. As a result of the charge pending against her, the defendant's employment has been disrupted, her financial resources have been drained, her association with people in the community has been curtailed, her liberty has been impaired, and she has suffered anxiety.

8. Despite the delays in the trial of this case, the Court finds that the defendant has not been deprived of any defenses available to her and that all potential witnesses for the defendant are still available.

Based upon the foregoing FINDINGS OF FACT, the Court concludes as a matter of law that any prejudice to the defendant caused by the delay in the trial of this case is not so great as to constitute a denial of her constitutional rights to a speedy trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant's motion is denied.

In *State v. Pippin*, 72 N.C. App. 387, 324 S.E.2d 900, *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985), we considered an appeal by the State from a trial court order dismissing the charges against defendant Pippin for denial of his constitutional right to a speedy trial. In *Pippin*, we carefully reviewed the law applicable in such cases. We need not repeat that discussion here, but based on the findings in Judge Bowen's pre-trial order in this case, I find *Pippin* to be directly on point and conclude that defendant's motion to dismiss for denial of her right to a speedy trial should have been granted.

First, the length of the delay in this case was significant: 494 days from arrest to trial (457 days in *Pippin*). It should not be overlooked that from the date of her indictment on 29 January 1990 until 4 September 1990, defendant was subject to being tried capitally.

Second, Judge Bowen's order clearly reflects either willful or neglectful delay by the State—or both—and arguably oppressive delay. The district attorney testified that he repeatedly calendared defendant's case for trial in hopes of obtaining a plea, clearly implying that he purposely and repeatedly delayed the trial of defendant's case. Additionally, it should not be overlooked that on one occasion, defendant was subjected to an aborted trial due to "scheduling conflicts" of the presiding judge.

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[111 N.C. App. 85 (1993)]

Third, the record reflects that defendant asserted her right to a speedy trial (1) by appearing prepared for trial each time her case was calendared and by being present for one aborted trial, and (2) by a timely motion. At the time defendant made her motion for a speedy trial, she had been under arrest for murder for at least 15 months and under indictment for 13 months. Since her case had been repeatedly calendared by the State and not tried, it cannot be said that defendant's motion was not timely.

Fourth, Judge Bowen's order and the record reflect the requisite facts and degree of prejudice resulting from the delays.

For these reasons, the judgment below should be vacated.

IN RE: BECKER, AARON MICHAEL, BELL (BECKER), JACOB TRISTAN, BECKER, JOSHUA LEE, BECKER, MATTHEW SETH, AND BECKER, MARK A., MINOR CHILDREN

No. 9229DC436

(Filed 20 July 1993)

1. Parent and Child § 104 (NCI4th) — petition to terminate father's parental rights—children left in foster care—sufficiency of evidence—dismissal of petition error

Evidence was sufficient to withstand respondent father's motion to dismiss a petition for termination of parental rights where it tended to show that the minor children were in foster care for approximately 29½ months prior to the filing of the petition; the father was incarcerated twice during that period; the father failed to maintain employment and to obtain suitable housing for the children following trial placement; he failed to pay child support during the six months prior to the filing of the petition and to participate in counseling and to attend any permanency planning seminars; and DSS provided diligent services to the respondents, including assistance in visitation with the children, assistance in obtaining housing, food stamps, medical care, and transportation, assistance in locating employment, and referral to mental health and AFDC.

Am Jur 2d, Parent and Child § 35.

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Parent's involuntary confinement, or failure to care for child as a result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 ALR3d 417.

2. Parent and Child § 106 (NCI4th) — petition to terminate father's parental rights — sufficiency of evidence of failure to pay child support — dismissal of petition error

The trial court erred in granting respondent father's motion to dismiss a petition for termination of parental rights where the evidence was sufficient to show that respondent father had the ability to pay some child support out of unemployment benefits and a tax refund during the six months preceding filing of the petition, despite his incarceration and his alleged medical disability, but that he willfully failed to pay a reasonable portion of the cost of care during this period.

Am Jur 2d, Parent and Child § 35.

Parent's involuntary confinement, or failure to care for child as a result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 ALR3d 417.

3. Parent and Child § 104 (NCI4th) — termination of mother's parental rights — failure to maintain home, pay support, make improvements — sufficiency of evidence

Evidence was sufficient to support the trial court's findings and conclusions that respondent mother willfully left her children in foster care, made no reasonable progress in correcting the conditions which led to the removal of the children, and willfully failed to pay support for her children where the evidence tended to show that the mother was aware of what she needed to do to regain custody of her children, but she failed to obtain suitable or permanent housing for them and had been "living in the streets"; she maintained employment for only several weeks despite her educational background and good health; she did not attend any counseling sessions, had three criminal convictions, failed to attend some of the scheduled visits with the children, and paid no child support; and DSS provided diligent efforts to encourage the mother to strengthen the parental relationship with the children.

Am Jur 2d, Parent and Child § 35.

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[111 N.C. App. 85 (1993)]

Parent's involuntary confinement, or failure to care for child as a result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 ALR3d 417.

Appeals by petitioner, McDowell County Department of Social Services, and respondent, Deondrea Suzanne Becker, from order entered 29 January 1992, in McDowell County District Court by Judge Robert S. Cilley. Heard in the Court of Appeals 1 April 1993.

Goldsmith & Goldsmith, P.A., by James W. Goldsmith, for petitioner-appellee/cross appellant, McDowell County Department of Social Services.

Story, Hunter & Evans, P.A., by W. Hill Evans, for petitioner-appellee/cross appellant, Guardian ad Litem for the minor children.

Carnes and Franklin, P.A., by Hugh J. Franklin, for respondent mother-appellant.

H. Russell Neighbors, Jr. for respondent father-appellee.

MCCRODDEN, Judge.

The McDowell County Department of Social Services (DSS) appeals from the trial court's dismissal of its petition to terminate the rights of respondent father, Mark Terrell Becker (father), in his five minor children. The respondent mother of the children, Deondrea Suzanne Becker (mother), cross-appeals from an order terminating her parental rights pursuant to N.C. Gen. Stat. § 7A-289.32 (1989). The resolution of both appeals necessitates a review of the evidence.

On 11 May 1988, DSS obtained custody of respondents' five children because the mother was incarcerated and DSS could not locate the father. A few days after placement of the children in foster care, DSS determined that the father was also incarcerated.

On 13 May 1988, the mother obtained her release from jail, but did not make any contact with DSS or the children for almost three weeks. After she contacted the agency on 2 June 1988, DSS assisted her in finding and moving into a residence, and on 1 July 1988, DSS returned the children to her. On 25 July 1988, the mother was again incarcerated and the children were returned to foster

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care. By order entered 26 July 1988, the McDowell District Court adjudicated the children as dependent juveniles pursuant to N.C. Gen. Stat. § 7A-517(13) (1989), and DSS received custody of them.

The mother remained incarcerated until 12 December 1988, and the father was incarcerated from 16 May 1988 until 3 May 1989. While the respondents were incarcerated, DSS assisted them in maintaining contact with the children through letters, phone visits, and some jail visits.

After being released from prison on 12 December 1988, the mother failed to attend a scheduled Christmas visit with the children and, until 16 February 1989, failed to make any contact with DSS or the children. After she reestablished contact, DSS again assisted her in arranging visits with the children, finding employment, and attempting to obtain suitable housing for her and the children. Respondent mother, however, did not find suitable housing or obtain a residence at this time.

After the father's release from prison on 3 May 1989, he obtained employment and, on 9 June 1989, reconciled and began living with the mother. DSS helped respondents maintain contact with the children, encouraged them to attend counseling, and offered assistance in obtaining suitable housing. Respondents eventually obtained a residence on 1 December 1989, in Caldwell County, and following a review on 11 January 1990, the court placed the children with respondents on a trial basis.

In July 1990, respondents experienced marital problems and the father left the home. The father reported to DSS that the mother regularly smoked marijuana, failed to prepare food properly for the children, failed to keep the children's clothes clean, left the children unsupervised in the evenings for long periods of time, and was generally not taking good care of the children. On 27 August 1990, DSS returned the children to foster care because of the marital instability of the respondents and the mother's failure to care for the children. On 29 August 1990, the mother's landlord evicted her from her residence.

On 10 October 1990, respondents entered into parent/agency contracts with DSS, in which they agreed to maintain schooling or employment, pay support for the children, obtain individual counseling, refrain from illegal activities, and obtain suitable housing for the children. During the six months prior to filing the

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termination petition, the mother worked for several weeks and grossed \$200.00 per week, but quit her job, citing a lack of transportation. The mother had completed a portion of a college education, was in good health and capable of obtaining employment, and had stated to a social worker that she could obtain employment if she chose to do so. The father, likewise, failed to remain employed during the time the children were in foster care. He was unemployed from February 1990 until July 1990, and from December 1990 until the termination hearing.

In the support agreements, the mother agreed to pay \$5.00 per month for the support of the children, and the father agreed to pay \$150.00 per month for support. The mother paid no child support for the minor children during the entire time the children were in foster care. During the six months preceding the filing of the termination of parental rights petition (5 January 1991 through 5 July 1991), the father received unemployment benefits in the amount of \$135.00 per week from at least 22 February 1991 until 1 April 1991, and in February 1991, he received an income tax refund in the amount of \$900.00. Nevertheless, he paid no child support during the six month period preceding the filing of the petition for termination. The cost of care for the minor children was in excess of \$45,000.00 at the time of the hearing.

From 1988 until the date of the hearing, both respondents had been incarcerated several times, and neither had attended any counseling sessions. Following their separation, respondents had failed to obtain a suitable residence. The father established temporary residences with his uncle and friends, and the mother was never able to provide DSS with an address where she could be reached. The mother had lived in more than twenty residences, and in her own words, had been living "in the streets."

On 5 July 1991, DSS filed its petition to terminate respondents' parental rights, and the hearing was held on 6 and 7 January 1992. The trial court granted the father's motion to dismiss at the close of DSS's evidence and, at the close of the mother's evidence, entered an order terminating her parental rights.

DSS'S APPEAL

DSS's appeal, in which the children's guardian ad litem joins, assigns as error the trial court's dismissal of the petition to terminate the parental rights of the father. DSS contends that the

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evidence was sufficient to establish that at least two grounds for terminating parental rights existed pursuant to N.C.G.S. § 7A-289.32.

We note at the outset that the record contains no answer of the father to the petition to terminate his parental rights. The failure of the father to respond to the petition within thirty days after service of summons and petition is grounds for terminating all parental and custodial rights. N.C. Gen. Stat. § 7A-289.28 (1989). Although the father was incarcerated at the time the petition was filed, he had an attorney who had represented him in prior hearings, and there is no reason for his failure to respond.

In granting the father's motion to dismiss, the trial court stated the following:

My reasons as to the father are, as to the neglect allegation, that there has been an insufficient showing even given the deference due the Petitioner at this stage of the proceedings of neglect by the father during periods when he had the opportunity to neglect or not neglect, which periods are somewhat limited by his not having had legal custody during any time relevant to these proceedings.

As to the allegation of wilfully having left the children in foster care, to some extent that is also weakened by the father's lack of legal custody in that it was not up to him to leave or not leave the children in foster care, but to an extent he had a responsibility to act to retrieve the children from foster care.

The statute conditions that responsibility to show improvement on a diligent effort by the Department of Social Services, and I'm aware from the testimony of Mrs. Comer that from May of 1989 the McDowell County Department of Social Services did not offer, nor provide, assistance to the Respondent Father, according to her testimony.

There was testimony by Mr. Ryan that there was assistance in transportation, but given the difficulties to which I will allude momentarily that Respondent Father encountered, the concededly praiseworthy efforts of the Department to provide transportation do not, in my opinion, rise to the level that the statute requires in order to say that someone has failed to respond to diligent efforts.

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Finally, to the allegation of six months in the Departmental custody during which there has been a willful failure to provide support; granted that there has been a demonstrated failure to provide direct support, I do not believe that failure can be dubbed willful in light of the intervention of what for want of a better term we may call force measure in the form initially of the—I have to say—inevitable activation of a suspended jail sentence for his failure to meet conditions which were in practical terms probably unmeetable; and later the Respondent Father's medical disability from holding gainful employment.

I do not ignore but do not give a great deal of weight to the information from the Employment Security Commission showing that the father had an income from Unemployment of \$133 per week for a period of time from the later part of 1991, even giving due weight to that information, it does not appear to me at this point that there has been a sufficient showing for the Petitioner to carry its burden on the father.

These findings are somewhat at odds with findings the court entered later when it terminated the mother's parental rights. For example, the trial court in those findings determined that DSS had provided to both respondents diligent services which included assistance with visiting their children, aid in obtaining housing, food stamps, medical care, and transportation, and support in locating employment, referral to mental health, and AFDC. N.C. Gen. Stat. § 7A-289.30(e) (1989) requires that "[a]ll findings of fact shall be based on clear, cogent, and convincing evidence." It is difficult to reconcile the two sets of findings except by reference to the transcript which supports the finding that DSS did provide diligent services to the father as well as the mother.

Furthermore, this Court is struck by what appears to be the disparate treatment of the two respondents. Although the trial court used the father's lack of custody as an extenuating factor, it did not do so for the mother. Yet the record indicates their custody coincided. In 1990, after marital discord, the father did abandon the home, and he subsequently criticized the mother for her lack of care; however, marital discord and separation do not eliminate a parent's obligation to his children. Furthermore, a parent does not obviate that obligation by simply calling DSS and complaining about the other parent's failures, as the father did in this case. There is nothing in the record to show that, during

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the period he found fault with the mother, he sought to prepare food for the children, keep their clothes clean, supervise them, or otherwise take care of them. Those are a father's responsibilities as well as a mother's.

Moreover, while the father filed no answer to the petition for termination, the mother did, indicating at least her diligent opposition to termination. Finally, the mother operated under some of the same constraints as the father, having been incarcerated a number of times during the relevant period.

With these concerns, we first review arguments made by DSS, in which DSS contends that it provided clear, convincing, and cogent evidence of the existence of at least two grounds to terminate the father's parental rights and that, therefore, the trial court should not have granted the father's motion to dismiss. When a Rule 41(b) motion is made in a nonjury trial, the judge becomes both the judge and jury, and he must consider and weigh all competent evidence before him. *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982); N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990). "The trial judge may weigh the evidence, find the facts and sustain defendant's Rule 41(b) motion at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial." *Childers v. Hayes*, 77 N.C. App. 792, 794, 336 S.E.2d 146, 148 (1985). He may decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence. *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973). We note the father's argument that the trial judge weighed the evidence and found that the evidence was insufficient to withstand a motion to dismiss. We find, however, that the evidence was far from making this a "clear case" and that the trial court's dismissal was, therefore, inappropriate.

The grounds for terminating the rights of both parents are found in the following subsections of N.C.G.S. § 7A-289.32:

The court may terminate the parental rights upon a finding of one or more of the following:

. . . .

- (3) The parent has willfully left the child in foster care for more than eighteen months without showing to

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the satisfaction of the court that reasonable progress under the circumstances has been made within 18 months in correcting these conditions which led to the removal of the child or without showing positive response to the diligent efforts of a county Department of Social Services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty

- (4) The child has been placed in the custody of a county Department of Social Services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

A finding of any one of the enumerated grounds in N.C.G.S. § 7A-289.32 is sufficient for the trial judge to terminate parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984).

[1] We agree with DSS's argument that it provided sufficient evidence that the father willfully left the minor children in foster care for more than eighteen months without showing that reasonable progress had been made pursuant to N.C.G.S. § 7A-289.32(3). In his written findings of fact, the trial judge determined that, excluding the periods of trial placement, the minor children were in foster care for a period of approximately 29½ months prior to the filing of the petition and that the father had been incarcerated two times during the period that the children were in foster care. Moreover, the father had failed to maintain employment since December 1990, and to obtain suitable housing for the children following the trial placement. He failed to pay child support during the six months prior to the filing of the termination petition and to participate in counseling and attend any permanency planning seminars. As noted above, the court also found that DSS provided diligent services to the respondents, including assistance in visitation with the children, assistance in obtaining housing, food stamps, medical care, and transportation, assistance in locating employ-

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ment, and referral to mental health and AFDC. We find that the evidence presented pursuant to N.C.G.S. § 7A-289.32(3) was sufficient to withstand a motion to dismiss.

[2] DSS also contends that it provided sufficient evidence to show that the father willfully failed to pay a reasonable portion of the cost of care during the six month period preceding the filing of the petition. In determining what is a "reasonable portion" under N.C.G.S. § 7A-289.32(4), the parent's ability to pay is the controlling factor. *In re Bradley*, 57 N.C. App. 475, 478, 291 S.E.2d 800, 802 (1982). In *In re Roberson*, the Court stated that "[b]ecause a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990) (citation omitted). Since the father entered into a voluntary support agreement to pay \$150.00 per month, DSS did not need to provide detailed evidence of his ability to pay support during the relevant time period.

The trial judge granted the father's motion to dismiss, stating that the father's failure to pay support was not willful because he was incarcerated from 22 March 1991 until October 1991, and because he was medically disabled. However, the evidence shows that the father paid no child support during the six month period prior to the filing of the petition, although he received unemployment benefits of \$135.00 per week from 22 February 1991 through 1 April 1991, and he received an income tax refund in the amount of \$900.00 in February 1991. We find that the evidence was sufficient to show that respondent father had the ability to pay some support during the six month period preceding the filing of the petition, despite his incarceration and his alleged medical disability. The trial court erred in granting the father's motion to dismiss on this ground as well.

Because the trial court granted the father's motion to dismiss prior to his putting on evidence, this Court has no choice but to remand this portion of the proceedings to allow the father to present his case. We are aware that, although the petitioner may meet its burden of showing by clear, cogent, and convincing evidence that the grounds for terminating the rights of the father exist, the decision of the trial court is discretionary. *In re Pierce*, 67

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N.C. App. 257, 264, 312 S.E.2d 900, 904-05. In making that determination, the trial judge must carefully consider the best interests of the children, *In re Tate*, 67 N.C. App. 89, 96, 312 S.E.2d 535, 540 (1984), and in so doing should consider the fact, as he found, that upon her release from incarceration, the mother, whose termination of rights we affirm, intends to live with the father.

RESPONDENT MOTHER'S APPEAL

[3] In her appeal, attacking the trial court's entry of an order terminating her parental rights to the five minor children, respondent mother argues, first, that the evidence was insufficient to support the trial judge's findings and conclusions that grounds for terminating her parental rights existed and, second, that the trial judge abused its discretion in terminating her parental rights.

The mother challenges the sufficiency of the evidence on a number of points. First, she argues that she did not willfully leave the minor children in foster care as proscribed by N.C.G.S. § 7A-289.32(3), because she did not do so with purpose and deliberation. We disagree. Even if the mother made some efforts to regain custody of the children, this does not preclude a finding of willfulness. *Tate*, 67 N.C. App. at 94, 312 S.E.2d at 539. The evidence shows that the mother was aware of what she needed to do to regain custody of the children, but she nevertheless failed to improve her condition. Respondent mother entered into a parent/agency contract with DSS which required that she obtain suitable housing for the children, maintain schooling or employment, attend counseling, refrain from illegal activities, visit with the children, and pay child support. The evidence shows that although the children were placed with respondents from 20 January 1990 until 27 August 1990, they were returned to foster care due to the respondents' marital instability and respondent mother's neglect of the children. After the mother was evicted from the apartment, she failed to obtain suitable or permanent housing for the children and had been living "in the streets." From the time the children were placed in foster care until the date of the termination hearing, the mother maintained employment for only several weeks despite her educational background and good health. Furthermore, respondent mother did not attend any counseling sessions, had three criminal convictions, failed to attend some of the scheduled visits with the children, and paid no child support.

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Second, the mother argues that she showed reasonable progress in correcting the conditions that led to the removal of the children because some improvement was made. We also reject this argument. There was clear, cogent, and convincing evidence to support the trial judge's finding that the mother had failed to take any action toward improvement, and had made no improvement in remedying the conditions that led to the removal of the children. Although the children were returned to the respondents' home on a trial basis and the mother was employed for several weeks, the evidence shows that the mother failed to obtain positive results in improving the situation. Indeed, at periods of time relevant to the proceeding, respondent mother was unemployed despite being able to work, did not have a suitable residence, and suffered several periods of incarceration.

Third, the mother argues that the trial court erred in finding that DSS made diligent efforts to reunite the family. We disagree, finding ample evidentiary support, as noted in our review of the evidence, for the trial court's determination that DSS provided diligent efforts to encourage the mother to strengthen the parental relationship with the children.

In the mother's fourth argument, she contends that the trial court erred in finding that she willfully failed to pay support according to N.C.G.S. § 7A-289.32(4). Again, we disagree. On 10 October 1990, the mother entered into a voluntary support agreement which required her to pay \$5.00 per month for child support. Since there is nothing in the record to indicate that she challenged this amount, the question of whether the amount she was ordered to pay is a reasonable portion of the costs is not before this Court. *Tate*, 67 N.C. App. at 95, 312 S.E.2d at 539.

We must, however, determine whether the trial court's findings of fact support the conclusion that respondent mother willfully failed to pay support. The evidence showed that the mother paid nothing for the cost of care during the entire time the children were in foster care. The mother was employed during the six months preceding the filing of the petition, from May 1991 through June 1991, and earned \$200.00 per week. Respondent mother quit the job, citing lack of transportation. There was additional evidence, as the court found, that the mother, after bearing a child by a man other than respondent father, placed the baby for adoption in South Carolina and received as income between \$2,000 and \$4,000.

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Moreover, the mother had completed a portion of college education, was in good health and capable of obtaining employment, and had stated to a social worker that she could obtain employment if she chose to do so. We find that the trial court did not err in concluding that respondent mother willfully failed to pay support.

Respondent mother finally argues that the trial court abused its discretion in terminating her parental rights because termination was not in the best interests of the children. Although the trial judge may terminate a parent's rights upon a finding of any one of the separately enumerated grounds, *Pierce*, 67 N.C. App. at 261, 312 S.E.2d at 903, the trial judge is never required to terminate a parent's rights even though one or more of the conditions authorizing termination exists. *Tate*, 67 N.C. App. at 96, 312 S.E.2d at 540. Since we determine that the trial judge properly concluded that grounds for termination existed, as set forth in N.C.G.S. § 7A-289.32(3) and (4), we hold that the judge did not abuse his discretion in finding that it was in the best interests of the children to terminate the mother's parental rights.

In summary, we reverse the trial court's dismissal of the petition to terminate respondent father's rights and remand for further proceedings consistent with this opinion. With regard to the termination of the mother's parental rights, we affirm.

Affirmed in part; reversed in part.

Judges JOHNSON and ORR concur.

WILLIAM N. DIXON, ADMINISTRATOR OF THE ESTATE OF WILLIE L. DIXON v.
RUSSELL C. TAYLOR, M.D., AND WATAUGA HOSPITAL, INC., D/B/A
WATAUGA COUNTY HOSPITAL

No. 9224SC760

(Filed 20 July 1993)

1. Appeal and Error § 340 (NCI4th) — medical negligence — appeal limited to issues raised in assignments of error

It was assumed on appeal that there was sufficient evidence presented at trial to establish a duty and a breach of that

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duty by defendant hospital where the hospital assigned error only to the sufficiency of evidence as to proximate causation.

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

2. Physicians, Surgeons, and Other Health Care Professionals § 118 (NCI4th)— medical malpractice—multiple negligence claims—proximate cause contested—submission of all claims

The trial court correctly denied a hospital's motions for directed verdict and judgment notwithstanding the verdict in a medical malpractice action if there was substantial evidence in the record that any one of the four claims of negligence asserted by plaintiff was a proximate cause of plaintiff's injuries where the hospital did not attempt to distinguish between the different claims of negligence asserted by plaintiff and relied on the general claim that plaintiff's evidence was deficient as to proximate cause. Plaintiff is required to offer evidence of the essential elements of negligence on each claim in order to support submission of the issue of negligence to the jury on each claim. The trial court is required to withdraw a claim from the jury upon proper motion by defendant, which must allege with particularity the deficiencies that exist with respect to each separate claim of negligence. A failure to so allege justifies submission to the jury of the multiple claims of negligence if there is substantial evidence in the record, considered in the light most favorable to plaintiff, of the essential elements of negligence on any one of the multiple claims.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 357 et seq.

3. Hospitals and Medical Facilities or Institutions § 66 (NCI4th)— negligence—failure to restock Code cart—proximate cause of injuries

The trial court correctly denied a hospital's motions for a directed verdict and judgment notwithstanding the verdict where one of the negligence claims asserted by plaintiff was that the hospital failed to stock the Code cart with the appropriate laryngoscope blade and that this failure was a proximate cause of the victim's injuries, and, viewed in the light most favorable to plaintiff, the evidence establishes that the hospital's breach of duty in not having the Code cart properly restocked resulted in a three-minute delay in the intubation

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of the victim which was the proximate cause of the victim's brain death.

Am Jur 2d, Hospitals and Asylums §§ 31, 32.**4. Physicians, Surgeons, and Other Health Care Professionals § 149 (NCI4th)— respiratory therapist—standard of care—instructions**

The trial court did not err in a medical malpractice action in its instructions regarding the standard of care for a respiratory therapist where the instruction did not, as defendant hospital suggested, permit the jury to hold the respiratory therapist to a higher standard of care than a general practitioner in respiratory therapy.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 363 et seq.**5. Trial § 13 (NCI4th)— medical malpractice—request to take exhibit into jury room—previous objection out of jury's presence—agreement in jury's presence**

The trial court did not err by permitting an exhibit to be taken into the jury room during a medical malpractice trial where one defendant's attorney had stated in the absence of the jury that he objected to any exhibits being taken into the jury room, the jury returned during deliberations and asked to take an exhibit into the jury room, and the defense counsel who had objected stated that he had no objection. The attorney was not bound by his first objection and was within his rights to change his opinion. The Court of Appeals would not accept that attorneys should be allowed to take one position before the jury and another before the trial judge; furthermore, the trial court was prepared to dismiss the jury before deciding the issue, thus giving the Hospital's attorney an opportunity to object outside the presence of the jury. Having apparently thought that the better strategy was to offer his consent in the presence of the jury, the attorney cannot now complain.

Am Jur 2d, Trial §§ 1665, 1692.

Appeal by defendant and plaintiff from judgment entered 8 November 1991 in Watauga County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 10 June 1993.

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Michael E. Mauney and John Alan Jones for plaintiff-appellee/appellant.

Mitchell, Blackwell & Mitchell, P.A., by W. Harold Mitchell and Keith W. Rigsbee, for defendant-appellee Russell C. Taylor, M.D.

Dameron and Burgin, by E. Penn Dameron, Jr. and Charles E. Burgin, for defendant-appellant Watauga Hospital, Inc.

GREENE, Judge.

The defendant Watauga Hospital, Inc. (Hospital) appeals from a judgment entered 8 November 1991 ordering it to pay the sum of \$900,000 to William N. Dixon, Administrator of the Estate of Willie L. Dixon (plaintiff). Plaintiff appeals from the portion of that judgment ordering that plaintiff recover nothing of defendant Dr. Russell Taylor (Dr. Taylor).

The evidence before the trial court revealed that Willie L. Dixon (Mrs. Dixon) was admitted to the Hospital during the morning of 23 September 1984, under the care of Dr. Charles Sykes (Dr. Sykes), Dr. Taylor's business partner. Mrs. Dixon was admitted to a regular hospital room and was diagnosed with pneumonia in her right lung. During the evening of 23 September, Mrs. Dixon's condition began to deteriorate and Dr. Sykes ordered Mrs. Dixon to be moved to the Intensive Care Unit (ICU).

Mrs. Dixon's condition continued to deteriorate and at 2:40 a.m. on 24 September a Code Blue (Code) was called signifying that Mrs. Dixon's cardiac and respiratory functions were believed to have ceased. During this Code, a decision was made to intubate, insert an endotracheal tube into, Mrs. Dixon so that she could be given respiratory support by a mechanical ventilator. Following the Code and during the day of 24 September, Mrs. Dixon stabilized, however, she remained very ill.

Dr. Taylor assumed care of Mrs. Dixon at 9:00 a.m. on 24 September 1984. As Mrs. Dixon's condition stabilized, Dr. Taylor ordered that Mrs. Dixon be gradually weaned from the respirator so it could be determined whether she could be extubated, the endotracheal tube removed, that evening.

Around 9:45 p.m. on 24 September, Dr. Taylor went to Mrs. Dixon's room and instructed Carolyn Thompson (Thompson), a critical

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care nurse employed by the Hospital, to summon John Blackham (Blackham), a respiratory therapist employed by the Hospital, to Mrs. Dixon's room. Dr. Taylor testified that when he returned to Mrs. Dixon's room, Thompson and Blackham were in the room and the decision was made to extubate Mrs. Dixon. Dr. Taylor further testified that one of the factors in his decision to extubate was a statement by Blackham that Mrs. Dixon was ready to be extubated. Blackham, however, testified he never made any statement indicating Mrs. Dixon was ready to be extubated, and that the decision to extubate was made by Dr. Taylor.

Prior to extubating Mrs. Dixon, the bed was rolled up so Mrs. Dixon would be in the proper position to be extubated. Additionally, Blackham went through the normal procedure of instructing and questioning the patient before the extubation. Mrs. Dixon, however, did not respond to Blackham's instructions or questions. Blackham was surprised and concerned about Mrs. Dixon's failure to respond, but did not express these concerns to Dr. Taylor. Mr. Blackham did look at Dr. Taylor as to say, "do you want me to extubate her?", and Dr. Taylor instructed Blackham to extubate Mrs. Dixon.

Mrs. Dixon was extubated at 10:15 p.m. on 24 September. After the extubation Blackham placed nasal prongs on Mrs. Dixon, and she initially breathed on her own. Dr. Taylor left Mrs. Dixon's room to advise her family that she had been extubated. Blackham decided an oxygen mask would better provide oxygen to Mrs. Dixon but could not locate an oxygen mask in the ICU, so he left the ICU and went across the hall to the Critical Care Unit (CCU). When Blackham returned to Mrs. Dixon's room with the oxygen mask and placed it on Mrs. Dixon he realized that she was not breathing properly. After checking Mrs. Dixon's airway and hearing no air movement, Blackham realized that she would have to be reintubated as quickly as possible.

Before Mrs. Dixon could be reintubated it was necessary for the hospital staff to remove the bed rails, roll down the bed, and remove Mrs. Dixon's restraints so she could be properly positioned for reintubation. While Mrs. Dixon was being prepared for reintubation her heart stopped and a second Code was called at 10:30 p.m. Bonnie Shackelford (Shackelford), a nurse in the Cardiac Critical Care Unit, responded to the Code and began to chart the Code sheet. During a Code, a Code nurse accurately records on the Code sheet everything that is done during the Code and exactly

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when it is done. Shackleford recorded on the Code sheet that she arrived in Mrs. Dixon's room at 10:30 p.m. She testified that upon arriving in the room she observed Blackham unsuccessfully attempting to intubate Mrs. Dixon. Shackleford testified that Blackham said he had too short of a blade and he needed a medium, a Number 4 MacIntosh laryngoscope blade, which was not on the Code cart. The Code cart is a cart equipped with all the medicines, supplies and instruments needed for a Code emergency. The Code cart in the ICU had not been restocked after the first Code that morning, so Shackleford was sent to obtain the needed blade from the CCU across the hall from the ICU.

When Shackleford returned to the ICU, the Number 4 MacIntosh blade was passed to Dr. Taylor who had responded to the Code and was attempting to reintubate Mrs. Dixon. Upon receiving the Number 4 MacIntosh blade, Dr. Taylor was able to quickly intubate Mrs. Dixon. Reintubation was recorded on the Code sheet at 10:33 p.m. and a heart beat was first recorded at 10:35 p.m. Mrs. Dixon was placed on a ventilator, but she never regained consciousness.

Neurological evaluation after the second Code procedure indicated that Mrs. Dixon was brain dead secondary to suffocation. After the family was informed there was no hope that Mrs. Dixon would recover the use of her brain, the family requested that no extraordinary measures be taken to prolong her life. Ultimately, Mrs. Dixon was discharged from the Hospital to a rest home where she remained until her death in July, 1985, from aspiration pneumonia, a normal complication of a chronic vegetative state.

Plaintiff filed a medical negligence claim against Dr. Taylor and the Hospital. Trial began on 21 October 1991 and lasted three weeks. The Hospital's motions for directed verdict were denied by the trial court, and the jury found the Hospital was negligent in causing the death of Mrs. Dixon and liable to plaintiff for \$900,000. The jury found that Dr. Taylor was not negligent. Following the verdict, the Hospital made motions for judgment notwithstanding the verdict and a new trial, both of which were denied.

The issues presented are whether (I) there was insufficient evidence of proximate causation presented at trial for the case to be submitted to the jury, therefore making it error for the trial court to deny the Hospital's motions for directed verdict and

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judgment notwithstanding the verdict; (II) the trial court erred in its jury instruction as to the standard of care of a respiratory therapist; and (III) it was error for the trial court to allow the jury to take an exhibit into the jury room during deliberations.

I

[1] The Hospital argues in its brief that the trial court erred in denying its motions for directed verdict, judgment notwithstanding the verdict and new trial because there was insufficient evidence introduced at trial of a breach of duty by the Hospital. The Hospital, however, only assigned error to the question of the sufficiency of evidence as to proximate causation and we thus address only that issue. N.C. R. App. P. 10(a) (appeal limited to those issues raised in the assignments of error). This Court will therefore assume there was sufficient evidence presented at trial to establish a duty and a breach of that duty by the Hospital.

[2] The parties agree that the evidence offered at trial relates to whether the Hospital was negligent in one or more of the following respects: failing to adequately assess the patient as a candidate for extubation; failing to communicate any concern about the patient's readiness for extubation to Dr. Taylor prior to the extubation; failing to stock the Code cart with a Number 4 MacIntosh blade; and failing to properly position the patient, after the extubation, for a possible reintubation. In order to support submission of the issue of negligence to the jury on each of the claims of negligence, plaintiff is required to offer evidence of the essential elements of negligence (duty, breach of duty, proximate cause and damages), *Garrett v. Overman*, 103 N.C. App. 259, 262, 404 S.E.2d 882, 884, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 519 (1991), on each of the claims. *See Di Egidio v. Kealy*, 162 N.E.2d 171, 173 (Ohio Ct. App. 1959). Upon proper motion by the defendant, plaintiff's failure to offer such proof requires the trial court to withdraw that claim from consideration by the jury. *Id.* A motion on this basis must specifically assert the grounds on which it is made. *See Hall v. Mabe*, 77 N.C. App. 758, 760, 336 S.E.2d 427, 428 (1985) (motion for directed verdict must "state the grounds therefor"). That is, the motion must allege with particularity the deficiencies that exist with respect to each separate claim of negligence. A failure to so allege justifies submission to the jury of the multiple claims of negligence if there is substantial evidence in the record, considered in the light most favorable to the plaintiff,

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see *Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181-82 (1991), of the essential elements of negligence on any one of the multiple claims.

In this case the Hospital's motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence, as well as the motion for judgment notwithstanding the verdict were on the basis that the "evidence was insufficient to justify the verdict inasmuch as the Plaintiff offered no evidence whatever of proximate causation as to the Hospital." The Hospital, in its motions, did not attempt to distinguish between the different claims of negligence asserted by plaintiff, instead relying on the general claim that plaintiff's evidence was deficient as to proximate cause. Furthermore, the Hospital did not object to the jury instructions, in which the trial court instructed on three different "contentions" of negligence and did not object to the submission to the jury of a single issue of negligence. Thus, if there is substantial evidence in the record, considered in the light most favorable to the plaintiff that any one of the four claims of negligence, asserted by plaintiff, was a proximate cause of plaintiff's injuries, the trial court correctly denied the Hospital's motions for directed verdict and the judgment notwithstanding the verdict. See *Brown v. Brown*, 104 N.C. App. 547, 549, 410 S.E.2d 223, 225 (1991), *cert. denied*, 331 N.C. 383, 417 S.E.2d 789 (1992) (motions for directed verdict and judgment notwithstanding the verdict require application of the same standards).

[3] One of plaintiff's claims of negligence was that the Hospital failed to stock the Code cart with the appropriate laryngoscope blade. This negligent act, plaintiff contends, was a proximate cause of plaintiff's injuries because it resulted in a delay in reintubation and that this delay caused the injuries.

Proximate cause is defined as:

a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, *and* one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

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Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (emphasis added). The actor need not foresee the events which are merely possible, but only those which are reasonably foreseeable. *Adams v. Mills*, 312 N.C. 181, 193, 322 S.E.2d 164, 172 (1984).

Viewed in the light most favorable to the plaintiff, the evidence establishes that the Hospital's breach of duty in not having the Code cart properly restocked resulted in a three-minute delay in the intubation of Mrs. Dixon. Plaintiff offered the testimony of Code nurse Shackelford to show that the failure to restock the cart resulted in a three-minute delay in Mrs. Dixon's reintubation. Shackelford testified that she observed Blackham attempting unsuccessfully to intubate Mrs. Dixon at 10:30 p.m., and that at 10:33 p.m. Dr. Taylor was successfully able to intubate Mrs. Dixon after she retrieved the needed Number 4 MacIntosh blade. Plaintiff introduced the Code sheet into evidence to corroborate Shackelford's testimony as to the period of time between the observance of the attempt by Blackham to intubate and the successful intubation.

Substantial evidence was introduced at trial that the three-minute delay caused by the Hospital's breach of duty was the proximate cause of Mrs. Dixon's brain death. Plaintiff's expert witness, Dr. Evan McLeod (Dr. McLeod), testified that the Hospital employees' breach of duty, in not being prepared to promptly reintubate Mrs. Dixon, proximately caused Mrs. Dixon's brain death. Dr. McLeod expressed his expert opinion as to the cause of Mrs. Dixon's brain death during his cross-examination by defense counsel:

Q: And if he testified, if he has testified, and will testify, and the jury should find from all of the testimony in this case that Doctor Taylor said that there was absolutely no delay in the intubation of this patient from either bringing the blade in or from cranking the bed down, would you agree with that testimony?

A: I don't think it is physically possible to crank a bed down, and reposition a patient and intubate a patient in no time. Time must elapse. It may be questionable as to how much time elapsed. I think the critical thing is that sufficient time elapsed that the patient suffered a severe anoxic brain injury.

It is apparent that Dr. McLeod's opinion was that the delay caused by the Hospital employees' breach of duty was sufficient to cause

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Mrs. Dixon's brain death. Furthermore, the defendant's own expert, Dr. Robert Shaw, testified that a three-minute delay in the patient receiving oxygen is enough time to cause serious brain injury.

Reasonable minds could accept from the testimony at trial that the Hospital's breach of duty was a cause of Mrs. Dixon's brain death, without which the injury would not have occurred. Foreseeability on the part of the Hospital can be established from the evidence introduced by the plaintiff that the written standards for Watauga Hospital, Inc. require every Code cart be stocked with a Number 4 MacIntosh blade. This evidence permits a reasonable inference that the Hospital should have foreseen that the failure to have the Code cart stocked with a Number 4 MacIntosh blade could lead to critical delays in intubating a patient. Accordingly, there was substantial evidence that the failure to have the Code cart stocked with the proper blade was a proximate cause of Mrs. Dixon's injuries. Therefore, because this was one of the claims of negligence asserted by plaintiff, the trial court was correct in denying the Hospital's motions for directed verdict and judgment notwithstanding the verdict. Furthermore, there was no abuse of discretion in the trial court's denial of the Hospital's motion for new trial. *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 611 (1977) (motion for new trial addressed to the discretion of the trial court).

II

[4] The Hospital argues that the trial court committed error in the jury instructions regarding the standard of care for a respiratory therapist. The relevant part of the instruction in this case as to the standard of care required of Blackham reads as follows:

the respiratory therapists [sic] must perform his duties to the patient in accordance with the standards of practice that may differ from those of someone not so specializing in respiratory therapy, or in the respiratory therapy field.

We do not read this instruction, as the Hospital suggests, as permitting the jury to hold Blackham to a higher standard of care in respiratory therapy than the standard of care of a "general practitioner" in respiratory therapy. The jury was only instructed to hold Blackham to the standard of care of a respiratory therapist and thus was not error.

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III

[5] The Hospital finally argues it was error for the trial court to allow the jury to take an exhibit into the jury room during deliberations.

During jury deliberation, Dr. Taylor's attorney, Mr. W. Harold Mitchell, stated to the trial court, in the absence of the jury, that he objected to any exhibits being taken into the jury room. During deliberations the jury was returned and the following dialogue occurred:

FOREPERSON: Your Honor, would we be permitted to take [the blood gas chart blow up] back into the room with us.

MR. JONES: No objection from the Plaintiff.

THE COURT: I will have to make that decision in your absence.

MR. BURGIN [Counsel for Hospital]: We have no objection, Your Honor.

MR. MITCHELL: No objection, Your Honor.

THE COURT: All right, there being no objection, the Court will permit you to take Exhibit 29 back into the Jury room. Does that answer your question?

After the jury resumed deliberations the following exchange between the defendants' counsel and the court occurred:

MR. BURGIN: Your Honor, we were put in a position where we absolutely couldn't say anything, but we didn't object.

THE COURT: All right, now, do not, if the Jury comes back in make a statement in the presence of the Jury, that is not fair, having been previously an objection made for the presentation of any exhibits in the Jury room, that would not be fair. Do not, it did put the Defendants over a barrel, the objection having previously been raised. That raises a point on appeal that may cause somebody some difficulty.

MR. BURGIN: Would the Court consider asking the Bailiff to have that thing removed from the Jury room?

THE COURT: Well, whether or not you were put over a barrel, you nevertheless did allow it to be submitted, you

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said you had no objection. The Court takes your last statement, even under the possible coerce [sic] by the Plaintiff having said they had no objection. In order not to show favoritism or some objection, the Court will not obtain it from the Jury and will allow it to go under the latest statement made by counsel, that being, no objection.

MR. BURGIN: I would like the record to show, understand I am not fussing at the Court. I would like the record to show that for my part the objection was made with form only and not in substance I felt like I had no choice but to make that objection in light of the plaintiff counsel's statement and would like the record to show that, and feel like it was—well, that is all.

THE COURT: Well, the objection is overruled, and as I recall, I don't think there was an objection made by counsel for Defendant, Hospital. As I recall, the only objection by counsel for Defendant, Taylor.

MR. BURGIN: That is true, initially, but there should be no need for an objection until it happened.

MR. MITCHELL: But when I did make my objection to allowing the exhibit to be taken in, I expressly stated that it puts the party to a disadvantage for one of the parties to say, take these exhibits in, we don't care, and another party to object to it. That is the reason I did it in the absence of the Jury. I thought it was clear the reason I did it. And I think it is clear the reason Mr. Jones was so prompt in saying, "We don't object to it."

THE COURT: Well, I can't undo, I don't feel like, what has transpired. However, it is part of the record. It may be something at some later time some appellate Court will make some ruling, but I at this time do not feel that I should attempt to correct the situation any differently. Therefore the Court denies the objection and the request to ask the Bailiff to take the exhibit from the Jury.

It is well established that it is error to allow the jury to take exhibits into the jury room during deliberations without the consent of all parties. *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 527, 361 S.E.2d 909, 919 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Specific consent from the parties

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is required to allow the jury to take exhibits into the jury room during deliberations, therefore, an indication of an unwillingness to consent is sufficient to make it error to allow the exhibits into the jury room. *Doby v. Fowler*, 49 N.C. App. 162, 164, 270 S.E.2d 532, 533 (1980). The issue is whether the trial court was correct in relying on the consent of the attorney given in open court, in the presence of the jury, or was bound by the previous objection entered out of the presence of the jury.

We believe the court correctly relied on the last statement of the attorney to the court on the issue of a jury view of the exhibits. The attorney was not bound by his earlier objection and was within his rights to change his opinion on the question and the record reflects that he did. We are unable to accept that attorneys should be allowed to take one position before the jury and another before the trial judge. Furthermore, we do not accept the Hospital's argument that its attorney was forced to voice his consent before the jury because of the consent voiced by the plaintiff's attorney. The trial court was prepared to dismiss the jury before deciding the issue thus giving the Hospital's attorney an opportunity to object outside the presence of the jury. Apparently the attorney thought the better trial strategy was to offer his consent in the presence of the jury. The Hospital's attorney thus made his choice and cannot now complain. Therefore there was no error committed by the trial court in permitting the exhibit to be taken into the jury room.

Plaintiff has appealed the portion of the judgment decreeing defendant Dr. Taylor not liable. During oral argument plaintiff's counsel stated it would abandon its appeal if the court held there was no error in the judgment decreeing the Hospital liable. Because the Hospital's liability is affirmed, we accordingly do not consider plaintiff's appeal.

No error.

Judges JOHNSON and WYNN concur.

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STATE OF NORTH CAROLINA v. MELVIN ANTHONY HESTER

No. 9225SC897

(Filed 20 July 1993)

1. Criminal Law § 1185 (NCI4th) — prior sentence used as aggravating factor — guilty pleas in prior cases — waiver of rights

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to aggravate a defendant's sentence. In this case, defendant was represented by counsel at the time his earlier guilty pleas were entered; there was nothing in the record which affirmatively indicated that the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases; and, though waiver could not be presumed from a silent record, neither could lack of waiver be inferred, particularly in favor of a party with the burden of proving it.

Am Jur 2d, Criminal Law §§ 598-599.

2. Criminal Law § 692 (NCI4th) — jury taking written instructions into jury room — discretionary matter

A trial court has inherent authority in its discretion to submit its instructions on the law to the jury in writing.

Am Jur 2d, Trial § 1149.

3. Homicide § 287 (NCI4th) — second-degree murder — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for second-degree murder where it tended to show that defendant tried to provoke a response from the victim by yelling at him as he left a party; defendant followed the victim to his car and did something to the victim which made a loud noise, whereupon the victim fell to the ground; the first person on the scene observed blood flowing from the victim's head; an eyewitness observed defendant put an object down inside his pants; defendant admitted to the party hostess that he had used a gun; a gun linked to defendant and identified as the weapon used in the killing was found the next day in a nearby field; and the victim died of a gunshot wound to the head a couple of hours after the incident at the car.

Am Jur 2d, Homicide §§ 425 et seq.

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Appeal by defendant from judgment entered 15 May 1992 by Judge Shirley L. Fulton in Catawba County Superior Court. Heard in the Court of Appeals 22 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Melissa L. Trippe, for the State.

Morrow, Alexander, Tash, Long & Black, by Charles J. Alexander, II, for defendant-appellant.

JOHN, Judge.

Defendant was convicted of second degree murder and sentenced to a thirty year active term of imprisonment. He contends the trial court erred in (1) denying his motion to suppress certain prior convictions, which were then used to enhance his sentence beyond the presumptive; (2) allowing the jury to take written copies of the court's charge into the jury deliberation room; and (3) denying his motions to dismiss the charge of second degree murder for insufficiency of the evidence made at the close of State's evidence and at the close of all the evidence. We are not persuaded by defendant's contentions and find no error.

The State's evidence tended to show that on 11 May 1991 Tonia Isenhour, who is defendant's ex-wife's cousin, and Michael Lafone went to a party at Cindy Lineberger's trailer. Also present were defendant and his girlfriend, Michelle. After remaining there for approximately thirty minutes, Tonia and Michael decided to leave and started walking toward their car. Defendant and Michelle, who were standing at the other side of Cindy's driveway, yelled derogatory comments to them, but Tonia and Michael did not respond. Defendant began following them as they continued walking to the car. Tonia unlocked the driver's side door, got in, and leaned across to unlock the passenger door for Michael who was waiting beside the vehicle. Defendant was then approaching the rear of the vehicle on the same side where Michael stood. Tonia heard defendant ask Michael if he knew who defendant was, and when Michael replied in the negative, defendant said "I am the meanest M.F. in Catawba County." Tonia then heard a loud noise "like a board hitting the car or something" and felt the automobile move. She looked out the window and could no longer see Michael, but realized that defendant was coming around the back of the car to the driver's side. She locked her door, and defendant stood beside it for a few seconds before walking to the front of the

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vehicle. As defendant passed, Tonia could see him putting something down inside his pants, but was unable to identify the object.

Defendant returned to the passenger side of the automobile and nudged Michael, who was on the ground, with his foot, telling him "get up man, you are all right." Rick Loftin, also at the party, appeared at that point and Tonia heard defendant say "I hit him." Rick testified that defendant's comment was "I think that I hurt him[,] man." After defendant spoke to Rick, the latter looked down and saw Michael in convulsions on the ground. In stooping to help Michael, Rick noticed that his head was bleeding and attempted to carry him to the porch of the trailer for assistance. Tonia, unaware of the type of injury Michael had sustained, was advised to leave the party and did so. She telephoned 911 from her cousin's house to report the incident. Approximately thirty minutes later, she went to the hospital where she was told Michael had been shot in the head. He died from his injury within a few hours.

The day after the party, Cindy Lineberger went to defendant's home to tell him Michael was dead. Defendant admitted to her he had used a gun, but stated he had lost it and did not know where it was. Other people who had attended the party found a gun in the field behind Cindy's trailer, where defendant had parked his motorcycle. Cindy identified the gun as being one she had seen in defendant's possession three or four days before the party. Forensic firearm identification expert Ronald Marrs expressed the opinion that a bullet removed from the deceased was fired from the weapon found behind Cindy's trailer. The physician who performed the autopsy on Michael determined the cause of death to be a gunshot wound to the head.

Defendant offered no evidence.

I.

[1] Defendant first asserts the trial court erred by denying his motion to suppress evidence of three prior convictions, later relied upon by the court as aggravating factors to support sentencing defendant to a term greater than the presumptive. We find this argument unpersuasive.

At sentencing, the court found as an aggravating factor that defendant "has a prior conviction or convictions for criminal offenses punishable by more than 60 days[] confinement." N.C.G.S. § 15A-1340.4(a)(1)(o) (Cum. Supp. 1992). Specifically, the court noted

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convictions on pleas of guilty for assault on a female, damage to real property, and obstructing and delaying a public officer. Defendant maintains that, because the record before the court did not establish that his earlier guilty pleas were voluntarily and understandingly made, his constitutional rights were violated by the court's consideration of these convictions in his sentence determination.

Defendant relies on *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969) as authority for this contention. The *Boykin* Court initially discussed the standard applied when determining whether the Sixth Amendment right to counsel has been *voluntarily* waived: "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.* at 242, 23 L.Ed.2d at 279 (quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L.Ed.2d 70, 77 (1962)). The Court then observed that a plea of guilty effectively constitutes a waiver of several constitutionally protected rights, specifically: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Id.* at 243, 23 L.Ed.2d at 279. Ultimately, the Court held that with respect to waivers, the same level of protection is demanded for each of the aforementioned rights as is granted the Sixth Amendment right to counsel, and that the record, therefore, must clearly show that a waiver of any of the rights associated with a guilty plea was voluntarily and understandingly made prior to acceptance of the plea. *Id.* at 243-44, 23 L.Ed.2d at 279-80. ("We cannot presume a waiver of these three important federal rights from a silent record.")

In addition, defendant cites N.C.G.S. § 15A-980 (1988) as authority for his assertion that the court should not have considered his prior convictions. G.S. § 15A-980(a)(3) establishes a defendant's right to suppress certain prior convictions obtained in violation of his *right to counsel* if using them could result in a lengthened sentence of imprisonment. The statute further provides that upon a defendant's motion to suppress such convictions:

he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time

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of the conviction he was indigent, had no counsel, and had not waived his right to counsel.

G.S. § 15A-980(c) (emphasis added).

According to the *Boykin* Court, when a guilty plea is entered, the record must affirmatively indicate that a defendant voluntarily and understandingly waived the associated constitutional rights, which is the same level of protection accorded a waiver of the Sixth Amendment right to counsel. Because the Supreme Court examined alleged waivers of these various rights with the same degree of scrutiny, defendant essentially argues that henceforth the right to counsel and the privilege against self-incrimination, the right to confront one's accusers, and the right to a jury trial, should be treated the same in all instances. He maintains, therefore, that we should extend the scope of G.S. § 15A-980, dealing with violation of the right to counsel, to his own situation, wherein he asserts the record does not support the propriety of accepting his guilty pleas. In other words, according to defendant, the statute allowing suppression of prior convictions obtained in violation of one's right to counsel should also be interpreted so as to allow suppression of convictions obtained pursuant to guilty pleas, if those pleas were not knowingly and understandingly made. Defendant concedes that should we accept this interpretation, the evidentiary burden placed on a defendant in G.S. § 15A-980, ("he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel"), must also apply to the circumstances of his own case.

At the sentencing hearing, defendant offered into evidence the district court files reflecting his earlier convictions. These demonstrated that he had pled guilty to each of the earlier charges while being represented by an attorney. By presenting this evidence to the court, defendant contends he thus met the burden set out in G.S. § 15A-980, and that thereafter it was the State's task to present evidence on rebuttal as to the voluntary and understanding nature of defendant's earlier waiver of his *Boykin* rights. As the State declined to proffer evidence, the record before the court simply indicated a series of guilty pleas, and was silent as to the circumstances surrounding them.

Essentially the same arguments propounded by defendant in the case *sub judice* were discussed by this Court in *State v. Smith*, 96 N.C. App. 235, 385 S.E.2d 349 (1989), *disc. review denied*, 326

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N.C. 267, 389 S.E.2d 119 (1990). In *Smith*, the use of prior convictions based upon guilty pleas (which may not have been knowing or voluntary) for the enhancement of sentencing was addressed, as was the application of G.S. § 15A-980 to guilty pleas. *Id.* This Court emphasized that G.S. § 15A-980 places on a defendant the burden of proving that prior convictions were obtained in violation of his right to counsel, and observed that *Smith* had in fact been represented by counsel at the time his previous guilty pleas were entered. *Id.* at 239, 385 S.E.2d at 351. Moreover, we noted “a clear distinction between the defendant’s right to counsel and the right of the defendant to enter guilty pleas knowingly and voluntarily[.]” *id.*, suggesting that G.S. § 15A-980 may not necessarily be available as a means of suppressing prior convictions based upon allegedly involuntary or unknowing guilty pleas. We also commented on the fact that *Smith* presented no evidence, but then argued to the trial court that his prior convictions were invalid because there was “no showing in the records” that his guilty pleas were knowing and voluntary. *Id.* We held “[t]he State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence.” *Id.*

In the case *sub judice* as in *Smith*, the record reflects, and defendant’s counsel conceded at the sentencing hearing, that defendant was represented by counsel at the time his earlier guilty pleas were entered. Nothing in the record affirmatively indicates that the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases. Defendant requested the trial court to take judicial notice of the district court files in question, but only copies of the arrest warrants from those files have been included in the record. Defendant presented no testimony on this issue, and his assertion to the court below that the resultant convictions were invalid, without more, is insufficient. While waiver may not be “presumed” from a silent record, *Boykin*, 395 U.S. at 243, 23 L.Ed.2d at 279-80, neither may lack of waiver be inferred, particularly in favor of a party with the burden of proving it. In the case before us, “[t]he record is ‘silent’ only because the defendant voluntarily chose for it to be ‘silent.’” *State v. Green*, 62 N.C. App. 1, 10, 301 S.E.2d 920, 925 (Braswell, J., dissenting), *modified and aff’d per curiam*, 309 N.C. 623, 308 S.E.2d 326 (1983).

In sum, the circumstances here appear indistinguishable from those in *Smith*. Under *Smith* and on the facts in this record, therefore,

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defendant has failed to demonstrate he met his burden in the trial court, and thus is not entitled to relief on this assignment of error.

II.

[2] In his second assignment of error, defendant alleges the court erred in allowing members of the jury to take written instructions into the jury room. Defendant concedes a lack of support for this contention in North Carolina, and we have consistently held to the contrary. "A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992); *see also State v. Bass*, 53 N.C. App. 40, 45, 280 S.E.2d 7, 10 (1981). Accordingly, we find no error by the court in submitting instructions to the jury in writing.

III.

[3] By his final assignment of error, defendant maintains the court erred in denying his motions to dismiss the charge of second degree murder for insufficient evidence. We disagree.

When ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State; the State is entitled to every reasonable inference which can be drawn from the evidence presented, and all contradictions and discrepancies are resolved in the State's favor. *State v. Davis*, 325 N.C. 693, 696, 386 S.E.2d 187, 189 (1989); *State v. Abernathy*, 295 N.C. 147, 165, 244 S.E.2d 373, 384-85 (1978). Examining the evidence in this light, the court must determine whether substantial evidence has been presented to establish every element of the offense charged and to identify the defendant as the perpetrator of the offense. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975) (citations omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted).

Defendant was convicted of the offense of second degree murder. "Murder in the second degree is the unlawful killing of a human

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being with malice but without premeditation and deliberation.” *State v. Spicer*, 50 N.C. App. 214, 221, 273 S.E.2d 521, 527, *appeal dismissed*, 302 N.C. 401, 279 S.E.2d 356 (1981); *see also* N.C.G.S. § 14-17 (1989). Moreover, “[m]alice may be presumed upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon . . . absent any contrary evidence.” *State v. Weeks*, 322 N.C. 152, 172, 367 S.E.2d 895, 907 (1988). Therefore, if the State proves that a defendant intentionally inflicted a wound upon a victim with a deadly weapon, proximately resulting in the victim’s death, and no evidence is presented to the contrary, a presumption arises that the killing was done unlawfully and with malice. *Id.* at 172-73, 367 S.E.2d at 907-08. “Evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, ‘leaving only a permissible inference which the jury may accept or reject.’” *Id.* at 173, 367 S.E.2d at 907-08 (quoting *State v. Reynolds*, 307 N.C. 184, 190, 297 S.E.2d 532, 536 (1982)).

Defendant contends there was insufficient evidence that he inflicted the fatal gunshot wound. This argument is without merit. In *State v. Blake*, 319 N.C. 599, 600, 356 S.E.2d 352, 353 (1987), the North Carolina Supreme Court upheld the trial court’s denial of defendant’s motion to dismiss the charge of second degree murder for insufficiency of the evidence. In *Blake*, the evidence showed that on the evening the victim was killed, he and defendant Blake had been arguing and the victim fired a shot at defendant’s car. *Id.* at 600, 356 S.E.2d at 353. Before the victim was taken into police custody for his role in the altercation, defendant angrily threatened him. *Id.* at 601, 356 S.E.2d at 353. The victim was released on bond a couple of hours later and expressed his fears about defendant carrying out the threats. *Id.* Neighbors observed a vehicle similar to defendant’s pull up in front of the victim’s home shortly thereafter, heard two loud noises resembling gunshots, and saw the victim come out of his home and collapse in the street, whereupon the car sped away. *Id.* No one who testified on the State’s behalf was able to identify Blake as the perpetrator of the crime. *Id.* at 602, 356 S.E.2d at 354. The Supreme Court stated: “[t]his evidence taken all together is sufficient to permit the jury reasonably to find beyond a reasonable doubt both that defendant was the perpetrator of the crime and that all the elements of second degree murder are present.” *Id.* at 607, 356 S.E.2d at 356. The Court noted in particular the fact that all the events indicating defendant’s guilt “occurred within hours and in rapid succession.” *Id.*

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Similarly, an examination of the facts in the instant case as presented and enumerated earlier, viewed in the light most favorable to the State, reveals sufficient evidence to allow the issue of defendant's guilt to be submitted to the jury. Specifically: defendant tried to provoke a response from Michael by yelling at him as he left the party; defendant followed Michael to his car; did *something* to Michael that made a loud noise, whereupon Michael fell to the ground; the first person on the scene observed blood flowing from Michael's head; Tonia saw Michael put an object down inside his pants; defendant admitted to Cindy Lineberger that he had used a gun, and a gun linked to defendant and identified as the weapon used in the killing was found the next day in a nearby field; and Michael died of a gunshot wound to the head a couple of hours after the incident at the car. The court committed no error in denying defendant's motion.

For the foregoing reasons, we find defendant received a fair trial, free from prejudicial error.

No error.

Judges COZORT and LEWIS concur.

PAULA LOWERY PUGH v. LARRY SCOTT PUGH, FREDDIE GLENN PUGH, THELMA PUGH, AND PAUL CLIFTON; RE: MATTER OF B. ERVIN BROWN, II; RULE 11 SANCTIONS ORDERS OF 8 FEBRUARY 1991, 23 OCTOBER 1991

No. 9221SC442

(Filed 20 July 1993)

Rules of Civil Procedure § 11 (NCI3d) — allegations of complaint — reasonable inquiry into factual bases — sanctions against attorney not warranted

Plaintiff's attorney made a "reasonable inquiry" into the factual bases for the allegations contained in the complaint, and therefore the sanctions imposed against him, including a written reprimand and attorney's fees, were not warranted. The court on appeal declines to adopt the bright-line rule that when, as in the present case, an attorney forecasts substantial evidence and survives a motion for summary judgment, the

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allegations presented in the complaint are necessarily well-grounded in fact and not a proper basis for imposing Rule 11 sanctions.

Am Jur 2d, Pleading §§ 339 et seq.

Appeal by attorney for the plaintiff from Orders entered 8 February 1991 and 23 October 1991 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 1 April 1993.

White and Crumpler, by Fred G. Crumpler, for appellant B. Ervin Brown.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for appellees Freddie Glenn Pugh, Thelma Pugh, and Paul Clifton.

WYNN, Judge.

The imposition of Rule 11 sanctions against Attorney B. Ervin Brown, II arose out of a civil action by Paula Lowery Pugh against her estranged common-law husband, Larry Scott Pugh, members of his family, and his business associates.

Following the estrangement of Paula and Larry Scott Pugh, various defendants took out criminal warrants against Paula for several misdemeanor offenses, including communicating threats and trespass ("the first set of warrants"). Paula subsequently retained the legal services of High Point attorney Debra Irene Johnson, to whom she told of her experiences with the defendants. These experiences consisted of being evicted from her trailer home by defendant Thelma Johnson, on whose land the trailer was located, and being abducted and threatened with death by defendant Freddie Glenn Pugh.

Pursuant to Attorney Johnson's advice, Paula recorded her telephone conversations with Larry Scott Pugh, Freddie Glenn Pugh, and others. This was done so that Paula could document the Pugh family's threats that they were going to run her out of the county and that Freddie Pugh had held a gun to Paula's head. The recordings were also made in an effort to substantiate the Pugh family's contentions regarding the existence of a stolen car and auto parts theft ring and their political clout.

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Lexington attorney Joe Biesecker, as representative of the defendants and as special prosecutor, and Attorney Johnson reached a settlement whereby the defendants agreed to drop the criminal charges represented by the first set of warrants in exchange for Paula's agreeing to move out of Davidson County. The defendants, however, subsequently reinstated the criminal charges ("the second set of warrants") and Attorney Johnson, who was in the process of closing her North Carolina practice and moving out of state, contacted Attorney B. Ervin Brown, II. She explained the details of the Pugh case and informed him that Paula was extremely agitated and upset due to her fear of the Pughs and their continual harassment of her. Attorney Johnson also told Attorney Brown that Paula was destitute, had no family to whom she could turn, and, despite the fact that Paula was in poor health, the Pughs had canceled her health insurance.

Based on the facts related to him by Attorney Johnson, his own observations of Paula's mental state and her credibility, his review of the transcripts from the tape-recorded telephone conversations between Paula and Larry Scott Pugh and Freddie Glenn Pugh, his cross-examination of the defendants during the criminal proceedings relating to the second set of warrants, and the trial court's dismissal of all the criminal charges but one at the close of the state's evidence, Attorney Brown filed the Complaint which became the basis for the sanctions imposed against him.

The Complaint alleged five claims for relief: conversion of property against Freddie Glenn Pugh and Thelma Pugh; abuse of process against Freddie Glenn Pugh, Thelma Pugh, and Paul Clifton; malicious prosecution against Freddie Glenn Pugh, Thelma Pugh, and Paul Clifton; assault and battery against Freddie Glenn Pugh and Paul Clifton; and intentional infliction of emotional distress against Larry Scott Pugh, Freddie Glenn Pugh, Thelma Pugh, Paul Clifton, and Shirley Allen. The trial court considered the abuse of process and the malicious prosecution claims twice each, as related to the first set of warrants and the second set of warrants. The trial court also recognized three different categories of conspiracy to intentionally inflict emotional distress: forcing the plaintiff to leave the county; keeping silent regarding unlawful business; and turning over documents of alleged illegal business activity.

On 7 July 1989, the trial court dismissed the defendant Shirley Allen for failure of the Complaint to state a claim against her.

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Prior to trial, the defendants moved for summary judgment, which motion was subsequently denied. At the close of the plaintiff's evidence, the defendants moved for a directed verdict upon all claims, which motion was granted in part and denied in part. Regarding the first cause of action, the claim for conversion was dismissed as to Freddie Glenn Pugh, but not as to Thelma Pugh; the second cause of action, the abuse of process claim, was dismissed as to Freddie Glenn Pugh, Thelma Pugh, and Paul Clifton as it related to both the first and second sets of warrants; the third cause of action, the malicious prosecution claim, was dismissed as to Thelma Pugh as it related to the second set of warrants; and the fifth cause of action, the conspiracy to intentionally inflict emotional distress, was dismissed entirely as against Thelma Pugh and, as to Larry Scott Pugh, Freddie Glenn Pugh and Paul Clifton, was dismissed as it related to causing the plaintiff to turn over documents alleging illegal business activities.

A subsequent motion for a directed verdict made at the close of all the evidence was denied. The jury ultimately returned a verdict in favor of the defendants as to each of the remaining claims, except the claim for malicious prosecution against Paul Clifton.

The defendants moved for sanctions against the plaintiff and against Attorney Brown, claiming generally and without specifics that the lawsuit had been commenced in violation of the certification requirements of Rule 11(a). The trial judge issued an Order finding that Attorney Brown had failed to conduct an adequate pretrial factual investigation as to the plaintiff's claims of intentional infliction of emotional distress and abuse of process, and that a written reprimand was in order for the contents of paragraph six of the plaintiff's Complaint. From that Order, Attorney Brown appeals.

Initially, we note that the appellant has made a motion to suspend the rules of appellate procedure with regard to his brief as submitted to this Court. This motion comes in response to the appellees' brief, in which they argue that the appeal should be dismissed because the appellant violated Rules 10(c)(1), 10(c)(3), and 28(b)(5) of the Rules of Appellate Procedure. The appellant has rectified his errors in his reply brief with attached errata sheet. Pursuant to Rule 2 of the Rules of Appellate Procedure, we hereby

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grant the motion to suspend the rules of appellate procedure so as to prevent a manifest injustice to the appellant. N.C. R. App. P. 2.

The appellant makes six assignments of error all of which contend, essentially, that the trial court erred in granting the Rule 11 sanctions. For the reasons that follow, we find that the imposition of sanctions was error and we reverse the decision of the trial court.

Rule 11(a) of the Rules of Civil Procedure provides in pertinent part that

[t]he 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.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990). An attorney has satisfied the "reasonable inquiry" requirement if "'a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law'" *Jerry Bayne, Inc. v. Skyland Indus., Inc.*, 108 N.C. App. 209, 214, 423 S.E.2d 521, 523 (1992) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 661-662, 412 S.E.2d 327, 336 (1992)), *aff'd*, 333 N.C. 783, 430 S.E.2d 266 (1993).

Upon finding that the provisions of Rule 11 have been violated, the trial court must impose sanctions against the plaintiff and/or the plaintiff's counsel. Our Supreme Court has clearly established the standard of appellate review of the trial court's imposition of sanctions. Such review is *de novo*, and in that review the appellate court must 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." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *appeal after remand*, 101 N.C. App. 276, 399 S.E.2d 402, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 552 (1991).

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In the present case, the trial court found that the Complaint was not filed for an improper purpose, nor was it without basis in existing law. Rather, the sanctions were imposed because the trial court found that certain portions of the Complaint were not well-grounded in fact. Specifically, the trial court pointed to three allegations in the Complaint upon which it based its imposition of sanctions. We address each of those in turn below.

First, the trial court imposed the sanction of a written reprimand on Attorney Brown based on the contents of paragraph six of the Complaint. That paragraph read, in pertinent part, as follows:

In late December, 1987, or early January, 1988, defendant L.S. Pugh confided to plaintiff that he, defendant, Freddie Glenn Pugh (F.G. Pugh), and defendant Paul Clifton (Clifton) were involved in a highly lucrative auto theft-drug ring *which defendant L.S. Pugh alleged* also involved certain local attorneys, law enforcement officers and judges.

(Emphasis added). The trial court found as fact that Attorney Brown “did not make a reasonable inquiry” into the allegations “that a highly lucrative auto-theft ring involving certain local attorneys and judges existed” prior to filing the Complaint. Further, the trial court found that “[a]n allegation of official judicial or attorney misconduct is both highly implausible and particularly implausible The plaintiff totally misinterpreted [the taped telephone conversations between Paula and Freddie]. . . . [The statements made by Freddie Pugh regarding the Pugh family and its attorney buying off law enforcement were] . . . made in a bluffing manner to deal with a person who was very persistent in wanting to call and talk to Pugh family members and to see if she and Larry Scott Pugh could get back together. Many of the tapes between the plaintiff and Larry Scott Pugh and Freddie Pugh are argumentative” In its findings of fact, the trial court stated that Attorney Brown should have looked at the information recorded in the telephone conversations skeptically, and that his assuming “there was something rotten in Davidson County between lawyers and judges was reckless.”

Based on its findings regarding paragraph six, the trial court concluded as a matter of law that

With regard to the allegation in paragraph 6 that a highly lucrative auto-theft, drug ring involved certain local attorneys

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and judges, Attorney Brown did not make the required pre-filing complaint inquiry required for such an unplausible assertion.

. . . .

Regarding the allegations contained in paragraph 6 of the complaint that lawyers and judges were involved in official misconduct, the Court determines that an appropriate sanction is a written reprimand of Attorney Brown.

The evidence in the record does not support the trial court's imposition of sanctions against Attorney Brown based on the contents of paragraph six. The trial court's analysis of the paragraph is clearly based on its misunderstanding the contents of that paragraph. The complaint does not contain accusations that local attorneys, law enforcement officers and judges are involved in illegal activity. Rather, the complaint alleges that Larry Scott Pugh *told the plaintiff* that such individuals were involved in that activity. We find that, based on the taped telephone conversations between Paula and Freddie Pugh and between Paula and Larry Scott Pugh, Brown's conversations with Paula's former attorney regarding the Pugh family, and his conversations with Paula constituted a reasonable inquiry to determine whether the statements in paragraph six were well-grounded in fact.

The second basis upon which the trial court imposed sanctions against Attorney Brown, in the form of attorneys' fees, is contained in paragraph eleven of the Complaint, which reads in pertinent part that

[D]efendants F.G. Pugh, Thelma Pugh, Paul Clifton and Shirley Allen respectively took out criminal warrants against plaintiff charging her with misdemeanor trespass and communicating threats, all of which warrants were taken for the ulterior purpose of . . . (2) forcing plaintiff to hand over to these defendants or their attorney, Joe E. Biesecker, tapes made by the plaintiff of certain incriminating phone conversations between herself and one or more of the named defendants regarding the aforementioned auto theft-drug ring.

In determining that this allegation was not well-grounded in fact, the trial court found as fact that Attorney Brown "did not make a reasonable inquiry into [this] portion of paragraph 11 of the complaint. . . ." In so finding, the trial court noted that

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[T]he disclosure of the existence of these taped phone conversations did not occur until after these warrants were taken out. . . . It was not credible that the first set of warrants were taken out to force the plaintiff to hand over the tapes to the defendants or their attorney Joe C. Biesecker. . . . It was not impractical for Attorney Brown to check out the sequence of dates

The record confirms a sequence of events in the present case which establishes that the first set of criminal warrants was taken out before the Pugh family had any knowledge of the taped telephone conversations. Nevertheless, the evidence in the record, including the taped telephone conversations, further suggests that, even if the first set of warrants was taken out before the Pugh family had notice of the tapes, the charges were not dismissed, or were reinstated through a second set of warrants, in the hopes of having the tapes turned over to the Pughs. Rule 11 is not designed to pick apart each sentence of the Complaint and quarrel with its wording, which is what this Court would condone if we affirm the sanctions based on paragraph eleven. There is evidence in the record to suggest that the warrants were ultimately used in an effort to obtain the taped conversations and, as a whole, the allegations contained in paragraph eleven, as well as in the paragraphs which follow it, are well-grounded in fact. *See In re Kunstler*, 914 F.2d 505, 515 (4th Cir. 1990), *cert. denied*, --- U.S. ---, 113 L.Ed.2d 669 (1991).

The third, and final, basis upon which the trial court imposed sanctions, in the form of attorneys' fees, was the plaintiff's claim for intentional infliction of emotional distress. The reasons for sanctions on this basis are contained in the trial court's following finding of fact:

Before filing the complaint, the plaintiff's attorney did not make a reasonable inquiry into whether the plaintiff suffered severe emotional distress proximately caused by the actions of the defendants. Such allegation was not well-grounded in fact.

The defendants in the present case appear to suggest that Attorney Brown should have had the plaintiff examined by a psychiatrist in order to determine whether she was paranoid. They suggest, further, that Attorney Brown should have conducted in-depth interviews with the plaintiff's former employers and roommates. We find, however, that it was not unreasonable for Attorney

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Brown to sign the Complaint alleging intentional infliction of emotional distress based on the taped conversations, his conversations with the plaintiff's former attorney, who informed Attorney Brown that the plaintiff's hands often shook, and his interviews with the plaintiff. Attorney Brown correctly asserts in his brief that, even if the defendant was found to be suffering from a psychological disorder, and even if there were other factors, separate and apart from the actions of the Pugh family, which may have contributed to her emotional distress, the defendants are not absolved from any emotional distress they may have imposed upon the plaintiff.

We hold, based on the foregoing discussion, that Attorney Brown made a "reasonable inquiry" into the factual bases for the allegations contained in the Complaint and that, therefore, the sanctions imposed against him were not warranted. In so holding, we note that there is a school of thought which contends that when, as in the present case, an attorney forecasts substantial evidence and survives a motion for summary judgment, the allegations presented in the Complaint are necessarily well-grounded in fact and not a proper basis for imposing Rule 11 sanctions. *See* William Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 189 (1988); *see also* *Needle v. White, Mindel, Clarke and Hill*, 568 A.2d 856, 864 (Md. App. 1990), *cert. denied*, 573 A.2d 1338 (Md. App. 1990) (once the court allows a case to proceed to trial, it cannot thereafter decide that the case was brought in bad faith and without substantial justification). Because we have resolved the case at bar pursuant to a more traditional Rule 11 analysis, however, we decline to consider the merits of adopting the bright-line rule presented by this alternative reasoning. Instead we simply recognize its presence in the law and leave an in-depth analysis of that reasoning for future consideration.

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

Reversed.

Judges WELLS and GREENE concur.

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[111 N.C. App. 127 (1993)]

McDONALD'S CORPORATION, PLAINTIFF, AND LACY H. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, INTERVENOR v. WILLIAM D. DWYER AND WIFE, HESTER T. DWYER; JERONE C. HERRING, TRUSTEE FOR BRANCH BANKING AND TRUST COMPANY; BRANCH BANKING AND TRUST COMPANY; AND JONI-SON ENTERPRISES, INC., DEFENDANTS

No. 913SC1171

(Filed 20 July 1993)

Railroads § 3 (NCI3d) — abandoned railroad easements — presumptive ownership — application of statute to fee simple landowners in possession of disputed property — statute unconstitutional

N.C.G.S. § 1-44.2 which is entitled "Presumptive ownership of abandoned railroad easements" is unconstitutional as it applies to fee simple landowners in possession of disputed property in that it fails to provide them with adequate notice, an opportunity to be heard, and with just compensation.

Am Jur 2d, Railroads §§ 82-86.

Appeal by defendants from order entered 22 October 1991 by Judge David E. Reid, Jr., in Craven County Superior Court. Heard in the Court of Appeals 30 November 1992.

Moore & Van Allen, by Joseph W. Eason, Denise Smith Cline and A. Bailey Nager, for defendants-appellants William D. Dwyer, Hester T. Dwyer, Jerone C. Herring as Trustee, and Branch Banking and Trust Company.

Ward and Smith, P.A., by Kenneth R. Wooten and Bonnie J. Refinski-Knight, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James C. Gulick, for the State, as Intervenor.

JOHNSON, Judge.

On 19 June 1987, the North Carolina Legislature ratified North Carolina General Statutes § 1-44.2 which is entitled "Presumptive ownership of abandoned railroad easements." The Statute provides in pertinent part:

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be

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vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement.

(b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

Plaintiff-appellee McDonald's Corporation filed a complaint on 19 June 1990, stating that it owns in fee simple and possesses a tract of land located adjacent to an abandoned railroad easement and requesting that it be declared the owner in fee simple of and entitled to a portion of the abandoned railroad easement. An amended complaint was filed, seeking damages for lost rents and profits and for waste committed by the defendants, William D. Dwyer and wife, Hester T. Dwyer, Jerone C. Herring, trustee for Branch Banking and Trust Company, Branch Banking and Trust Company, and Joni-Son Enterprises. By way of their answer, defendants contend that McDonald's is not entitled to the property pursuant to the Statute because the Statute is unconstitutional, failing to provide notice or a hearing and effecting the taking of land without just compensation.

On 20 May 1991, the Dwyers, Herring and BB&T filed a motion for summary judgment. McDonald's filed a motion for partial summary judgment on 21 May 1991, seeking possession of and title to the property and ejection of the Dwyers and Joni-Son from the property. Upon notification of the constitutional issue involved in the case at bar, the Attorney General moved for and received the right to intervene in this action for the purpose of defending the constitutionality of the Statute. In his summary judgment order of 27 October 1991, Judge Reid determined that the Statute was constitutional and that McDonald's was entitled to possession of the land. Defendants filed timely notice of appeal.

The railroad easement at issue in the case at bar came into existence in the late 1800's when the Seaboard Coastline acquired easements from landowners who lined the proposed railway. Eventually, many of these landowners sold their land to the Pepsi-Cola

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Company before it filed bankruptcy on 17 February 1923. Also on 17 February 1923, the Craven Holding Corporation was incorporated in the State of Virginia for the purpose of purchasing, holding title to and making disposition of real property owned by the bankrupt Pepsi-Cola Company. The Corporation came to possess property on both sides of the Seaboard Coastline Railroad easement and the land under the railroad easement. At that time, the Railroad had an active railroad line on the property. On 24 October 1923, the Corporation disposed of by deed, all of its holdings in Craven County. These conveyances did not provide a specific description of the land conveyed from the Corporation, but each referenced the Plat Map at Book One, page 59.

On 31 May 1931, the Corporation was dissolved by operation of law. The Corporation had been inactive after making these conveyances, but was not officially dissolved until 1931, when dissolution came after the Corporation failed to pay taxes in the State of Virginia.

By 1984, the Seaboard Coastline Railroad had discontinued using the railroad tracks and the easement. The formal declaration of abandonment of easement was signed and recorded on 27 August 1987. An amended declaration of abandonment of easement was signed and recorded on 3 November 1987.

Mr. Zachary Taylor, the Dwyers' predecessor in title, believing that the title to the land under the railroad easement passed by operation of law to the shareholders of the dissolved Craven County Holding Company, sought the heirs of the Corporation in order to buy their rights to the land under the easement. Upon locating Herbert T. Southgate, Taylor obtained a "title" to the abandoned railroad easement by telling Southgate that Southgate owned property in New Bern. The property was purchased for one hundred dollars and a portion of the easement was conveyed to defendants' predecessors.

Simultaneously, Earnest C. Richardson, III was appointed ancillary receiver in North Carolina to marshal the assets of the Craven County Holding Corporation, which were still alleged to exist. Following the appointment of his receivership, Richardson filed suit against those who acquired "title" to portions of the abandoned railroad easement. Defendants to this law suit included P. M. Stewart, predecessor in title to the Dwyers; BB&T, as lender to P. M. Stewart; and Herring, in his capacity as trustee under the BB&T

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deed of trust. The complaint challenged titles to property that were received and then reconveyed by Taylor. The title to the land at issue in this case was included in the case, 88CVS149.

In March 1987, construction of the restaurant on the property at issue began. In April 1987, House Bill 876 was introduced in the Legislature. Construction of the restaurant was stopped until BB&T obtained title insurance to cover claims as to the railroad easement. After coverage was secured, construction resumed and was completed in May 1987.

In June 1987, House Bill 876 was ratified and became North Carolina General Statutes § 1-44.2. Taylor and Richardson continued to obtain title to the abandoned easement by filing claims rebutting the presumption that the easement from the center line belonged to adjacent landowners.

Before Taylor began to file claims to rebut the presumption in the Statute, he wrote to defendant Dwyer c/o Dan-Par Investments in April 1988 to invite Dwyer to coordinate efforts with Taylor to secure the title to portions of the abandoned easement in accordance with the Statute. The Dwyers did not accept this invitation nor did they attempt to rebut the presumption by individual efforts.

Taylor filed suits against the adjacent landowners, within the prescribed time, asserting that he had title to the abandoned easement. In each suit, Taylor alleged that he owned those portions of the property that were formally owned by the Seaboard Coastline Railroad; that he owned the property to the exclusion of any claim under the Statute; and that the Statute was unconstitutional. Taylor did not bring suit against McDonald's or any of the defendants because he had already conveyed the property now at issue. Defendants, however, failed to bring suit within one year of the enactment of the Statute or within one year of the abandonment as required by Statute.

On 3 May 1988, Richardson, as receiver of the Craven County Corporation in Craven County, North Carolina, filed suit against defendants which included Dan-Par Investments, Herring, BB&T, McDonald's and Zachary Taylor. Case No. 88CVS977. Richardson specifically referenced the Statute as his claim of action. The aforementioned defendants were dismissed from the action for lack of personal jurisdiction. The remaining parties reached a settlement dissolving Richardson's receivership; entering summary judgment

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in favor of Taylor; and providing that Richardson would give notice of appeal from the summary judgment but would dismiss the appeal following an exchange of deeds and consummation of the settlement agreement. Case No. 88CVS977 was dismissed by Richardson with prejudice.

On appeal, defendants-appellants bring forth four assignments of error. By their first assignment, they argue that the trial judge erred "by failing to find unconstitutional [North Carolina General Statutes] § 1-44.2 which both on its face and as applied, purports to divest defendants' vested and possessory property interests without affording defendants the notice and opportunity to be heard required by due process of law." We find this issue dispositive of defendants' appeal.

The United States Constitution as well as the North Carolina Constitution provides that no state shall deprive any person of life, liberty, or property, without due process of law. To demonstrate a property interest that falls within the purview of the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972).

The facts of the case *sub judice* make it clear that defendants have a property interest in the land at issue. Defendants hold title to the land, and the fee simple interest in property has been long recognized by law as a vested property interest. *See United States ex rel. Turner v. Fisher*, 222 U.S. 204, 56 L.Ed. 165 (1911); *see also Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E.2d 363 (1968), *appeal after remand*, 277 N.C. 297, 177 S.E.2d 513 (1970). Moreover, in addition to being record title holders to the land, defendants were in possession of the land prior to the enactment of the Statute. Therefore, defendants' vested property interest in the land at issue cannot be seized without the owner's consent or due process of law. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Defendants, arguing that the Statute on its face is unconstitutional, state that the Statute "strips defendants' property interests without due process by failing to provide any notice reasonably calculated to assure actual notice," as required by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865 (1950). We do not agree that the Statute is unconstitutional on its face,

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but we do find it unconstitutional in its application to fee simple landowners who are in possession of disputed property.

The Supreme Court of this State has held statutes violative of due process rights when, the statutes, without prior notice, purport to effect a forfeiture of property rights when an owner in possession fails to sue to establish those rights. *See Price v. Slagle*, 189 N.C. 757, 128 S.E. 161 (1925) (statute requiring property owners in possession to sue to clear title within a limited time after their property is sold to enforce tax liens are unconstitutional if they fail to give notice).

Plaintiffs-appellees argue, however, that *Sheets v. Walsh*, 217 N.C. 32, 6 S.E.2d 817 (1940) is controlling. In granting partial summary judgment for appellees, the trial court held that the agreed facts of this case cannot be materially distinguished from those in *Sheets*, and "the *Sheets* decision is controlling." We disagree, noting that the property owners in *Sheets* were not in possession of their property at the time the statute was enacted. We also note, while acknowledging that the law favors the use of land, that in *Sheets* the non-use or abandonment of the land therein materially distinguishes it from the case at bar.

In *Sheets*, the plaintiffs' land was included on two recorded plats. No one ever possessed the platted land, the platted streets were never built and were unnecessary for ingress and egress to lots sold within the parcel. In 1939, plaintiffs withdrew the land dedicated for streets from public use pursuant to a newly enacted statute which created a presumption of revocation of a dedication of streets by plat if the streets were not opened for 20 years. The defendants, who wanted to purchase the land, challenged the constitutionality of the statute on due process grounds, arguing that purchasers of lots within the plats were deprived of their vested rights to enforce the easements shown on the plats.

In *Sheets*, defendants' non-use of the land and their consequent failure to be in possession of the land allowed the statute to pass constitutional muster. The statute itself provided that the land would be conclusively abandoned by the public if it "shall not have been actually opened and used by the public within twenty years from and after the dedication thereof[.]" *Sheets* at 36, 6 S.E.2d at 820. In the instant case, the Statute makes no exception for owners in possession of the land and operates to divest those owners

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of land even when they have been in actual possession and enjoyment of the land.

In the instant case, not only was the remedy by which such rights might be enforced changed, defendants were automatically deprived of their land by the Statute. "It is well settled that the Legislature may change the remedy, and as the statute of limitations applies to the remedy, that it may also change that, either by extending or shortening the time; provided, in the latter case a reasonable time is given for the commencement of an action before the statute works a bar." *Sheets* at 39, 6 S.E.2d at 821. Whatever pertains to the remedy may be modified by the Legislature if no substantial right is affected, provided a sufficient remedy is left to the parties. *Id.*

Defendants in *Sheets* were not being deprived of anything they claimed as their own. Moreover, since the law favors the use of land, defendants should have known that the non-use of land would result in the transfer of title or the waiver of right to use the land. The *Sheets* Court further held that no vested right was destroyed by the statute; rather, the remedy by which those rights could be enforced had changed. The Court held that the grantees of the deeds in which the references to maps were made had constructive notice of and a reasonable time to challenge the statute.

In the case now before us, however, the Statute operates to deprive defendants in possession and enjoyment of a vested property interest. We adopt the language of the Nebraska Supreme Court: "The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never." *Pinkham v. Pinkham*, 61 Neb. 336, 338, 85 N.W. 285 (1901).

Moreover, "in this State, a statute will not be given retroactive effect when such construction would interfere with vested rights[.]" *Lester Bros. v. Pope Realty & Insurance Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959). "A retrospective statute affecting or changing vested rights, is founded on unconstitutional principles and [is] consequently void." *Id.* Retroactive divestment of property rights runs afoul of the Fourteenth Amendment to the United States Constitution. *Perry v. Perry*, 80 N.C. App. 169, 173, 341 S.E.2d 53, 56 (1986), *disc. review dismissed*, 320 N.C. 170, 357 S.E.2d 925 (1987).

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Before the Statute at issue in the case *sub judice* was enacted, defendants had acquired title to the disputed property and were in possession of the property. Therefore, the enactment of the Statute is retroactive and affects defendants' vested property rights. The Statute "under review not only bars the [defendants] of [their] right of recovery, but takes from [them their] property, transfers it to another and enables the other to recover and own it. The [defendants] not only lose [their] property, but by the magic of this [Statute] and without consideration received, it is vested absolutely in another." *Trustees of the University of North Carolina v. North Carolina Railroad Co.*, 76 N.C. 103, 107 (1877). The *Trustees* Court opined that "forfeitures of rights and property cannot be adjudged by legislative act; and confiscations without a judicial hearing, after due notice to the party to be affected, would be void, as not being by due process of law." *Id.* at 108.

Accordingly, we hold that North Carolina General Statutes § 1-44.2 is unconstitutional as it applies to fee simple landowners in possession of disputed property, in that it fails to provide them with adequate notice, an opportunity to be heard, and with just compensation.

The decision of the trial court is reversed.

Chief Judge ARNOLD and Judge ORR concur.

JULIA COURTS v. ANNIE PENN MEMORIAL HOSPITAL, INC.

No. 9221SC783

(Filed 20 July 1993)

Gifts or Donations § 11 (NCI4th) — stock given to hospital — condition that foundation be named after donor's family — insufficiency of evidence to show condition at time of donation

The trial court properly granted summary judgment for defendant hospital in plaintiff's action seeking the return of the gift of stock which she had donated to defendant hospital where plaintiff contended that the gift was made contingent upon defendant's naming its charitable foundation after her grandfather, but the evidence showed that the stock certificates

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were in fact delivered to defendant's president with no conditions attached in that plaintiff did not tell an attorney, friends, family, or any member of the hospital administration about her donation prior to signing over the stock certificates; when plaintiff went to Wachovia Bank to effectuate the transfer of the stock, she told no one that it was conditioned on a foundation being named for her family; in her phone conversations with defendant's president both before and after he received the stock certificates, plaintiff did not mention the conditional nature of the gift; at the time of the gift, defendant hospital had not even completed definite plans to establish a charitable foundation; plaintiff did not state any conditions for the gift on her IRS forms required for non-cash contributions; and only after she had made her gift did plaintiff learn about defendant's plans to establish a charitable foundation.

Am Jur 2d, Gifts §§ 49-53.

Appeal by plaintiff from Judgment entered 7 April 1992 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 8 June 1993.

Wright, Parrish, Newton & Rabil, by Melvin F. Wright, Jr. and Nils E. Gerber, for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, by Amy S. Klass, for defendant-appellee.

WYNN, Judge.

The plaintiff, Ms. Julia Courts, is a resident of Winston-Salem, North Carolina, where she has lived since 1927. Prior to relocating to Winston-Salem, Ms. Courts and her family resided in and around Reidsville, North Carolina, located in Rockingham County. Her grandfather, Dr. William James Courts, Sr., was a surgeon and prominent member of the Reidsville community whom Ms. Courts grew to admire and respect as she learned of his great contributions to the area.

When she started working in 1927, Ms. Courts commenced investing her earnings in the common stock of the R.J. Reynolds Tobacco Company and, later, R.J.R. Nabisco, Inc. [hereinafter "the stock"], and continued to invest her money in the stock for many years. In the course of purchasing the stock, Ms. Courts decided

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to some day donate it to the defendant, the Annie Penn Memorial Hospital, Inc. [hereinafter the "Hospital"], located in Reidsville, in honor of her family.

Ms. Courts had at one time contemplated leaving the stock to the hospital in her will, but changed her plans in December 1988 when it appeared that R.J.R. Nabisco, Inc. was going to be acquired by private investors. On 6 December 1988, Ms. Courts removed stock certificates representing 7,954 shares of her stock from her safe deposit box at First Union National Bank and brought them to Wachovia Bank and Trust Company [hereinafter "Wachovia"], the transfer agent for the stock. At Wachovia, Ms. Courts endorsed the stock certificates and informed the bank representative that she wished to give the stock to the Hospital. She then telephoned the Hospital, obtained its identification number necessary for the stock transfer, and left a message for Mr. James Knight, who at that time was the Hospital president. Ms. Courts relayed the identification number to Wachovia and requested that the stock certificates be mailed to Mr. Knight at the Hospital.

Later on the afternoon of 6 December 1988, Mr. Knight returned Ms. Courts' telephone call, at which time she informed him that she was sending a gift to the Hospital. She did not identify the nature or the amount of the gift, preferring instead to surprise Mr. Knight. On or about 15 December 1988, Mr. Knight received the stock certificate representing 7,954 shares of common stock in the R.J.R. Nabisco Company and telephoned Ms. Courts to tell her that he had received the certificate and to accept it on behalf of the Hospital. Mr. Knight thanked Ms. Courts and inquired into the motivation for such a generous gift. Ms. Courts told Mr. Knight she had donated the stock to the Hospital in honor of or to honor her family.

In a letter dated 22 December 1988, Mr. Knight reiterated the Hospital's appreciation for the gift and informed Ms. Courts that the Hospital wanted to express its appreciation by recognizing Ms. Courts or her family. On 23 December 1988, Mr. Knight and Mr. Craig Cardwell, then Chairman of the Board of Trustees of the Hospital, met Ms. Courts for lunch. At that time, Ms. Courts more fully explained her family ties to Rockingham County, and Mr. Knight and Mr. Cardwell explained some of the Hospital's current projects to her in an apparent effort to obtain her input as to how the Hospital might best recognize her and her family.

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While there is some evidence that Ms. Courts suggested the money might aid the poor in paying their medical expenses, other evidence shows that Mr. Knight and Mr. Cardwell told Ms. Courts about current and future Hospital projects which might be funded by the income from the stock. At deposition Ms. Courts testified that she had not selected one of the suggested projects or voiced a preference of one over the others, "Because I didn't know. I wasn't there to see what was actually needed." And when asked if, therefore, she had wanted to leave that decision up to the Hospital, she replied, "That's right." Additionally, various area newspapers carried stories regarding the Courts' family history in Reidsville and reporting the generous donation given to the Hospital by Ms. Courts in honor of her family.

Prior to receiving the gift from Ms. Courts, the Hospital had been contemplating establishing a charitable foundation through which donations could be raised for the Hospital. Ms. Courts was informed of the Hospital's efforts in this area, and she became increasingly interested in having such a foundation established in her grandfather's name. The Hospital had set up a "core group," or committee, to study the details of establishing such a foundation. Ms. Courts apparently believed that the foundation was to be named for her family and inquired on occasion as to the progress of the Courts' Foundation. Additionally, she submitted to Mr. Knight a list of people whom she wanted to sit on the foundation's board.

The Hospital did establish a charitable foundation on 5 April 1990, but, because of the apparent tradition that such a foundation should call to mind the name of the organization it supports, named it the Annie Penn Memorial Hospital Foundation. The Hospital informed Ms. Courts regarding the naming of the foundation in a letter dated 30 March 1990 from Mr. Willis Apple, then Chairman of the Board of Trustees. In that letter, Mr. Apple reiterated the Hospital's desire to show its appreciation for Ms. Courts' gift, and suggested that perhaps a Courts' Family Endowment could be established within the Foundation. Ms. Courts was very disappointed by the decision regarding the naming of the Foundation, refused to speak to any representative from the Hospital, and filed this lawsuit alleging that the gift of the stock had been conditioned on the Hospital's naming the foundation in honor of her grandfather. In fact, at the end of opposing counsel's examination of Ms. Courts during her deposition, he asked, "Ms. Courts, if the Hospital were willing to set up the William James Courts Endow-

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ment in that name and give it permanent publicity and notoriety in the press and otherwise, would that—?” Ms. Courts responded, “No, I wanted—I wanted what was originally intended, for which it was originally intended. I want to know why that couldn’t happen.” Counsel further asked, “So you weren’t going to give the money unless its name was that name of the foundation. Is that right?” Ms. Courts responded, “That’s right.”

Ms. Courts filed this lawsuit on 4 June 1991, seeking the return of the gift she had donated to the Hospital. On 20 March 1992, the Hospital made a motion for summary judgment, which motion the trial court granted on 7 April 1992 after reviewing the pleadings, depositions, answers to interrogatories, the affidavit in support of the motion, and the briefs submitted by the respective counsel and hearing counsels’ arguments. From the Judgment granting the defendant’s motion for summary judgment, the plaintiff appeals.

The plaintiff-appellant’s sole argument on appeal is that summary judgment should not have been granted in favor of the defendant-appellee. In support of this contention, the plaintiff argues that there exists a genuine issue of material fact with regard to the nature of her gift. We disagree.

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact so that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56.

In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery. *Holloway v. Wachovia Bank & Trust Co.*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992); *Sinclair v. Travis*, 231 N.C. 345, 351, 57 S.E.2d 394, 399 (1950); *Buffaloe v. Barnes*, 226 N.C. 313, 318, 38 S.E.2d 222, 225, *reh’g denied*, 226 N.C. 778, 39 S.E.2d 599 (1946). These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery must divest the donor of all right, title, and control over the property given. *Buffaloe*, 226 N.C. at 318, 38 S.E.2d at 225; *see also Thomas v. Houston*, 181 N.C. 91, 93, 106 S.E. 466, 468 (1921) (the intention must be executed by a complete and unconditional delivery). The intention to give, unaccompanied by the delivery, constitutes a mere promise to make a gift, which is unsupported by consideration, and, therefore, non-obligatory and revocable at will. *Sinclair*,

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231 N.C. at 353, 57 S.E.2d at 400. Likewise, delivery unaccompanied by donative intent does not constitute a valid gift. See *Plymouth Pallett Co. v. Wood*, 51 N.C. App. 702, 277 S.E.2d 462, *disc. rev. denied*, 303 N.C. 545, 281 S.E.2d 393 (1981).

A person has the right to give away his or her property as he or she chooses and "may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 321, 88 S.E.2d 114, 123 (1955) (quoting *Grossman v. Greenstein*, 155 A. 190 (Md. 1931)), *cert. denied*, *Leeper v. Charlotte Park & Recreation Comm'n*, 350 U.S. 983, 100 L.Ed. 851 (1956). An unconditional *inter vivos* gift, however, once given is irrevocable. See *Atkins v. Parker*, 7 N.C. App. 446, 450-51, 173 S.E.2d 38, 41 (1970); see also *Thomas*, 181 N.C. at 94, 106 S.E. at 468 (a gift *inter vivos* is absolute and takes effect at the time delivery is completed, provided there are no conditions attached). The intent of the donor to condition the gift must be measured at the time the gift is made, as any "undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention." *Howell v. Smith*, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (intent in context of a contract).

There is no question in the present case regarding the delivery of the stock. Ms. Courts went to Wachovia and had the stock certificates issued in the name of the Hospital, and those certificates were subsequently mailed to Mr. Knight in his capacity as president of the Hospital. See *Buffaloe*, 226 N.C. at 318, 38 S.E.2d at 225 (stating the general rule that where the owner or purchaser of shares of stock has the certificate issued in the name of another, and so registered on the books of the corporation, the transaction is regarded as a gift completed by constructive delivery). The issue with which we are concerned on appeal then stems from the element of donative intent and requires this Court to determine whether Ms. Courts attached any conditions to her gift at the time she delivered the stock to the Hospital.

Ms. Courts contends that she donated the stock on the condition that the Hospital name its charitable foundation after her

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grandfather. The evidence in the record, however, suggests that the gift of the stock was unconditional. Before signing over the stock certificates, Ms. Courts did not discuss her donation with an attorney, friends, or any member of the Hospital administration. There is no evidence to suggest that when she went to Wachovia to effectuate the transfer of the stock that she told anyone the transfer was conditioned on a foundation being named for her family. Moreover, in her phone conversations with Mr. Knight, both before and after he received the stock certificate on behalf of the Hospital, she did not tell him that the gift was conditioned on such a foundation being established. Additionally, it appears that at the time of the gift the Hospital had not even completed definite plans to establish a charitable foundation. Furthermore, Ms. Courts completed IRS Form 8283 as required for non-cash charitable contributions when filing her income tax returns in 1988, 1989, and 1990, which form has a section which must be completed if any conditions were placed on a charitable contribution. The forms completed by Ms. Courts indicate that there were in fact no conditions placed on the gift.

The record indicates that it was only after she had made an unconditional gift of the stock to the Hospital that Ms. Courts learned about the Hospital's plan to establish a charitable foundation. It was then that she conceived the idea that her donation should be used to fund the foundation and that the foundation should bear her grandfather's name. It is evident, however, that there was some misunderstanding between the Hospital and Ms. Courts regarding the naming of the foundation. Ms. Courts referred to the foundation as the "Courts Foundation" in Mr. Knight's presence and neither he nor anybody else at the Hospital corrected her misconception. Moreover, it is apparent that the Hospital did not explain to Ms. Courts in detail the nature of the foundation, the procedure used to select a name for the foundation, or that, while the foundation itself should be named for the Hospital, within the foundation a lasting endowment could be established in the Courts family name.

The record illustrates that the Hospital, in accepting Ms. Courts' generous gift, failed to take great care to see that it was adequately recognized in a manner acceptable to the generous donor, and failed to ensure that there were no misunderstandings regarding how it intended to utilize the gift. Essentially, it appears that the Hospital and its administration, though initially openly ap-

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preciative of the gift, became insensitive to the fact that the elderly Ms. Courts had unselfishly donated her life's savings to the Hospital. We do not wish to condone such callousness, as it will act only to discourage the generosity of private citizens necessary to serve the public good.

The law, however, does not require the Hospital to name its charitable foundation for Ms. Courts' family. As we have previously concluded, at the time Ms. Courts completed the stock transfer, which is the relevant time to examine her donative intent, she attached no conditions to her gift. It was only later, upon learning of the means by which the Hospital could show its appreciation for her gift and establish a lasting memorial to the Courts family, that she attached conditions to her gift. Such "after-the-fact" conditions are not recognized by the law. *See Howell*, 258 N.C. 150, 128 S.E.2d 144. To allow conditions to attach after the gift has been completed would effectively allow for the revocation of an unconditional gift, which the law does not permit. *See Thomas*, 181 N.C. 91, 106 S.E. 486. Moreover, to allow conditions to attach later would put the donee in a position fraught with uncertainty regarding his or her rights to the property received.

The evidence suggests that there was no genuine issue regarding the nature of Ms. Courts' gift to the Hospital. For the foregoing reasons, therefore, the decision of the trial court is,

Affirmed.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. LUIS ANTONIO OLIVERA RODRIGUEZ

No. 9215SC578

(Filed 20 July 1993)

Criminal Law § 124 (NCI4th) — prosecutor to take no position on sentencing — violation of plea agreement

The District Attorney did take a position with regard to sentencing by noting for the trial judge certain available non-statutory aggravating factors, particularly as they applied

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to defendant's case, thereby violating defendant's plea agreement. Failure of the trial court to find any of the aggravating factors suggested by the District Attorney did not render the error harmless, and failure of defense counsel to object to the prosecutor's actions did not constitute a waiver.

Am Jur 2d, Criminal Law §§ 481-485.

Appeal by defendant from judgment entered 21 February 1992 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 11 May 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General E. H. Bunting, Jr., for the State.

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

JOHN, Judge.

On February 21, 1992, defendant entered pleas of guilty to two counts of second degree murder and one count of assault with a deadly weapon inflicting serious injury. Pursuant to a plea arrangement as to sentencing, he received two consecutive life sentences on the second degree murder convictions. The trial court also imposed a ten year consecutive sentence on the felonious assault conviction. As defendant expressly states in his brief to this Court, the murder convictions and sentences are not the subject of his appeal. It is only the sentence for felonious assault which he contests.

Defendant asserts he was deprived of his constitutional right to due process of law. He bases this contention upon his being sentenced to a term in excess of the presumptive term for felonious assault after the prosecutor suggested to the trial court certain non-statutory aggravating factors. These suggestions were made in open court despite the express terms of a plea agreement in which the prosecutor agreed to "take no position on sentencing." Upon review, we find defendant's position persuasive.

The facts are not in dispute. Defendant was indicted for two counts of murder in the shooting deaths of Loreda Burnett and Barbara Quirindongo, and for assault with a deadly weapon with intent to kill inflicting serious injury on Carmen Garcia. After negotiations, defendant pled guilty to two counts of second degree murder with the express agreement that he would be sentenced

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to two consecutive life terms. He also pled guilty to the offense of assault with a deadly weapon inflicting serious injury. In defendant's written transcript of plea form, the District Attorney agreed the State would "take no position on sentencing on the assault charge." The court accepted the pleas and subsequently sentenced defendant.

At the sentencing hearing, defendant's counsel urged the court, based on defendant's history of epileptic seizures and substantial ingestion of cocaine at the time of the offenses, to find as a statutory mitigating factor that defendant was suffering from a mental or physical condition which reduced his culpability for the felonious assault offense. N.C.G.S. § 15A-1340.4(a)(2)(d) (Cum. Supp. 1992). The court then inquired of the State, "Anything further . . . ?" In response, the District Attorney made the following statements:

Your Honor, just to suggest briefly, I did want to make the Court aware that under the facts and under what's already been presented, that the courts have—the Court has recognized in its discretion that in the evidence of the particular crimes, particularly with regard to the assault with a deadly weapon, inflicting serious injury, the nonstatutory aggravating factor of the course of violent conduct, and the nonstatutory aggravating factor of a crime committed following flight from another crime.

That the Court has recognized the nonstatutory aggravating factor of a course of violent conduct, and also the nonstatutory aggravating factor of a crime committed such as the assault that was committed following his flight from the initial shooting which had occurred at 751 Pritchard Extension, at a later location, when this occurred over in Elliot Road some distance away.

The trial court thereafter found no mitigating factors, no statutory aggravating factors, and one non-statutory aggravating factor ("the crime arose out of the defendant coming to Chapel Hill from another state for the purpose of selling illegal drugs"). Defendant subsequently received the statutory maximum sentence of ten years for felonious assault.

Defendant contends the District Attorney's remarks on non-statutory aggravating factors breached the provision of the plea agreement promising that the prosecution would "take no position

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on sentencing on the assault charge." Defendant further maintains this breach deprived him of his constitutional right to due process of law and entitles him to resentencing even if the prosecutor's comments had no effect on the trial judge's sentencing decision. We agree.

Plea bargaining is an essential component of the criminal justice system. *State v. Slade*, 291 N.C. 275, 277, 229 S.E.2d 921, 923 (1976). "It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Santobello v. New York*, 404 U.S. 257, 261, 30 L.Ed.2d 427, 432 (1971). Moreover, the process is duly codified in North Carolina's statutory scheme of criminal procedure, the Criminal Procedure Act. See N.C.G.S. § 15A-1011 *et seq.* (1988 & Cum. Supp. 1992).

Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835, 93 L.Ed.2d 75 (1986). A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain. See *Dixon v. State*, 8 N.C. App. 408, 416, 174 S.E.2d 683, 689 (1970) (a plea of guilty will stand unless induced by misrepresentation, including unfulfilled or unfulfillable promises); *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) (if defendant elects not to stand by his portion of the plea arrangement, the State is not bound by its agreement).

The *Santobello* Court highlights the serious contractual nature of a plea bargain: "[A] constant factor [in the plea bargaining process] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262, 30 L.Ed.2d at 433. In addition, because of a defendant's due process right arising out of the "adjudicative element inherent in accepting a plea of guilty, [the agreement between the parties must be] attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances."

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Id. Once the prosecution makes a promise in exchange for a guilty plea, the right to due process and basic contract principles require strict adherence.

This Court endorsed *Santobello* in *Northeast Motor Co. v. N.C. State Board of Alcoholic Control* by stating that:

the Court's conclusion in *Santobello* is predicated upon the defendant's surrender of fundamental constitutional rights—effectuated by the entry of a plea of guilty or *nolo contendere*—in reliance upon the prosecutor's promise. See *Brady v. United States*, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970). Thus, when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he is entitled to relief.

35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978).

In *Santobello*, a defendant indicted for two felonies entered into a plea agreement to plead guilty to a lesser-included offense in exchange for the prosecutor's agreement to make no recommendation as to sentencing. Sentencing was delayed and at the hearing many months later a new prosecutor, unaware of the prior agreement, recommended the maximum sentence. When defendant objected, the trial judge stated, "I am not at all influenced by what the District Attorney says," and "[i]t doesn't make a particle of difference what the District Attorney says" *Id.* at 259, 30 L.Ed.2d at 431. He thereafter sentenced defendant to imprisonment for the maximum term of one year. The Supreme Court held that even if the trial court's decision on sentencing was not affected, the prosecutor's failure to comply with the terms of the plea agreement, although inadvertent, required the judgment to be vacated and the case remanded for, at a minimum, specific performance of the agreement through resentencing before a different judge. *Id.* at 263, 30 L.Ed.2d at 433.

Under the plea arrangement in the case *sub judice*, the District Attorney promised to "take no position on sentencing on the assault charge." The phrase "take no position on sentencing" may be characterized as ambiguous. Arguably one might assert the language simply bars the District Attorney from urging the court to impose a *specific* sentence. A more plausible interpretation, however, is that "once the issue of guilt had been resolved by entry of a plea, the [prosecutor is to] make no comment to the sentencing judge,

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either orally at sentencing or in writing prior to sentencing, that bears in any way upon the type or severity of the sentence to be imposed.” *United States v. Corsentino*, 685 F.2d 48, 51 (2nd Cir. 1982). Stated another way, “taking no position” means making no attempt to influence the decision of the sentencing judge. *United States v. Miller*, 565 F.2d 1273, 1275 (3d Cir. 1977), *cert. denied*, 436 U.S. 959, 57 L.Ed.2d 1125 (1978).

The State insists in its brief that the District Attorney “merely set forth the facts and circumstances necessary, and required,” to permit the court to fulfill its sentencing role, and that the record does not support “a conclusion that the prosecutor engaged in taking a position on sentencing or in attempting to influence the severity of the sentence.” The State’s assertion is unconvincing and ignores the day-to-day realities of give and take advocacy in the trial court. The District Attorney’s statement cited previously approved non-statutory aggravating factors. In the context of the sentencing hearing, his remarks, even if intended otherwise, can only be construed as suggesting that defendant’s sentence be aggravated under the balancing methodology set forth in the Fair Sentencing Act. In the words of one court, “[o]nly a stubbornly literal mind would refuse to regard the Government’s commentary as communicating a position on sentencing.” *United States v. Crusco*, 536 F.2d 21, 26 (3d Cir. 1976). We hold the District Attorney did take a position with regards to sentencing by noting for the trial judge certain available non-statutory aggravating factors, *particularly* as they applied to defendant’s case, and he therefore violated the plea bargain.

The language of the plea agreement between defendant and the State is very similar to that examined in *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989), where the government promised not to “take a position relative to whether or not a custodial sentence shall be imposed.” *Id.* at 1358. Yet, the government in its sentencing memorandum offered opinions and drew conclusions about defendant’s character, commenting he was “not just a white-collar criminal.” *Id.* at 1359. The statements were found to be in violation of the plea agreement. “[T]he government must adhere strictly to the terms of the bargain it strikes with defendants.” *Id.* at 1361 (quoting *Miller*, 565 F.2d at 1274). Furthermore, “[a]n unqualified promise of the prosecution not to take a position on sentencing obviously jeopardizes the government’s position in the sentencing process and may require the government to remain

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silent when it should stand up and speak.” *Id.* at 1361 (citing *Crusco*, 536 F.2d at 26).

The State also points out that none of the non-statutory aggravating factors suggested by the District Attorney were found by the trial court, inferring that its decision was not affected by the improper comments. However, even a deliberate effort by the court to disabuse itself of any influence from the prosecutor’s remarks in breach of a plea agreement was held to be unavailing in *Santobello*:

[The sentencing judge] stated that the prosecutor’s recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case

Id. at 262, 30 L.Ed.2d at 433; accord *United States v. Martin*, 788 F.2d 184, 187 (3d Cir. 1986) (immaterial whether the government’s breach is inadvertent and the breach probably did not influence the judge in the sentence imposed).

In addition, the failure of defense counsel to object to the prosecutor’s actions does not constitute a waiver. “Ordinarily there is no requirement that a defendant object to the violation of a plea agreement at the time of sentencing, and defendant’s claim that his plea agreement was violated is not waived by his failure to raise the issue at sentencing” *Paradiso v. United States*, 689 F.2d 28, 30 (2d Cir. 1982), cert. denied, 459 U.S. 1116, 74 L.Ed.2d 970 (1983); see also *Moscahlaidis*, 868 F.2d at 1360. As Justice Stevens observed in a concurring opinion in *United States v. Benchimol*, 471 U.S. 453, 85 L.Ed.2d 462 (1985) (Stevens, J., concurring), “[i]f the Government erred in failing to recommend affirmatively the proper sentence, the time to object was at the sentencing hearing or on direct appeal.” *Id.* at 457, 85 L.Ed.2d at 467. While defendant did not raise his objection before the trial court, he does so now in this direct appeal.

Furthermore, the purpose of a contemporaneous objection is to afford the trial judge an opportunity to cure the asserted error. As previously noted, the Supreme Court expressly held in *Santobello* that a deliberate effort by the trial judge to ignore improper remarks cannot cure the due process violation caused by breach of the

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plea agreement. *Santobello*, 404 U.S. at 262, 30 L.Ed.2d at 433. Thus, when a trial judge cannot effectively cure the error, enforcement of the principle of waiver for lack of a contemporaneous objection serves no legitimate purpose. See *State v. Sanderson*, 327 N.C. 397, 404, 394 S.E.2d 803, 806-07 (1990).

Having concluded the prosecutor violated the terms of the plea agreement, even though the court likely was not influenced by this breach, and that defendant has not waived raising this issue on direct appeal by failing to object at trial, we must consider the type of relief to which defendant may be entitled. He requests a new sentencing hearing before a different trial judge, i.e., enforcement of his bargain. The prosecution promised something within its power to control, and in such cases enforcement of the bargain is appropriate. *United States v. Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972), cert. denied, 417 U.S. 933, 41 L.Ed.2d 237 (1974). We hold defendant is to receive a new sentencing hearing at which the State "takes no position on sentencing" on the charge of assault with a deadly weapon inflicting serious injury. Accordingly, we vacate the judgment entered thereon and remand for sentencing on the felonious assault offense.

While we have every confidence in the distinguished trial judge's ability to afford defendant a fair and impartial hearing on remand, under the holding of *Santobello* cited above we also direct that defendant's new sentencing hearing be conducted before a different trial judge. See also *United States v. McCray*, 849 F.2d 304, 306 (8th Cir. 1988); *United States v. Brody*, 808 F.2d 944, 948 (2d Cir. 1986) (egregious nature of breach requires the additional step of reassigning the proceedings to a different sentencing judge); *United States v. Carbone*, 739 F.2d 45, 47-48 (2d Cir. 1984) (resentencing by different judge is required though trial court not influenced by government's argument).

Vacated and remanded.

Judges WELLS and COZORT concur.

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WILLIAM DWIGHT BOESCHE, PLAINTIFF v. RALEIGH-DURHAM AIRPORT
AUTHORITY, *ET AL.* DEFENDANTS

No. 9215SC23

(Filed 20 July 1993)

1. Labor and Employment § 66 (NCI4th); Constitutional Law § 85 (NCI4th)— employer's drug testing policy— plaintiff in position to affect public safety or safety of others— constitutional policy

The drug testing policy implemented by defendant airport authority was constitutional where plaintiff was authorized to drive a vehicle on the apron of the flight area of Raleigh-Durham airport; he was in a position in which public safety or the safety of others was an overriding concern; and there thus existed a legitimate reason for the implementation of a drug testing program.

Am Jur 2d, Constitutional Law §§ 557-573; Master and Servant §§ 49-59.

2. Labor and Employment § 63 (NCI4th)— wrongful discharge— bad faith exception not recognized

North Carolina does not recognize an independent tort claim for wrongful discharge under the bad faith exception.

Am Jur 2d, Master and Servant §§ 27-33.

3. Labor and Employment § 66 (NCI4th); Constitutional Law § 85 (NCI4th)— random drug testing— testing procedure constitutional— no testing performed on plaintiff— dismissal of constitutional claims proper

The trial court properly dismissed plaintiff's constitutional claims against defendant airport authority's random drug testing procedure policy that afforded plaintiff no prior notice of testing or test procedure, that included no guarantee of confidentiality of test results or immunity from criminal prosecution in the case of a positive result, and that led to plaintiff's termination with no opportunity for a hearing before an impartial tribunal, since (1) defendant's random drug testing procedure was constitutional, and (2) plaintiff never participated in the testing procedure which effectively precluded any possible constitutional violation.

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Am Jur 2d, Constitutional Law §§ 557-573; Master and Servant §§ 49-59.

Appeal by plaintiff from order entered 4 November 1991 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 9 December 1992.

Loftin and Loftin, by John D. Loftin, for plaintiff-appellant.

Walter H. Bennett, Jr. for plaintiff-appellant.

Newsom, Graham, Hedrick, Bryson & Kennon, by Lewis A. Cheek, Richard S. Boulden and John R. Long, for defendants-appellees.

JOHNSON, Judge.

Plaintiff, William D. Boesche, was employed by the defendant, Raleigh-Durham Airport Authority, as a Maintenance Mechanic II on or about 30 August 1987. Plaintiff's employment duties generally consisted of performing preventative maintenance and repairs on airport terminal air conditioning and ventilating and heating systems. Throughout his employment tenure, plaintiff had performed his job duties competently and satisfactorily. Based on this satisfactory performance, plaintiff had received two merit pay raises.

On 21 February 1990, plaintiff was approached by defendant's Airport Maintenance Manager, Mr. Owens, who asked plaintiff to accompany him to Park Medical Center in Wake County to submit to a urine drug test. Mr. Owens did not express that plaintiff was suspected of any individualized wrongdoing. Plaintiff refused to submit to the test.

Plaintiff demanded to see defendant Airport Personnel Manager Farrar-Luten who told plaintiff that the new proposed testing policy was implemented pursuant to a Federal Aviation Administration directive requiring that all employees who drive a motor vehicle in the airside of the airport must be tested. Plaintiff asked to see the directive, but Farrar-Luten refused to show him the directive.

Plaintiff then saw defendant Airport Director Brantley who told plaintiff that plaintiff must submit to a drug test because that was the airport's policy. Upon plaintiff's refusal to submit to the drug test, he was discharged.

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On 26 April 1991, plaintiff filed a complaint in this action alleging the aforesaid facts and claiming that the actions of the defendants violated his rights to be free from illegal searches and invasion of privacy under the Fourth Amendment to the United States Constitution and Article I, Sections 20, 35 and 36 of the North Carolina Constitution; his rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 19, 35 and 36 of the North Carolina Constitution; his right not to be discharged from employment in bad faith or for reasons contravening public policy under the common law of North Carolina; and for the common law tort of intentional/negligent infliction of emotional distress. Defendants moved to dismiss the complaint as amended under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that it failed to state a claim upon which relief could be granted. On 4 November 1991, the motion to dismiss was granted in its entirety. Plaintiff appealed.

By plaintiff's first assignment of error, plaintiff contends that the trial court committed reversible error by dismissing plaintiff's claim for wrongful discharge of a public employee under the public policy and bad faith exceptions to the employment at will doctrine, where plaintiff was discharged for his refusal to waive his rights to due process of law, privacy, and freedom from unreasonable search and seizure of his person by submitting to an unconstitutional drug test. We disagree.

On review of a motion to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, all allegations of fact are taken as true but conclusions of law are not. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). The trial court's dismissal of plaintiff's complaint under Rule 12(b)(6) is proper and must be sustained when (1) the complaint on its face reveals that no law supports plaintiff's claim; (2) the complaint on its face reveals the absence of fact sufficient to make a good claim; and (3) some facts disclosed in the complaint necessarily defeat the plaintiff's claim. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986).

With this in mind, we now address plaintiff's claim that by his discharge, defendants violated North Carolina public policy. Generally, North Carolina adheres to the employment-at-will doctrine which holds that absent a contract of employment for a definite

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term, the employee-employer relationship can be terminated by either party at any time for any reason or no reason. *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991); *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990); *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). There have been several exceptions carved out of the employment-at-will rule. The legislature has enacted certain statutory exceptions that place certain limitations on this rule, i.e., prohibiting discharge in retaliation for filing a workers' compensation claim, North Carolina General Statutes § 97-6.1 (1983); prohibiting discharge for engaging in labor disputes, North Carolina General Statutes § 95-83 (1985); and prohibiting discharge for filing Occupational Safety and Health Act claims, North Carolina General Statutes § 95-130(8) (1985).

North Carolina Courts have also placed some limitations on the doctrine by the creation of two public policy exceptions. The first public policy exception was created in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 334 S.E.2d 13 (1985). In *Sides*, the Court was reviewing the dismissal of plaintiff's complaint for failure to state a claim upon which relief could be granted. The plaintiff in *Sides* alleged that she was discharged for her refusal to testify untruthfully or incompletely in a court action against her employer. In determining that the plaintiff's complaint stated a cause of action under a public policy exception, the *Sides* Court stated:

[W]hile 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. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Id. at 342, 328 S.E.2d at 826. A second public policy exception was created in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). In *Coman*, an employee was discharged for refusing to violate government highway safety rules. The *Coman* Court held that the defendant's discharge of plaintiff was in violation of the public policy of North Carolina. Although these two cases seem to have expanded the employment-at-will doctrine, subsequent case law has made it very clear that the decisions

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in *Sides* and *Coman* have only narrowly eroded the employment-at-will doctrine. *Burgess*, 326 N.C. at 209-10, 388 S.E.2d at 137.

Plaintiff in the case *sub judice*, argues that this Court should create a third public policy exception based on an employee's exercise of his legal rights and privileges. Plaintiff acknowledges his employment-at-will status but argues that this should not require him to waive his basic constitutional right. Plaintiff further argues that he was terminated when he asserted his basic Fourth Amendment right to be free from unreasonable searches and seizure, invasion of privacy and deprivation of due process. In order to determine whether a third public policy exception should be adopted, we must first determine whether defendant's random drug testing program was unconstitutional.

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" The essential purpose of the Fourth Amendment is to "impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54, 59 L.Ed.2d 660, 667 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 935 (1967).

Courts have clearly established that individuals retain an expectation of privacy and a right to be free from government intrusion in the integrity of their own bodies. *United States v. Ramsey*, 431 U.S. 606, 52 L.Ed.2d 617 (1977). With this premise in mind, Courts have determined that governmental taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment. *Skinner v. Railway*, 489 U.S. 602, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (1987).

The Supreme Court, however, established that random drug testing of urine in the workplace can be constitutional if the reasonableness of the search is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests. *Skinner*, 489 U.S. 602, 103 L.Ed.2d 639. In *Skinner*, the Court allowed random drug testing where the individual tested was engaged in activity which involved either public safety or safety concerns for others because it was

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a legitimate governmental interest. *Id.* The Court in *Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990) stated:

Where a business is engaged in an activity which involves either public safety or safety concerns for others, we find that there exists a legitimate reason for the implementation of a drug testing program[.] . . . However, there must be a showing by the employer that the employees required to undergo such testing have responsibilities or duties which are connected to the safety concerns of others.

Twigg, 185 W.Va. at 159, 406 S.E.2d at 56.

[1] Applying this standard to the facts in the case *sub judice*, the record showed that plaintiff was in a position in which public safety or the safety of others was an overriding concern. Plaintiff's duties consisted of generally performing preventative maintenance and repairs on airport terminal air conditioning and ventilating and heating systems, but plaintiff also had security clearance to drive a motor vehicle 10 M.P.H. in a designated area on the apron of the flight area in order to get access to the systems located on the outside of the building. We find that plaintiff, if drug impaired while operating a motor vehicle on the apron of the flight area, could increase the risk of harm to others. Accordingly, we find that the drug testing policy implemented by defendants was constitutional and therefore, plaintiff does not state a cognizable claim for relief.

[2] Plaintiff next argues that the trial court committed reversible error when it held that plaintiff failed to state a cognizable claim under the bad faith exception to the employment-at-will doctrine. This argument is meritless.

The Court in *Coman*, 325 N.C. 172, 381 S.E.2d 445, noted that North Carolina had not recognized a bad faith exception to the employment-at-will doctrine but stated that other courts in other states "have recognized wrongful discharge theories characterized either as the bad faith exception to the at-will doctrine or under the implied covenant of good faith and fair dealing." *Id.* at 177, 381 S.E.2d at 448 (citations omitted). In addition, the *Coman* Court stated that "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Coman*, 325 N.C. at 177, 381 S.E.2d at 448. However, the statements addressing a bad faith exception were not relied

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upon in *Coman's* ultimate holding that plaintiff had stated a valid claim for wrongful discharge based on the public policy exception to the employment-at-will doctrine.

Most Courts interpreting *Coman* have recognized that the discussion in *Coman* of a bad faith discharge was dicta, but have come to different conclusions. *English v. Gen. Elec. Co.*, 765 F. Supp. 293 (E.D.N.C. 1991) (disallowing tort claim for bad faith exception); *Haburjak v. Prudential Bache Sec., Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991) (disallowing tort claim for bad faith exception); *Iturbe v. Wandel & Goltermann, Technologies, Inc.*, 774 F. Supp. 959 (M.D.N.C. 1991) (allowing claim for bad faith discharge).

However, two recent cases, *Salt*, 104 N.C. App. 652, 412 S.E.2d 97 and *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), have clarified North Carolina's position on the issue of a bad faith exception. The *Salt* Court and the *Amos* Court both held that North Carolina does not recognize an independent tort claim for wrongful discharge under the bad faith exception. We therefore find plaintiff has not stated a cognizable claim.

By plaintiff's second assignment of error, plaintiff contends that he is not subject to random drug testing because he is neither (1) a sensitive public employee because of either safety or security reasons or (2) an individual suspected of drug use.

A discussion of this assignment of error was encompassed in the first argument where we determined that plaintiff was indeed a sensitive public employee because of safety concerns. As such, plaintiff is subject to random drug testing as a legitimate governmental interest. We do not deem it necessary to further address this issue.

[3] By plaintiff's third assignment of error, plaintiff contends that the trial court committed reversible error in dismissing plaintiff's constitutional claims against defendant's random drug testing procedure policy that afforded plaintiff no prior notice of testing or test procedure, that included no guarantee of confidentiality of test results or immunity from criminal prosecution in the case of a positive result, and that led to plaintiff's termination with no opportunity for a hearing before an impartial tribunal. We disagree.

After a careful review of the record, we find no violation of plaintiff's constitutional rights. The arguments raised in this

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assignment of error are moot in that (1) we found that the defendants' random drug testing procedure was constitutional and (2) plaintiff never participated in the testing procedure which effectively precluded any possible constitutional violation. As such, plaintiff has failed to raise a cognizable claim. This assignment of error is overruled.

By plaintiff's fourth assignment of error, plaintiff contends that the trial court committed reversible error when it dismissed plaintiff's claims in his complaint which were based upon defendants' denial of plaintiff's right of substantive due process rights. We disagree.

"An employment discharge violates substantive due process rights if it is based upon constitutionally impermissible grounds, regardless of whether the employee had a property interest in continued employment." *Privette v. University of North Carolina*, 96 N.C. App. 124, 135, 385 S.E.2d 185, 190 (1989).

Plaintiff alleged that his substantive due process rights were violated because he was forced to elect between exercise of a constitutional right and the privilege of government employment. As we have made an earlier determination that plaintiff's constitutional rights were not violated, we find no violation of substantive due process rights.

In plaintiff's fifth assignment of error he argues that the trial court committed reversible error when it dismissed plaintiff's claims in his complaint which were based upon defendants' denial of plaintiff's right to procedural due process.

In order to sufficiently state a claim of denial of due process rights, plaintiff must reveal "a colorable claim that a 'property' or 'liberty' interest was violated by the procedures attendant to plaintiff's discharge." *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979).

In the present case, there has been no dispute and the record clearly reveals that plaintiff is an employee-at-will. "At-will employees have no property interests in their employment cognizable under the due process clause." *Privette*, 96 N.C. App. at 137, 385 S.E.2d at 192. This assignment of error is overruled.

We have carefully reviewed assignments of error seven and eight and find them to be meritless.

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The trial court's decision is affirmed.

Chief Judge ARNOLD and Judge ORR concur.

MARLENE ELLIS, PETITIONER-APPELLANT v. NORTH CAROLINA CRIME
VICTIMS COMPENSATION COMMISSION, APPELLEES

No. 9121SC894

(Filed 20 July 1993)

1. Criminal Law § 1648 (NCI4th)— findings of administrative law judge adopted by Commission—cooperation of victim—subsequent contradictory finding improper

Where the administrative law judge found no evidence that appellant victim had failed to cooperate with the Winston-Salem police department, and respondent Crime Victims Compensation Commission subsequently adopted those findings, the Commission could not then find that, because petitioner refused to prosecute the man who had assaulted her, she had not fully cooperated as a matter of law. Consequently, the Commission's decision to deny compensation was the result of an arbitrary determination by the Commission and, as such, must be reversed.

Am Jur 2d, Criminal Law §§ 1051, 1058.

2. Criminal Law § 1653 (NCI4th)— compensation for crime victims—prosecution not prerequisite

Respondent Commission erred in finding that N.C.G.S. Ch. 15B, the Crime Victims Compensation Act, imposes an affirmative obligation upon crime victims to pursue prosecutions as a prerequisite to compensation under the Act, and erred in determining that failure to prosecute in and of itself constitutes willful refusal to cooperate which will result in denial of compensation.

Am Jur 2d, Criminal Law §§ 1052, 1058.

Statutes providing for governmental compensation for victims of crime. 20 ALR4th 63.

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[111 N.C. App. 157 (1993)]

Appeal by petitioner from judgment entered 3 June 1991 by Judge Preston Cornelius in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 1992.

In August 1989, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings to review the adverse decision rendered against respondent by the North Carolina Crime Victims Compensation Commission. After a hearing on 10 May 1990, the Administrative Law Judge found that the denial of the award should be reversed. The Crime Victims Compensation Commission (the Commission) considered the recommended decision of the administrative law judge, and on 11 September 1990, issued its decision and order, again denying compensation. Petitioner then filed this action for judicial review of the final decision of the Commission. Following a hearing on 3 June 1991, the trial court affirmed the decision of the North Carolina Crime Victims Compensation Commission. From this judgment, petitioner appeals.

Legal Aid Society of Northwest North Carolina, Inc., by Hazel M. Mack, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Hal F. Askins, for the State.

ORR, Judge.

The issue on appeal is whether the trial court erred in affirming the decision of the North Carolina Victims Compensation Commission and in ordering that petitioner not be compensated for her medical expenses. We reverse the order of the trial court for the reasons set forth below.

Petitioner Marlene Ellis filed an application with the North Carolina Crime Victims Compensation Commission on or about 22 February 1989, alleging that she was a victim of crime subject to compensation under the North Carolina Crime Victims Compensation Act. On 24 July 1989, petitioner was informed that her claim for compensation had been denied because "she had failed to cooperate with or to supply requested information to the appropriate law enforcement agencies." Based on these determinations, petitioner's request for compensation was denied in accordance with N.C. Gen. Stat. § 15B-11(c). N.C.G.S. § 15B-11(c) states that

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[a] claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies with regard to the criminally injurious conduct that is the basis for the award.

In its findings, the Commission stated that

[i]nvestigation of the hereinabove-captioned matter by the undersigned has revealed that the claimant has not fully cooperated with appropriate law enforcement agencies in the criminally injurious conduct from which this claim arises, to wit: willfully failed or refused to cooperate in the prosecution of the offender charged in the incident at issue.

In August 1989, the petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings alleging that by denying her claim for compensation, the Victims Compensation Commission exceeded its authority and failed to act as required by law. On 10 May 1990, a hearing was held before an Administrative Law Judge (ALJ). Subsequent to the hearing, the ALJ made the following findings of fact and conclusions of law:

Findings of Fact

1. On the evening of January 21, 1989, the petitioner returned home to her apartment. Her boyfriend, Terry Edgar Trail, was on the couch. The petitioner had a couple of alcoholic drinks. Thereafter, Mr. Trail assaulted the petitioner by hitting her in the face with his fist and throwing her against the piano. The petitioner immediately telephoned the Winston-Salem Police Department. Officer J.H. Williams responded to the call. The petitioner told Officer Williams what occurred. She refused medical treatment but stated "that she thought her nose had been disconnected." The petitioner did not wish to prosecute. She merely wanted Mr. Trail to leave. Mr. Trail was the father of her twenty-eight month old son. The petitioner received medical treatment for her injuries.

2. An employee of the respondent telephoned the petitioner and informed her that she was required to prosecute in order to receive benefits. The victim assistance coordinator of the Winston-Salem Police Department told her the same thing. Mr. Trail has not been prosecuted for the assault.

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3. There is no evidence that the petitioner has not fully cooperated with the Winston-Salem Police Department with regard to the assault. There is no evidence that the petitioner failed to supply requested information to the Police Department. The employee of the respondent and the victim assistance coordinator were not acting on behalf of the Winston-Salem Police Department in investigating and prosecuting the assault.

Conclusions of Law

The respondent improperly denied the petitioner's claim pursuant to GS 15B-11(c).

The respondent filed exceptions and written arguments to the recommended decision of the ALJ on 23 May 1990. The respondent, "conceded that the findings of the Administrative Law Judge correctly reflect testimony presented at the November 8, 1989 hearing. . .", but asserted that since the petitioner had consistently refused to prosecute, the permissive word "may" in N.C. Gen. Stat. § 15B-14(a) gave the Commission the legislative power to deny compensation in cases where there was no prosecution of the perpetrator. The Commission made a final determination on 11 September 1990, adopting the ALJ's findings of fact. However, it declined to adopt the conclusions of law and recommended decision. Based on the "findings therein", the Commission stated that:

Petitioner has not fully cooperated with appropriate law enforcement agencies with regard to the criminally injurious conduct and is denied compensation pursuant to G.S. 15B-11(c). A crime victim has an affirmative obligation to pursue criminal prosecutions against the perpetrator. By her own admission, Petitioner failed to prosecute. She cannot, therefore, expect the State of North Carolina to compensate her for injuries resulting from the criminally injurious conduct. The Crime Victims Compensation Commission is intended to assist innocent victims of crime with the financial burden incurred as a result of injuries received, and to encourage those victims to participate in the criminal justice system and pursue prosecution of offenders. Petitioner has failed to do so and is denied compensation.

Pursuant to N.C. Gen. Stat. § 150B-45, petitioner sought judicial review in the Forsyth County Superior Court. Following a hearing on 3 June 1991, the trial court determined that the Commission

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stated specific reasons why it did not adopt the recommended decision of the ALJ and found that the Commission's action was made on lawful process without error of law and was neither arbitrary nor capricious. The court further determined that the decision of the Commission was based on a reasonable interpretation of the applicable statutes, and affirmed the decision of the Commission. The petitioner has appealed that decision for a determination by this Court.

The petitioner argues that the Commission's decision to deny compensation based on a conclusion that Ms. Ellis did not fully cooperate with law enforcement officers is (1) not supported by substantial evidence, (2) not based on a reasonable interpretation of Chapter 15B of the General Statutes and (3) the determination is arbitrary and capricious. The petitioner further contends that the findings of fact adopted by the Crime Victims Compensation Commission do not support its conclusions of law as set forth in the final determination of the Commission. The petitioner asserts that she meets the statutory requirements for compensation, thereby precluding the Commission from denying her an award.

N.C. Gen. Stat. § 150B-51(b) states in pertinent part that:

. . . the court reviewing [an agency's] final decision may . . . 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:

. . .

(2) In excess of the statutory authority or jurisdiction of the agency;

. . .

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1992).

"The proper standard to be applied depends on the issues presented on appeal. If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required."

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Walker v. N.C. Dep't of Human Resources, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). A review of whether the agency decision is supported by sufficient evidence, or is arbitrary and capricious, requires the court to employ the whole record test. *Id.* While the appellate court's review is typically limited by the assignments of error, it is not required to give any particular deference to the lower court's findings or conclusions. *Watson v. N.C. Real Estate Comm'n.*, 87 N.C. App. 637, 362 S.E.2d 294 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). Furthermore, "[i]ncorrect statutory interpretation by an agency constitutes an error of law under G.S. 150B-51(b) and allows this court to apply a *de novo* review." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

Therefore, our review may determine the court's interpretation of the law in light of the record as a whole as to petitioner's first and third assignments of error, (whether the evidence supports the conclusions of law, or whether the decision is arbitrary and capricious), and employ *de novo* review as to petitioner's contention that the statute at issue was wrongly interpreted by the Commission. *Id.* at 463, 372 S.E.2d at 344. Under the facts of this case, under either standard, we find that appellant was wrongly denied compensation.

The "whole record" test requires the reviewing court to examine all the competent evidence and pleadings which comprise the "whole record" to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n.*, 43 N.C. App. 493, 497, 259 S.E.2d 373, 376 (1979); N.C. Gen. Stat. § 150B-51(b)(5) (1987). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Commissioner of Insurance v. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *Humana Hosp. Corp. v. N.C. Dep't of Human Resources*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986).

[1] The record indicates that the findings of fact made by the ALJ and subsequently adopted by the Commission found no evidence that the appellant had failed to cooperate with the Winston-Salem

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police department. Having adopted such a finding, the Commission could not then find that the petitioner had not fully cooperated as a conclusion of law. There was simply no evidentiary or factual basis for the decision. We find that the determination was not supported by "competent, material and substantial evidence." In fact, the record is totally devoid of any evidence of petitioner's lack of cooperation. Consequently, the decision was the result of an arbitrary determination by the Commission and as such, must be reversed.

[2] With respect to the statutory interpretation issue, the Commission found that N.C. Gen. Stat. § 15B imposes an affirmative obligation upon crime victims to pursue prosecutions as a prerequisite to compensation under the Act. It further determined that failure to prosecute in and of itself constituted willful refusal to cooperate, resulting in denials of compensation.

In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of the legislative purpose is the language of the act, and what the act seeks to accomplish. *State ex rel. Hunt v. North Carolina Reinsurance Facility*, 302 N.C. 274, 275 S.E.2d 399 (1981). "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Justice v. Scheidt*, 252 N.C. 361, 363, 113 S.E.2d 709, 711 (1960). "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented. If the rule were otherwise, the ills which prompted the statute's passage would not be redressed." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979).

N.C. Gen. Stat. § 15B-11 sets forth the grounds for denial of an award. Failure to prosecute is not listed among those grounds. Further, N.C. Gen. Stat. § 15B-14, entitled "Effect of prosecution or conviction of offender." states that "an award of compensation may be approved whether or not any person is prosecuted or convicted. . . ." G.S. § 15B-14(a) (1992). As petitioner correctly points out, "compensation for criminally injurious conduct shall be awarded . . . if the requirements for an award have been met."

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G.S. § 15B-7 lists the ten requirements for filing an application. No information dealing with prosecution is among those ten requirements. In fact, a requirement of prosecution is absent from any section of the act.

Respondent contends in his argument that the “not fully cooperate” language of G.S. § 15B-11(c) must imply prosecution of the perpetrator. He further argues that the use of the word “may” in § 15B-14 gives the Commission complete discretion in approving awards where there has been no prosecution. However, this appears to be a strained conclusion. Reviewing the sections of the Act together, we find that the Legislature specifically identified the grounds for denial of an award, and also specifically addressed, under § 15B-14, a separate section, that awards were to be granted “whether or not” prosecution resulted. The use of the word “may” in the statute at issue does not grant the Commission additional discretionary powers, but rather underscores the fact that prosecution is not a prerequisite to an award. If the Legislature intended to include failure to prosecute as a ground for denial, it would have done so in N.C. Gen. Stat. § 15B-11(a)-(h).

Additionally, as this review is *de novo*, we may look at all the evidence in the case. We find it significant that the Administrative Law Judge, in his Memorandum supporting his conclusions noted that “There is no evidence that the investigating officer asked her to prosecute. In fact, in a domestic disturbance such as the one that occurred . . . it is most likely that the officer considered his responsibilities completed when Mr. Trail was removed from the apartment.” The ALJ also referred to the respondent’s Prehearing Statement that asserted that “petitioner contributed to her own demise by voluntarily entering into an affray with her boyfriend.” He (the judge) continued, “There is no evidence of an affray. There is evidence of a brutal assault by a man of a woman in a home environment. This case should not become another example of a woman, subjected to such abuse, being denied equal justice.” It is certainly not the intent of the Legislature to ignore or penalize victims of domestic violence, nor to give agencies the authority to determine whether a victim “contributed to her own demise.” The victim in this case is no less a victim because of her actions.

We therefore hold that the trial court incorrectly concluded that the appellant was not entitled to compensation, and

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accordingly remand for entry of an order consistent with this opinion.

Reversed and remanded.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. JACOB CARLYLE GISH

No. 9127SC1131

(Filed 20 July 1993)

1. Evidence and Witnesses § 1227 (NCI4th)— failure to follow Miranda procedure—statement inadmissible—subsequent statement not tainted

Even though police officers failed to follow *Miranda* procedure by continuing to question defendant after he indicated his desire to cut off questioning and by encouraging him to “get it off [his] chest” and “help [him]self,” and defendant’s statement should have been excluded, defendant was nevertheless not entitled to a new trial, since his statement to police officers the next day was freely and voluntarily given in that defendant was returned to jail overnight, was warned of his rights the next day before questioning resumed, and waived those rights; the second statement was not tainted by the first; and no promises or threats were made to induce defendant to make either the first or second statement.

Am Jur 2d, Evidence § 537; Trial §§ 723, 725.

2. Homicide § 300 (NCI4th)— second-degree murder—sufficiency of evidence

The trial court did not err in failing to grant defendant’s motion to dismiss the charge of second-degree murder where the evidence, including defendant’s confession, tended to show that deceased was last seen alive when she left her home in her car with defendant; defendant and deceased argued because deceased wanted to end her relationship with defendant; they exchanged words and pushes, and defendant struck deceased; she fell and hit her head; defendant realized that

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deceased was bleeding and her chest was not moving; defendant believed deceased was dead; and deceased's decomposed body was discovered six days later where she had fallen.

Am Jur 2d, Homicide §§ 425 et seq.

Appeal by defendant from judgments entered 17 May 1991 by Judge Hollis M. Owens, Jr., in Gaston County Superior Court. Heard in the Court of Appeals 2 February 1993.

Defendant was tried on proper bills of indictment charging him with the murder of his girlfriend, Anita Willard, and felonious failure to appear. Prior to trial, defendant moved to suppress certain statements which he made to law enforcement officers prior to his arrest for Ms. Willard's murder, but while he was in custody on an unrelated charge. The trial judge conducted a *voir dire* hearing and, after making oral and written findings of fact and conclusions of law, denied the motion to suppress.

The jury found defendant guilty of voluntary manslaughter and felonious failure to appear, and defendant was sentenced to an active term of imprisonment of twenty years for voluntary manslaughter and a consecutive three-year term for failure to appear. Defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. Corne, for the State.

Assistant Public Defender Kellum Morris for defendant-appellant.

MARTIN, Judge.

Defendant assigns error to the denial of his motions to (1) suppress evidence of the inculpatory statements which he made to law enforcement officers, and (2) dismiss the murder charges. For the reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

[1] First, defendant contends the trial judge should have suppressed evidence of statements he made on 1 October 1989 and 2 October 1989 while in police custody because these statements were involuntary and obtained in violation of his state and federal constitutional rights. In *State v. Martin*, 97 N.C. App. 19, 387 S.E.2d 211 (1990), this Court summarized the established principles sur-

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rounding the admissibility of in-custody statements made by a person accused of a crime:

We note [at] the outset that *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), points out the rules governing the admissibility of in-custody statements made by an accused. These rules provide that an accused must be advised '(1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation; (4) that if he is an indigent a lawyer will be appointed to represent him; and (5) that if he at any time prior to or during questioning indicates that he wishes to stop answering questions or to consult with an attorney before speaking further, the interrogation must cease.' *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976). A statement will be rendered incompetent if involuntarily made. *Id.*

Martin, at 26-27, 387 S.E.2d at 215. Where law enforcement officers follow the procedural safeguards required by *Miranda*

[T]he court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation. (citation omitted.)

State v. Corley, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (1984).

At the suppression hearing, the State offered the testimony of the two police officers who questioned defendant and recorded his statements on 1 October and 2 October 1989. Defendant also testified. The undisputed evidence indicates that on both occasions, prior to questioning, defendant was advised of and understood his constitutional rights, signed a waiver of rights form and proceeded to answer questions concerning the disappearance and death of Ms. Willard. The evidence is also clear that no promises or threats were made by the officers to defendant.

During the course of the first interrogation on 1 October 1989, defendant stated at one point, "I just don't want to talk about

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it no more," but continued to answer when the detectives proceeded with additional questions. At a later point, the following exchange occurred:

Gish: I think I just want to go back to jail.

Anderson (detective): You think you want to go back to jail?

Gish: So I can be by myself and think.

Anderson: You don't want to go back up to the jail and lay in bed all night thinking about this. Get it off your chest now and tell us. It ain't going to be no easier tomorrow or next year. Every day you're going to have to live with this the rest of your life. Now is the time to tell it and get it over with, get a good night's sleep. West, you didn't kill her on purpose. You didn't do it. You have had a long time to sit in jail and think about it and it eat you alive. It's eating you alive right now. Smoke a cigarette and tell us what happened, get it off. I have more respect for you if you tell me the truth now. Was it an accident? Was it an accident, West? I can believe it. If it adds up, we know basically what happened. You are going to have to help yourself.

Following this exchange, defendant continued to talk with the officers and told them that he and Ms. Willard had had a fight behind the Burger King on the Bessemer City Road on the date of her disappearance, that he struck Ms. Willard a couple times, that she fell and hit her head on a curb and did not get up, that she was bleeding, and that he got scared and ran across the Interstate where he hitched a ride to Rockingham and stayed in a cabin there until the following Tuesday when he returned to Gastonia. On several occasions, he repeated that he wanted to cooperate and that he had "been wanting to get this over with." Following his statement, defendant was returned to jail, but told the officers that he would be willing to answer any other questions that might assist in their investigation.

On the following day, the detectives asked defendant if he would be willing to talk with them again about the case. Defendant agreed to do so without reluctance or hesitation. Defendant was once again advised of his *Miranda* rights and signed a waiver of rights form. Defendant then gave another statement to the officers in which he stated that on 6 May 1989, he and Ms. Willard drove to the dead-end of Raeford Road behind the Burger King in Willard's

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green MG to talk. As they were standing around the outside of the car, they began to argue. Defendant stated that Ms. Willard told him that she did not want to see him anymore. They began to shout at each other, and defendant tried to get in the car. Ms. Willard then pushed him away and told him he would have to walk. Defendant stated that he pushed her back and she fell and hit her head. Ms. Willard jumped up and swung at him, and defendant hit her twice and she fell against the curb and did not get up again. Defendant then stated, "I kneeled down beside her and slapped her a couple times in the face and I was holding her hand at the same time and telling her to get up and there was no response and that's when I took off." Defendant also stated, "At the time when she fell I didn't know if she was dead. All that I know is that I didn't see no breathing." In this same statement, defendant also explained how he went to his mother's house and changed his bloody clothing prior to hitchhiking to the cabin in Rockingham where he threw the clothes in the river.

From this evidence, the trial court found that on both occasions defendant had been fully advised of his rights, that he appeared to understand those rights and indicated to the officers that he did in fact understand them, and that the officers made no offers of reward, or violence or threats to induce defendant to talk with them on either occasion. The trial court concluded that defendant had knowingly and understandingly waived his rights and that both defendant's statements to the officers had been made freely and voluntarily. The trial court also concluded that the officers made no promises, offers of reward, or threats or suggestions of violence to persuade or induce defendant to make a statement. These conclusions are fully reviewable on appeal. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

Defendant argues that his request to return to jail and think during the 1 October 1989 interrogation was an attempt to exercise his right, under *Miranda*, to cut off questioning. He contends that the detective, by persisting in the interrogation, did not "scrupulously honor" his exercise of the right, rendering the statement involuntary and obtained in violation of his constitutional rights. See *Michigan v. Mosley*, 423 U.S. 96, 46 L.Ed.2d 313 (1975).

Defendant's argument appears to have merit. The procedural safeguards announced by the Court in *Miranda* require that where a suspect in custody indicates at any time during interrogation

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that he wishes to cut off questioning, the interrogation must cease. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966); *Mosely, supra*. Here, the detectives continued to question defendant, encouraging him to "get it off [his] chest" and "help [him]self." Thus, it does not appear that the *Miranda* procedures were properly followed by the officers.

Assuming, however, that the 1 October statement should have been excluded due to the officers' violation of *Miranda* procedures, defendant is not entitled to a new trial. We must so hold because the trial court correctly found and concluded that the 2 October statement was freely and voluntarily given, and thus properly admissible in evidence. See *State v. Harris*, 333 N.C. 543, 428 S.E.2d 823 (1993).

Not every error entitles a defendant to a new trial. In order to entitle a defendant to a new trial, the error must have been prejudicial, i.e., there must have been "a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a); *State v. Turner*, 268 N.C. 225, 150 S.E.2d 406 (1966). Where the error arises in violation of a defendant's constitutional rights, however, the error is prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705 (1967). The State has the burden of proving beyond a reasonable doubt that the error was harmless. *Id.* In our view, the State has met its burden in this case.

After defendant gave the 1 October statement, he was returned to jail over night. The next day, the officers returned to see him, again warning him of his rights and obtaining a waiver. They asked if he would agree to talk with them again, and he readily agreed to do so. On this occasion, defendant provided a detailed description of the events surrounding Ms. Willard's death. Defendant argues, however, that since the 1 October statement was obtained in violation of his rights, any subsequent statement is tainted and likewise inadmissible. We reject his argument.

It is well settled that "where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." *State v. Silver*, 286 N.C.

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709, 718, 213 S.E.2d 247, 253 (1975). However, in *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977), the Supreme Court acknowledged that the presumption “which predates the *Miranda* decision arises out of a concern that where the first confession is procured through promises or threats rendering it involuntary as a matter of law, these influences may continue to operate on the free will of the defendant in subsequent confessions . . . [w]here no threats or promises were used to extract the first confession, as in this case, the reason for the rule giving rise to the presumption does not exist.” *Id.* at 551-552, 234 S.E.2d at 739; *See State v. Greene*, 332 N.C. 565, 422 S.E.2d 730 (1992). As in *Siler* and *Greene*, the uncontradicted evidence shows that no promises or threats were made to induce defendant to make either the first or second statement and the trial court made findings to that effect. The 1 October statement was inadmissible solely as a result of the officers’ failure to observe proper *Miranda* procedures.

The trial court’s findings with respect to the 2 October statement clearly support its conclusion that defendant was aware of, and waived his rights under *Miranda* and that the statement was freely and voluntarily made. Since the same evidence was properly admitted, the admission of the 1 October statement could not have been prejudicial. Defendant’s first assignment of error is overruled.

[2] Next, defendant contends the trial court erred in failing to grant his motion to dismiss the charge of second degree murder because the “State failed to offer sufficient evidence of the commission of a crime or of the [d]efendant being the perpetrator of said crime to send the homicide case to the [j]ury” We disagree.

When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). The function of the trial court is to determine whether the evidence, direct, circumstantial, or both, will permit a reasonable inference that defendant is guilty of the crimes charged. *Id.* In ruling on a motion to dismiss, 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.*

At trial, the State sought to prove that defendant had committed murder in the second degree. “Second-degree murder is the unlawful killing of a human being with malice, but without premedita-

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tion and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Malice may be found if there is an intentional taking of the life of another without just cause, excuse or justification. *Id.* As distinguished, voluntary manslaughter, which is a lesser included offense of second degree murder, is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979).

The State presented evidence through the testimony of Ms. Willard's mother tending to show that defendant had become upset with Ms. Willard on 6 May 1989 because she had been paying more attention to her friends and to her new car, a green MG, than to him. The last time that Ms. Willard was seen alive was at approximately 3:00 p.m. on 6 May 1989 when she left her home in her car with defendant. Defendant acknowledged in his 2 October 1989 statement that he and Ms. Willard argued because Ms. Willard indicated she wanted to end her relationship with defendant. In the course of the argument, they got out of the car. Ms. Willard told defendant that she did not want to see him anymore. When defendant tried to get back into the car, Ms. Willard pushed him away saying that he would have to walk. Defendant then pushed Ms. Willard, and she fell to the ground. Ms. Willard got up, they exchanged words and defendant again pushed her causing her to fall to the ground hitting her head. She jumped up and swung at defendant. Defendant blocked the punch and struck Ms. Willard twice in the jaw. This time, Ms. Willard fell to the ground striking the curb. When she did not get up, defendant knelt beside her and slapped her face a couple of times, but she did not respond. Defendant noticed that her chest was not moving, and he got blood on his clothes. He believed she was dead and ran from the scene. Another witness testified that he had seen defendant riding alone in a green MG in Lincolnton, North Carolina six days after Ms. Willard's disappearance. On 10 June 1989, a decomposed body was discovered behind the Burger King on Bessemer City Road. The body was later determined to be that of Anita Willard.

From this evidence, the jury could reasonably infer that defendant killed Ms. Willard behind the Burger King on 6 May 1989. The trial court did not err in denying defendant's motions to dismiss the homicide charges.

Defendant received a fair trial, free from prejudicial error.

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No error.

Judges JOHNSON and GREENE concur.

JOHN GOSS, PLAINTIFF-APPELLANT AND TM ENTERPRISES, INC., PLAINTIFF
AND NOMINAL COUNTERCLAIM DEFENDANT v. EDWARD G. BATTLE, KATHY
BATTLE, CHARLES DUCKETT, MARKETING INCORPORATED, AND
BATTLE AND ASSOCIATES, INC., DEFENDANT-APPELLEES

No. 9221SC900

(Filed 20 July 1993)

**Rules of Civil Procedure § 37 (NCI3d)— failure to comply with
discovery— consideration of sanctions less severe than dismissal
required**

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under Rule 37(d) of the N.C. Rules of Civil Procedure.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 41.

Judge LEWIS dissenting.

Appeal by plaintiff from order filed 23 April 1992 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 7 July 1993.

Plaintiff-appellant, John Goss, instituted this action against the defendant-appellees, Edward Battle, Kathy Battle, Charles Duckett, Marketing Incorporated, and Battle and Associates, Inc., on 10 September 1991. The complaint alleged fraud, unfair trade practices, and misappropriation of corporate opportunity. The allegations arose out of the operation of TM Enterprises, Inc. (TM), a marketing firm owned jointly by John Goss and Edward Battle. Defendants made a timely answer and counterclaimed against Goss and named TM as a nominal counterclaim defendant. The plaintiffs replied to the counterclaim.

The trial court, in its 23 April 1992 order, found the following uncontested facts:

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- | DATE | ACTION |
|-------------|---|
| (a) 1/14/92 | Defendants served Interrogatories, and Request for Production of Documents on plaintiffs; |
| (b) 2/13/92 | Plaintiffs' counsel, Phillip S. Banks, represented that plaintiffs never received discovery requests, that such requests were "lost in the mail;" |
| (c) 2/13/92 | Defendants hand-delivered additional copies of Interrogatories and Requests for Production of Documents to Mr. Banks and mailed additional copies to Mr. Gregory R. Leonard, counsel for plaintiffs resident in New Jersey, and gave plaintiffs through 3/2/92 to answer discovery pursuant to Mr. Banks' representation that this would allow plaintiffs sufficient time to respond; |
| (d) 3/2/92 | No responses or objections were served by plaintiffs; no motion for protective order was filed; and no request for extension of time made to defendants; |
| (e) 3/5/92 | Mr. Banks left a message at the office of defendants' counsel that additional time was needed to respond to discovery; by letter of same date defendants granted plaintiffs additional time to respond through 3/10/92; |
| (f) 3/10/92 | No responses or objections were served; no motion for protective order was filed; and no request for extension of time made to defendants; |
| (g) 3/13/92 | By letter, defendants granted plaintiffs third and final extension of time to respond through 3/16/92; |
| (h) 3/16/92 | No response whatsoever from the plaintiffs; |
| (i) 3/17/92 | Mr. Banks represented to defendants that responses would be served by 3/20/92 and that if plaintiffs were unable to serve responses by this date, plaintiffs would contact defendants; |
| (j) 3/20/92 | Plaintiffs served no responses of any kind; defendants' calls to Mr. Banks' office were not returned; |
| (k) 3/23/92 | Defendants filed Motion to Compel and for Sanctions under Rule 37(d) as result of plaintiffs' failure to make discovery; |

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- (l) 3/24/92 Mr. Banks called defendants to discuss responses and represented that all documents in the possession of plaintiffs which related to the action would be made available for inspection by defendants only at the home of plaintiff John Goss beginning 3/27/92; and Mr. Banks gave no estimated date for the service of interrogatory responses;
- (m) 3/26/92 Defendants objected to being compelled to review documents in home of hostile party, John Goss, and so notified the plaintiffs. Defendants offered to transport the documents from plaintiff's home to Mr. Banks' office at defendants' expense; plaintiffs refused this offer outright; plaintiffs failed to provide any responses to defendants' discovery requests;
- (n) 3/30/92 Mr. Banks hand-delivered to defendants' counsel two letters . . . stating, in essence, that plaintiffs will make their documents available only at the home of plaintiff John Goss and further that all documents in plaintiffs' possession are documents also possessed, in one form or another, by defendants; as to interrogatories, plaintiffs responded that the deposition of plaintiff John Goss answered all interrogatories and plaintiffs feel there is, therefore, no need to respond further;
- (o) 3/30/92 Counsel for plaintiffs consistently represented that
thru responses to interrogatories would be forthcoming but
4/9/92 no responses of any kind were served until 4/9/92;
- (p) 4/9/92 Plaintiffs delivered, after close of business hours, responses to defendants' Interrogatories and Requests for Production of Documents, . . .

The response to the interrogatories and requests for production of documents made reference to data compilations on computer disks, which the court found required access to a computer and special knowledge of its use. The court further found plaintiffs' counsel offered no reasonable excuse for failing to respond as required by the North Carolina Rules of Civil Procedure. Based on the foregoing facts, the trial court concluded the plaintiffs' conduct in discovery matters was a "reprehensible abuse" of applicable rules and therefore dismissed plaintiffs' action with prejudice. The record does not indicate that the trial court considered any sanc-

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tion less severe than dismissal with prejudice before ordering dismissal.

Hendrick, Zotian, Bennett, Cocklereece & Blancato, by Richard V. Bennett and Sherry R. Dawson, for plaintiff-appellants.

Robinson, Maready, Lawing & Comerford, by Norwood Robinson and Michael Robinson, for defendant-appellees.

EAGLES, Judge.

The sole issue presented by this appeal is whether a trial court must consider less severe sanctions before dismissing a plaintiff's complaint under Rule 37(d) of the North Carolina Rules of Civil Procedure. Appellants argue the rule enunciated in *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992) and *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989), which require a trial court to consider lesser sanctions before dismissing an action under Rule 41(b), should be extended to include a trial court's decision to dismiss an action under Rule 37(d) as well. We agree.

Appellees argue that Rule 37(d) specifically provides for the sanction of dismissal for failure to comply with discovery rules and, therefore, the trial court did not err in dismissing plaintiffs' action. Dismissal is specifically listed as an appropriate sanction in N.C. R. Civ. Pro. 41(b) and G.S. § 1-109. The language of these provisions does not expressly require a trial court to consider lesser sanctions before dismissing. However, our courts have interpreted these provisions to require a trial court to consider lesser sanctions before ordering a dismissal pursuant to these provisions. *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984) (dismissal pursuant to Rule 41(b) to be ordered only when the trial court determines less drastic sanctions will not suffice); *Thompson v. Hanks of Carolina, Inc.*, 109 N.C. App. 89, 426 S.E.2d 278 (1993) (requiring trial court to consider lesser sanctions before dismissing pursuant to G.S. § 1-109).

Our Supreme Court has held: "Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice." *Maready*, 311 N.C. at 551, 319 S.E.2d at 922. See also *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303. Also in the context of Rule

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41(b), this Court has held that "sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Rivenbark*, 93 N.C. App. at 420-21, 378 S.E.2d at 200-01. Likewise, in construing G.S. § 1-109, this Court has held, "the trial court erred by imposing the sanction of dismissal without first considering less stringent sanctions." *Thompson*, 109 N.C. App. at 92, 426 S.E.2d at 281.

The determination of what sanction, if any, should be imposed under Rule 41(d) and G.S. § 1-109 lies in the sound discretion of the trial court. *Rivenbark*, 93 N.C. App. at 420, 378 S.E.2d at 200; *Thompson*, 109 N.C. App. at 93, 426 S.E.2d at 281. Likewise, the determination of what, if any, sanction to be imposed under Rule 37(d) lies in the sound discretion of the trial court. *Plumbing Co. v. Associates*, 37 N.C. App. 149, 153, 245 S.E.2d 555, 557 (1978). In the context of Rule 41(d) and G.S. § 1-109, this Court requires the trial court to first consider less severe sanctions. The same policy requires the trial court consider less severe sanctions before dismissing pursuant to Rule 37(d).

Appellees argue that this Court has upheld dismissals under Rule 37(d) for failure to respond to discovery in cases such as *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 362 S.E.2d 868 (1987). However, *Fulton* is distinguishable from the present case. In *Fulton*, this Court rejected the appellant's argument that a trial court must impose, not merely consider, a less stringent sanction before ordering dismissal under Rule 37(d). *Fulton*, 88 N.C. App. at 275, 362 S.E.2d at 869. Here, appellants argue the trial court must at least *consider* a less severe sanction before ordering a dismissal, but do not argue that the trial court must first impose a less severe sanction.

Here, we have reviewed the transcript of the 10 April 1992 hearing and the order filed 23 April 1992. Neither indicate the trial court considered a less severe sanction before dismissing the action. Accordingly, the order of the trial court dismissing the plaintiffs' action is vacated, and is remanded for further proceedings not inconsistent with this opinion. It is important to note that our holding today does not affect the trial court's discretionary authority, on remand, to impose the sanction of dismissal with prejudice after properly considering less severe sanctions.

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Vacated and remanded.

Judge GREENE concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent because I do not believe a trial judge should be required to state whether or not he or she has considered discovery sanctions less severe than dismissal with prejudice. This is an issue of first impression in North Carolina. Although our courts have stated that a trial judge need not impose less drastic discovery sanctions under Rule 37 before more severe sanctions, *see Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 362 S.E.2d 868 (1987), our courts have not discussed whether a trial judge must first *consider* lesser sanctions.

The majority draws support from the Supreme Court case of *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984). In that case the Court of Appeals reversed the trial court for refusing to grant a Rule 41(b) involuntary dismissal for a Rule 8(a)(2) violation. The Supreme Court's opinion clarified that it was not error for the trial judge to *refuse* to impose the severe sanction of dismissal, stating that:

dismissal for a violation of Rule 8(a)(2) is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice.

311 N.C. at 551, 319 S.E.2d at 922. Because the Supreme Court was addressing a different, almost opposite, situation under a different rule, I believe that *Harris* is not relevant to the case at hand.

The imposition of sanctions under Rule 37 is within the discretion of the trial judge, *see Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990), *disc. rev. denied*, 328 N.C. 93, 402 S.E.2d 418 (1991), and the sanction imposed was clearly authorized under Rule 37. N.C.G.S. § 1A-1, Rule 37(b)(2)c. (1990). The trial judge was certainly aware of the other options

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available under Rule 37, but chose, for obvious reasons, to impose the severe sanction of dismissal with prejudice.

It is an imposition on judicial economy to remand the case at hand so that the judge may state for the record that he considered other sanctions but believes the sanction chosen was appropriate. I believe a trial judge naturally considers the options before him when making various decisions, and that it is superfluous to require the judge to formally state that he has considered lesser options. This rule was made applicable to sanctions under Rule 41, but Rule 37 applied to the case at hand, which involved only discovery proceedings.

With all trial courts overburdened by volume and complexity of cases, I can see no justifiable reason to fetter a discretionary ruling with another requirement for "findings" or "considerations." Since we presume that citizens "know the law," why not presume as well that trial judges know the law and their range of sanctions? If they know what they can do, is it not reasonable to believe that the judge did in fact consider all the options available before ordering the sanction imposed?

I see no reason to create another time consuming, space devouring judicially enacted requirement. I would affirm the decision of the trial court and therefore respectfully dissent from the majority opinion.

DAVID R. HOPKINS, JR., AND JEFFERSON TODD HOPKINS, D/B/A D. R. HOPKINS, JR. AND SONS, FARMS v. CIBA-GEIGY CORPORATION; ELANCO PRODUCTS COMPANY, A DIVISION OF ELI LILLY AND COMPANY; THE DOW CHEMICAL COMPANY; AND DOW ELANCO & COMPANY

No. 9218SC321

(Filed 20 July 1993)

1. Rules of Civil Procedure § 41 (NCI3d) — two-dismissal rule — voluntary dismissal of second party — not an adjudication on the merits

Plaintiffs' voluntary dismissal of their claim against defendant Ciba-Geigy did not constitute an adjudication on the

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merits pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) where plaintiffs filed their initial action against Lebanon on Chemical Corporation and Ciba-Geigy and plaintiffs filed a first notice of voluntary dismissal as to Lebanon Chemical and a second as to Ciba-Geigy. The two-dismissal rule applies only when the plaintiff has twice dismissed an action based on or including the same claim; here, plaintiffs dismissed their *action* only once.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 73 et seq.

2. Products Liability § 35 (NCI4th) — herbicide labels — warnings — federal preemption

The trial court did not err by granting summary judgment for defendants in an action arising from the loss of a crop where plaintiffs alleged that defendants negligently failed to warn plaintiffs about the carryover effect of prior chemical use. State common-law tort claims based on inadequate labeling are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act if the label complies with FIFRA.

Am Jur 2d, Products Liability §§ 292, 347, 350, 771, 772.

3. Products Liability § 35 (NCI4th) — herbicide use — knowledge of prior chemical use — summary judgment for defendant proper

Summary judgment was properly entered for defendant Ciba-Geigy in an action arising from a crop failure where plaintiffs claimed that Ciba-Geigy knew or should have known that plaintiffs had used a different chemical the prior year and that applying the chemical used the next year could result in crop damage where plaintiff Jeff Hopkins admitted that he did not recall discussing with Ciba-Geigy's representative the use of the different chemical the previous year.

Am Jur 2d, Products Liability §§ 292, 347, 350, 771, 772.

4. Products Liability § 35 (NCI4th) — herbicide use — prior use of other products — no duty to inquire or perform soil tests

Summary judgment was properly granted for defendant Ciba-Geigy in an action arising from a crop failure because Ciba-Geigy did not owe plaintiffs a duty to inquire about chemicals that had been applied to the soil previously or to conduct soil tests themselves or advise plaintiffs to do so.

Am Jur 2d, Products Liability §§ 292, 347, 350, 771, 772.

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[111 N.C. App. 179 (1993)]

Appeal by plaintiffs from orders entered 21 November 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 8 March 1993.

Defendant Ciba-Geigy Corporation filed a motion to dismiss, motion for summary judgment, and motion for partial summary judgment. Defendants Elanco Products Company, Eli Lilly and Company, the Dow Chemical Company, and DowElanco & Company (the Elanco defendants) also filed a motion for summary judgment. The trial court granted defendant Ciba-Geigy's motion for summary judgment and the Elanco defendants' motion for summary judgment and dismissed the action with prejudice. From these orders, plaintiffs appeal.

Max D. Ballinger for plaintiff appellants.

Adams Kleemeier Hagan Hannah & Fouts, by Larry I. Moore, III and Edward L. Bleynt, Jr., for defendant appellees Elanco Products Co., a division of Eli Lilly and Company; Eli Lilly and Company; The Dow Chemical Company; and DowElanco & Company.

Smith Helms Mulliss & Moore, by Jon Berkelhammer, for defendant appellee Ciba-Geigy.

ARNOLD, Chief Judge.

[1] We first address whether or not plaintiffs' second voluntary dismissal constituted an adjudication on the merits pursuant to N.C.R. Civ. P. 41(a)(1), thus barring plaintiffs from bringing this action.

Rule 41(a)(1) provides in pertinent part:

(a) *Voluntary dismissal; effect thereof.*—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of

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this or any other state or of the United States, an *action* based on or including the same claim.

(Emphasis added.) The provision in Rule 41(a)(1) equating a second voluntary dismissal with an adjudication on the merits is known as the “two-dismissal rule.”

Plaintiffs filed their initial action against Lebanon Chemical Corporation and Ciba-Geigy. Subsequently, plaintiffs filed two notices of voluntary dismissal pursuant to Rule 41(a)(1)(i), the first as to defendant Lebanon Chemical and the second as to Ciba-Geigy. At that point, plaintiffs had dismissed their entire first action. The two-dismissal rule, however, applies only when the plaintiff has twice dismissed *an action* based on or including the same claim. *Id.* Here, plaintiffs dismissed their first *action* only once. Accordingly, the two-dismissal rule does not apply in this case. Consequently, plaintiffs’ voluntary dismissal of their claim against defendant Ciba-Geigy did not constitute an adjudication on the merits pursuant to Rule 41(a)(1) and plaintiffs were not barred from bringing this action.

[2] The next question is whether or not summary judgment for defendants was proper. Plaintiffs concede that the trial court correctly concluded that there was no genuine issue of material fact, but argue that “the undisputed nature of the facts supported recovery by the plaintiffs rather than summary judgment in favor of the defendants.”

Plaintiff Jeff Hopkins (Hopkins) stated in his affidavit, and testified at his deposition, as follows: In 1986, Hopkins planted soybeans on his ninety acres of farming fields. He applied TREFLAN, an herbicide manufactured and sold by the Elanco defendants, at a rate of one quart per acre. Plaintiffs had used TREFLAN for several years. They felt as though they knew how to use TREFLAN. They applied it in a manner prescribed by the directions that accompanied the product. Based upon Hopkins’ understanding of the instructions on the TREFLAN label, if he applied TREFLAN at the rate of one quart per acre in 1986, he could safely plant sorghum (milo) the following year. He was unaware that there was any possibility of crop damage from TREFLAN so long as it was used at the manufacturer’s suggested rates.

Rick Wall, a Lebanon Chemical Company representative, contacted Hopkins in March of 1987 about purchasing BICEP (R) 6L

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(BICEP), an herbicide manufactured by Ciba-Geigy. Wall told Hopkins that BICEP was simply a combination of Atrazine and Dual, an herbicide that Hopkins had used in previous years. Hopkins also talked with Charles Flippin, a Ciba-Geigy representative. Both Flippin and Wall told Hopkins that BICEP was economical and could be used on corn and milo. Based upon those representations, Hopkins ordered a tank of BICEP from Wall. Hopkins had never used the product before that time. He would not have ordered the product if Flippin and Wall had not told him that he could use it on milo. Hopkins did not recall discussing with Flippin that he had used TREFLAN on the fields the previous year.

When Hopkins picked up the tank of BICEP, Flippin showed him how to operate the pump on the tank. Flippin and Wall assured Hopkins that BICEP was safe to use on the fields if he planted "safened" milo seed. Accordingly, Hopkins ordered the "safened" milo seeds from Wall. Neither representative informed Hopkins that he needed to have his soil tested for chemical residues before he used BICEP on his land and planted milo. Because Hopkins purchased the BICEP in bulk, Ciba-Geigy and Lebanon gave him the tank and pump. There was a multi-page BICEP label in a plastic wrapper attached to the tank. Hopkins stated in his affidavit that "[t]he only way to ever read the label was to rip it from the tank, and tear the sealed plastic wrapper open. I do not make it a practice to nor have I ever ripped off and torn into a label affixed to a product before I bought it."

In early June of 1987, Hopkins planted the "safened" milo seed and applied BICEP on the fields. On or about 4 July 1987, Hopkins observed massive damage and stuntage to his fields. Ciba-Geigy representatives visited the fields and Dow Elanco Company conducted soil tests which showed "some TREFLAN carryover."

Hopkins believed that BICEP was the sole or a contributing factor to his crop damage because on fields at another farm: (1) he used TREFLAN at the rate of one quart per acre in 1986; (2) he planted milo in 1987 and used Atrazine herbicide instead of BICEP; and (3) he had a good crop of milo. He also believed that if TREFLAN carryover had been the sole cause of his crop damage, the greatest damage would have been "in the low areas of the fields where the water ran following rains" but that was not the case here.

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Plaintiffs alleged the following in their complaint: Ciba-Geigy knew or should have known that plaintiffs "had applied TREFLAN in 1986 and that applying BICEP (R) 6L the following year could or would result in crop damage." Ciba-Geigy, therefore, should have informed plaintiffs of this danger. Ciba-Geigy, acting through its agent Charles Flippin, was negligent in failing to: (1) inquire about chemicals that had previously been applied to the soil; and (2) warn plaintiffs about the "carryover effect" of chemicals that, when combined with BICEP, could cause crop damage; (3) warn plaintiffs that the "safened" seeds were potentially ineffective against TREFLAN; and (4) conduct soil tests themselves or advise plaintiffs to do so in order to determine if BICEP was safe to use. If plaintiffs' crop damage was not solely caused by Ciba-Geigy's negligence, the TREFLAN "carryover residue" alone or in combination with BICEP caused the damage. The Elanco defendants negligently failed to: (1) warn plaintiffs that "TREFLAN could carryover in the soil to the following year and cause crop damage either alone, or in combination with other later applied herbicides"; and (2) warn plaintiffs to conduct soil tests after using TREFLAN to determine whether the carryover could cause crop damage.

Plaintiffs claim that the warnings on defendants' herbicide labels were inadequate. Defendants contend that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 to 136y preempts state regulation of pesticide labeling and packing. We agree with defendants' contention.

7 U.S.C. § 136v provides that, although a State is granted the authority to regulate the "sale or use" of pesticides, "such State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required pursuant to this Act." The legislative history of FIFRA demonstrates a Congressional intent to preempt state regulation of pesticide labeling and packaging. The Senate Agriculture Committee Report stated FIFRA "preempts any State or local government labeling or packaging requirements differing from such requirements under the Act." *Reprinted in* 1972 U.S. Code. Cong. and Ad. News 3993, 4021. The Agriculture Committee stated the intent of the provision was to allow state and local governments to impose stricter regulations on pesticide use than required under the Act. However different state packaging or labeling requirements are prohibited. *Id.*

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Preemption is not limited to conflicts between state and federal statutes; federal regulatory schemes may preempt state common-law tort claims as well. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.E.2d 775 (1959). Accordingly, state common-law tort claims based on inadequate labeling are preempted by FIFRA if the label complies with FIFRA. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) "To the extent that state tort claims . . . require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Id.* at 1179. In *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1308-09 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit held that FIFRA

manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA . . . or the EPA in its regulations. . . . If to avoid breaching a state duty a pesticide producer is required to revise its pesticide labeling, then the duty, common law or otherwise, is preempted by § 136v(b).

We are persuaded by the analysis in these cases and therefore hold that FIFRA preempts state common-law tort claims based on inadequate labeling where such labeling is in compliance with FIFRA. Therefore, plaintiffs' action alleging inadequate warnings about the dangers of defendants' herbicides cannot be maintained if the warnings on defendants' labels complied with FIFRA. Plaintiffs do not contend that the warnings on defendants' labels failed to comply with FIFRA. In fact, the Elanco defendants presented uncontradicted evidence that their labels complied with FIFRA. Accordingly, plaintiffs' claims that Ciba-Geigy negligently failed to warn plaintiffs about "carryover effect" and the potential ineffectiveness of "safened seeds" and that the Elanco defendants negligently failed to warn plaintiffs (1) about "carryover effect" and (2) to conduct soil tests after using TREFLAN to determine whether the carryover could cause crop damage are preempted by FIFRA.

[3] Plaintiffs' next claim is that Ciba-Geigy knew or should have known that plaintiffs "had applied TREFLAN in 1986 and that applying BICEP (R) 6L the following year could or would result in crop damage," and therefore, Ciba-Geigy should have informed

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plaintiffs of this danger. Plaintiff Jeff Hopkins admitted that he did not recall discussing with Flippin, Ciba-Geigy's representative, the fact that he had used TREFLAN on the fields the previous year. Based on this admission, plaintiffs' claim is rejected.

[4] Finally, there are plaintiffs' claims that Ciba-Geigy negligently failed to (1) inquire about chemicals that had previously been applied to the soil and (2) conduct soil tests themselves or advise plaintiffs to do so. To establish a case of actionable negligence plaintiffs must show that defendants owed them a duty, that defendants failed to exercise proper care in the performance of that duty, and that defendants' breach of that duty was the actual cause of plaintiffs' injuries. See *Burr v. Everhart*, 246 N.C. 327, 329, 98 S.E.2d 327, 329 (1957). The absence of any one of these essential elements will defeat a negligence action. *Id.* We hold that Ciba-Geigy did not owe plaintiffs a duty to (1) inquire about chemicals that had previously been applied to the soil or (2) conduct soil tests themselves or advise plaintiffs to do so. Therefore, Ciba-Geigy cannot be held liable for failing to take such actions.

The orders of the trial court granting summary judgment to defendants are

Affirmed.

Judges GREENE and MCCRODDEN concur.

IN THE MATTER OF: JOHN S. McCOLLOUGH, D.D.S., P.A. JUDICIAL REVIEW
OF THE DECISION OF THE NORTH CAROLINA STATE BOARD OF
DENTAL EXAMINERS, PETITIONER V. NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS, RESPONDENT

No. 9130SC1270

(Filed 20 July 1993)

**1. Physicians, Surgeons, Other Health Care Professionals § 59
(NC14th)— dentist giving nitrous oxide to patient—sexual
misconduct—negligent behavior—sufficiency of notice**

The notice of hearing given to petitioner dentist by respondent Dental Board was sufficient to put petitioner on notice that he not only faced charges of willful misconduct but also

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of negligent behavior, and there was no merit to petitioner's contention that, while the notice he received informed him that he faced charges of sexual misconduct, arising out of allegations that he administered nitrous oxide to a female patient while alone with her in his office, the notice did not sufficiently inform him that respondent intended to inquire into whether petitioner's administration of nitrous oxide to a female patient, absent the presence of an appropriate third party, constituted negligent behavior.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 105, 108.

2. Physicians, Surgeons, Other Health Care Professionals § 60 (NCI4th)— dentist giving nitrous oxide to female patient—no other person present—negligent behavior—sufficiency of evidence

Evidence was sufficient to support respondent Board's finding and conclusion that petitioner's conduct in administering nitrous oxide to a female patient without the presence of a female assistant or a person whom the patient trusted constituted negligence in the practice of dentistry in North Carolina, and this was true even though respondent found that the patient was not injured during the episode under review.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 357.

3. Physicians, Surgeons, Other Health Care Professionals § 60 (NCI4th)— severity of sanctions imposed upon dentist—no arbitrary or capricious action

While the sanctions imposed against petitioner dentist may seem arguably harsh for violation of an unwritten standard of care which apparently has never been addressed by the Dental Board, the court on appeal cannot say that the Board's 90-day active suspension and five-year conditional reinstatement of petitioner's license was arbitrary or capricious.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 75, 83.

Improper or immoral sexually related conduct toward patient as ground for disciplinary action against physician, dentist, or other licensed healer. 59 ALR4th 1104.

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[111 N.C. App. 186 (1993)]

Appeal by petitioner from judgment entered 30 September 1991 in Jackson County Superior Court by Judge J. Marlene Hyatt. Heard in the Court of Appeals 2 December 1992.

Petitioner, a licensed dentist, seeks appellate review of a trial court order affirming a final agency decision of the North Carolina State Board of Dental Examiners (the Board) to suspend his license for five years, with a conditional reinstatement of his license after ninety days. The Board suspended petitioner's license following an investigation and hearing which were conducted in response to a complaint filed by one of petitioner's female patients. The patient's complaint alleged that petitioner had administered nitrous oxide to her and then had indecently exposed himself to her and sexually assaulted her.

On 28 February 1990, the Board issued a notice of hearing to petitioner, and on 22 April 1990, the Board held a hearing on the charges. Although the Board concluded that there was insufficient evidence to determine that petitioner had, in fact, indecently exposed himself to the patient, it found petitioner's administration of nitrous oxide sedation to a female patient, in the absence of a female dental assistant or some other individual whom the patient trusted, constituted negligence in the practice of dentistry in North Carolina, in violation of N.C. Gen. Stat. § 90-41(a)(12).

The Board made a final agency decision on 14 September 1990 to revoke petitioner's license for five years, but offered to reinstate petitioner's license after three months of active suspension, provided that petitioner consented to the order and its various conditions.

Petitioner filed a petition for judicial review on 24 August 1990 and a stay of the Board's decision was entered by Judge Hyatt on that same day. On 20 November 1990, Judge Hyatt heard the petition for judicial review. On 27 December 1990, Judge Hyatt affirmed the Board's decision and remanded the case to the Board for imposition of appropriate sanctions. Upon remand, on 27 August 1991, the Board reinstated its original decision but removed the provision which required petitioner's consent. This order was affirmed by Judge Hyatt on 30 September 1991. Respondent filed notice of appeal that same day.

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Gudger & Gudger, by Lamar Gudger; and Gary E. Kirby; for petitioner-appellant.

Bailey & Dixon, by Ralph McDonald and Alan J. Miles, for respondent-appellee.

WELLS, Judge.

[1] Pursuant to his first assignment of error, petitioner contends that the Board's suspension was improper because the Board failed to give petitioner proper notice of the nature of the charge against him. Petitioner contends that while the notice he received informed him that he faced charges of sexual misconduct, arising out of allegations that he administered nitrous oxide to a female patient while alone with her in his office, the notice did not sufficiently inform him that the Board intended to inquire into whether petitioner's administration of nitrous oxide to a female patient, absent the presence of an appropriate third party, constituted negligent behavior. We disagree.

While N.C. Gen. Stat. § 150B-38(b)(2) requires the notice of hearing to contain a "reference to the particular sections of the statutes and rules involved," after examining the notice of hearing given to petitioner by the Board, we conclude that this particular requirement was met. The notice stated:

5. Respondent's conduct as described above constituted negligence in the practice of dentistry, prohibited by G.S. § 90-41(a)(12) [which reads: Has been negligent in the practice of dentistry], and malpractice of dentistry, prohibited by G.S. § 90-41(a)(19) [which reads: Has, in the practice of dentistry, committed an act or acts constituting malpractice].

This language was sufficient to put petitioner on notice that he not only faced charges of willful misconduct but also of negligent behavior.

[2] Pursuant to two of his assignments of error, petitioner contends that the trial court improperly affirmed the Board's final agency decision to suspend petitioner's license because the evidence does not support the Board's finding and conclusion that petitioner's conduct constituted negligence in the practice of dentistry in North Carolina, in violation of N.C. Gen. Stat. § 90-41(a)(12). In *Woodlief v. N.C. State Bd. of Dental Examiners*, 104 N.C. App. 52, 407

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S.E.2d 596 (1991), this Court set out the appropriate standards involved in a judicial review of respondent Board.

Judicial review of the decisions of administrative agencies is governed by the whole record test pursuant to General Statutes Chapter 150B, the Administrative Procedure Act. Upon reviewing an agency's decision, a trial court may "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 . . . (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or (6) Arbitrary or capricious." G.S. 150B-51(b) Accordingly, the whole record test requires that

"[i]f after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." [*quoting Little v. Board of Dental Examiners*, 64 N.C. App. 67, 306 S.E.2d 534 (1983).]

See also In re Guess, 327 N.C. 46, 393 S.E.2d 833 (1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991) (Findings of Board of Medical Examiners, if supported by competent evidence, may not be disturbed by a reviewing court).

The factual events and circumstances providing the basis for the Board's order of suspension are not in dispute and are reflected in the following findings of fact set out in the Board's order.

3. Henrietta Brendle was a dental patient under Respondent's care from June 23, 1989, through December 30, 1989.

4. Respondent frequently used Nitrous Oxide sedation in his treatment of Ms. Brendle, at her request.

5. On Friday, December 29, 1989, Ms. Brendle made an appointment to see Respondent at 9:00 p.m. that evening. Ms. Brendle told the person in Respondent's office who made the appointment that she was in considerable pain and needed immediate attention.

6. Ms. Brendle arrived at Respondent's office for her appointment at approximately 9:00 p.m., on Friday, December 29, 1989. Respondent was busy with other patients and did not see Ms. Brendle until approximately 10:00 p.m.

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7. Respondent took a radiograph of the tooth which was causing Ms. Brendle's pain and determined that the tooth had abscessed and required a root canal.

8. Respondent advised Ms. Brendle that he was too tired to perform the procedure that evening and requested that she return the following day at 9:30 a.m.

9. Before leaving his office Friday evening, Respondent was aware that he would not have a dental assistant available to assist with Ms. Brendle's treatment the following day.

10. Ms. Brendle arrived at Respondent's offices at or around 9:30 a.m. for her appointment with Respondent on Saturday, December 30, 1989.

11. Even though he was expecting Ms. Brendle, Respondent was dressed in an unprofessional manner, wearing only jogging shorts and a sweatshirt.

12. The front door to Respondent's office was unlocked when Ms. Brendle arrived, and she seated herself in the waiting area of Respondent's offices until Respondent asked her to come back to his operatory and sit in the dental chair.

13. Respondent was aware that Ms. Brendle had come to his office alone and that no member of his staff was present. Respondent and Ms. Brendle were alone in his office.

14. Respondent had treated Ms. Brendle's mother in the past and knew that Ms. Brendle's mother lived with Ms. Brendle. Aware that he and Ms. Brendle were alone in his office, Respondent had the options available of not treating Ms. Brendle at that time, of not using Nitrous Oxide, of requesting that Ms. Brendle return home and bring her mother back with her to be with Ms. Brendle during the treatment, or of requesting that Ms. Brendle telephone her husband, or another family member, to ask that he come to the office and be with her during the treatment.

15. Instead, Respondent administered Nitrous Oxide sedation to Ms. Brendle while he and Ms. Brendle were alone in his office. At some point after seating Ms. Brendle in the dental chair, Respondent locked the front door to his offices.

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The disputed findings are thus:

16. The standard of care for general dentists practicing in North Carolina on or about December 30, 1989, prohibited the use of Nitrous Oxide sedation on a female patient by a male dentist without the presence of a female dental assistant or some other individual whom the patient trusted.

17. Respondent violated this standard of care by administering Nitrous Oxide sedation to Ms. Brendle while he and Ms. Brendle were alone together in his office on December 30, 1989.

These findings were followed by the Board's disputed conclusions of law:

Respondent's actions described in Findings of Fact 13 through 17 above, in administering Nitrous Oxide sedation to a female patient while no one else was present in the office constituted negligence in the practice of dentistry, in violation of G.S. § 90-41(a)(12).

The referenced statute reads as follows:

G.S. 90-41. Disciplinary Action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

. . .

(3) Revoke or suspend a license to practice dentistry; and

(4) Invoke other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

. . .

(12) Has been negligent in the practice of dentistry[.]

William D. Rabb, D.D.S., an expert witness for the Board, after reviewing the factual events in this case and describing what dental students have been taught for "a hundred years," testified that he was familiar with the standard of care among dentists in North Carolina with regard to the administration of nitrous oxide sedation to patients, and that it was a violation of that stand-

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ard of care for Dr. McCollough to give nitrous oxide sedation to a female patient without a female assistant or chaperon being present in the office. While in the law of torts, the term "negligence" not only presupposes a breach of a legal duty owed by one to another, but also resulting injury or damage caused by such breach of duty, our Supreme Court has clearly rejected such a standard in reviewing the decisions of administrative boards which regulate providers of health care. In *In re Guess, supra*, the Court rejected the proposition that the conduct of a physician must carry risk or threat of harm before it failed to conform to the standard of care invoked by the Board of Medical Examiners in its disciplinary order applying to Dr. Guess. We are persuaded that the *Guess* rule allows the Dental Board's finding and conclusion of negligence, although the Board found that Dr. McCollough's patient was not injured during the episode under review. These assignments of error are overruled.

[3] Pursuant to his last assignment of error, petitioner contends that the sanctions imposed by the Board were arbitrary and capricious. In essence, petitioner contends that after the Board determined that there was insufficient evidence to support a finding of willful sexual misconduct by petitioner, the Board found petitioner negligent in the practice of dentistry, and then unfairly imposed severe sanctions in an attempt to punish petitioner for the charges which the Board could not prove.

The arbitrary and capricious standard is a difficult one to meet. *Woodlief, supra*.

These imposing terms apply "when such decisions are 'whimsical' because they indicate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning and exercise of judgment,' [citation omitted] or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements."

Little v. Board of Dental Examiners, 64 N.C. App. 67, 306 S.E.2d 534 (1983) (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980)).

While the sanctions imposed against petitioner may seem arguably harsh for violation of an unwritten standard of care which

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apparently has never been previously addressed by the Board, we cannot say that the Board's 90-day active suspension and five-year conditional reinstatement of petitioner's license was arbitrary or capricious.

For the reasons stated, the order of the trial court must be affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

JAMES B. HOLLOWAY, PLAINTIFF-APPELLEE v. T. A. MEBANE, INC., AND
U.S.F.&G. COMPANY, DEFENDANTS-APPELLANTS

No. 9210IC466

(Filed 20 July 1993)

**Master and Servant § 71.1 (NCI3d)— workers' compensation—
subcontractor for several employers—average weekly wage**

Where plaintiff, an independent contractor who performed work as a subcontractor for other contractors as well as for defendant employer, was injured while working as a subcontractor for defendant, the Industrial Commission properly calculated plaintiff's average weekly wage on the basis of his total net income from his subcontracting business for the two previous years rather than on the basis of his earnings from work only for defendant. N.C.G.S. § 97-2(5).

Am Jur 2d, Workers' Compensation § 423.

Appeal by defendants from Opinion and Order of the Full Commission of the North Carolina Industrial Commission entered 20 March 1992 by Deputy Commissioner Lawrence B. Shuping, Jr. Heard in the Court of Appeals 14 April 1993.

Gabriel Berry & Weston, by M. Douglas Berry, for plaintiff-appellee.

Adams Kleemeier Hagan Hannah & Fouts, by David A. Senter and Stephen A. Mayo, for defendants-appellants.

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LEWIS, Judge.

Plaintiff, an independent contractor, was injured while working as a subcontractor for defendant T.A. Mebane, Inc. ("Mebane") on 8 February 1989, and was out of work until 24 April 1989. Neither Mebane nor its carrier, defendant U.S.F. & G. Co. ("USF&G"), contested the applicability of workers' compensation coverage, and on 19 April 1989 defendants entered into a Form 21 Agreement awarding disability benefits to plaintiff. Under the facts of this case, the plaintiff was covered by defendants' policy. On 14 November 1990 Deputy Commissioner Jan N. Pittman set aside the Form 21 Agreement due to mutual mistake, determined plaintiff's average weekly wage and awarded temporary total disability benefits. On 20 March 1992 the Full Commission entered an award adjusting the average weekly wage calculated by Commissioner Pittman. The sole issue on appeal is the calculation of plaintiff's average weekly wage.

As an independent contractor plaintiff normally works on several different jobs within a short time period. Plaintiff's main area of work is "interlocking weather stripping" and hanging doors. According to plaintiff, he is the only person in the area performing such work, and he works constantly from one job to the next. Plaintiff has worked for Mebane periodically over the last four or five years, and has been paid on a job-by-job basis. Plaintiff asserts his earnings from work for Mebane constituted about 10% of his 1988 gross earnings.

Commissioner Pittman calculated the average weekly wage under N.C.G.S. § 97-2(5) based only on plaintiff's earnings from employment with Mebane, and did not consider plaintiff's earnings from work performed for other contractors. Commissioner Pittman divided the total amount plaintiff had earned from Mebane for the 52-week period prior to this injury by thirteen, the number of weeks plaintiff had actually worked for Mebane during that period. This resulted in an average weekly wage of \$205.76. The Full Commission, on the other hand, based its determination of the average weekly wage upon the average of plaintiff's net income from his sub-contracting business for the years 1988 and 1989, which resulted in a much higher average weekly wage of \$480.45.

When reviewing a decision of the Full Commission, this Court must determine whether there is competent evidence to support

the Commission's findings of fact, and whether the findings of fact support the conclusions of law. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). In its Opinion and Order, the Full Commission set forth the following in its Findings of Fact:

4. The method of determining plaintiff's appropriate average weekly wage which most nearly approximates the amount he would be earning were it not for his injury is to do so on the basis of an average of his net income from his sub-contracting business for the years 1988 and 1989, which is shown on his Schedule C tax returns for these same years, involves the two years in which he did work during the year prior to his injury and results in an average weekly wage of \$480.45 (\$26,127 earnings for 1988 plus \$23,977 earnings for 1989 divided by 2, divided by 365 times 7).

This finding is actually a legal conclusion based upon the Commission's interpretation of N.C.G.S. § 97-2(5). We note that "[a]lthough the Commission's findings are conclusive on appeal if supported by competent evidence, its legal conclusions are reviewable by our appellate courts." *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985).

N.C.G.S. § 97-2(5) sets forth several methods for determining average weekly wage. The first method set forth in the statute states that:

"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . , divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, . . . , then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

The second method states:

Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be fol-

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lowed; provided, results fair and just to both parties will be thereby obtained.

According to the third method:

Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

Finally, the fourth method states:

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (1991). Both the Deputy Commissioner and the Full Commission found that computation based on the first two methods would be unfair and unjust, and that it would not be possible at all under the third method. Therefore, because of the nature of plaintiff's employment as an independent contractor, only the fourth method, the catch-all method, is applicable.

Defendants contend the Full Commission erred in considering plaintiff's earnings from employers other than Mebane. Defendants argue that each method listed in the statute is subject to the limitation in the first sentence, thereby precluding consideration of employment other than that in which the employee was working at the time of the injury. Plaintiff, on the other hand, argues that in this situation it was proper and fair to consider plaintiff's net income over the most recent years to approximate his average weekly wage.

A recent decision of this Court applying the fourth method supports plaintiff's position that the Commission properly considered plaintiff's average income over the previous few years instead of limiting itself to earnings from employment with Mebane. *Postell v. B & D Construction Co.*, 105 N.C. App. 1, 411 S.E.2d 413, *disc. rev. denied*, 331 N.C. 286, 417 S.E.2d 253 (1992), also involved an

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independent contractor who had worked for the defendant employer only a short time before his injury. Applying the fourth method, the *Postell* Court did not restrict itself to consideration of wages earned in the employment in which plaintiff was injured, but instead agreed with the Commission to uphold an average weekly wage computation based upon actual earnings recorded during the years 1986, 1987, and 1988. The Court focused on plaintiff's earning capacity, and found its result to be fair and equitable since it "appear[ed] to best reflect plaintiff's actual earnings." *Id.* at 7, 411 S.E.2d at 416. Obviously, the Court did not find its calculation under the fourth method restricted by the first sentence of section 97-2(5).

In interpreting section 97-2(5), our courts have generally sought to achieve a fair and equitable result. In *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), the Court interpreted another method listed under section 97-2(5) to permit the combination of a volunteer fireman's wages from other employment. Significantly, the Court commented on the purpose of the average weekly wage basis for compensation, which is to "measure . . . the injured employee's earning capacity." *Id.* at 197, 347 S.E.2d at 817. Furthermore, Professor Larson, in discussing the fourth method of calculation, stated that:

[the statute's] language could hardly be more clear: the test is what the claimant would have earned if he had not been injured. . . . The statute does not refer to what he would have earned 'in the same employment.'

Indeed, the whole point of having a catch-all clause is to prevent unfairness in just such situations as this. . . . fairness means approximating what the employee would have made if not injured.

Larson, *Workmen's Compensation*, § 60.31(c) (1993).

The cases relied upon by defendants are distinguishable from the case at hand. *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966), *overruled in part by Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 198, 347 S.E.2d 814, 818 (1986), involved the determination of the average weekly wage in a concurrent employment situation, in which the employee held a full-time and a part-time job. 266 N.C. at 423, 146 S.E.2d at 482. That Court, calculating the average weekly wage under the fourth method,

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limited itself to consideration of earnings from the employment in which the employee was injured. *Id.* at 429, 146 S.E.2d at 486. *See also Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966) (under second method of § 97-2(5), same result in concurrent employment situation involving full and part-time jobs).

Discussing *Barnhardt*, the *Derebery* Court noted that the full-time employer in *Barnhardt* had no reason to know plaintiff held another job, thus rendering it unfair to the employer to combine wages from other employment. *Derebery*, 318 N.C. at 198, 347 S.E.2d at 818. In the case at hand, however, defendants must have known plaintiff worked for other employers because of the nature of plaintiff's work as an independent contractor. Moreover, this is not a case of concurrent employment, where the employee may hold several different permanent or long-term jobs at once, drawing separate wages or salaries from each employer. As an independent contractor, plaintiff works for short periods of time for each employer, moving from one job to the next. Basing plaintiff's average weekly wage upon work for one employer would be inherently unfair to plaintiff.

Although fairness to the employer is also a consideration, we note that our courts have stated that the premium paid by a particular employer towards worker's compensation insurance "is not in any sense determinative as to the 'fair and just' result as contemplated under G.S. 97-2(5)." *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 144-45, 269 S.E.2d 165, 167-68 (1980). Moreover, Professor Larson explains that

fairness to the employee and fairness to the employer-carrier are not symmetrical, and cannot be judged by the same standards. . . . The rule operates impartially in both directions. Today this employer-carrier may be saddled with a slight extra cost; tomorrow the positions may be reversed, and the employer-carrier will be completely relieved of the cost of an injury to one of its employees . . . when it happens to be the other employment in which the injury occurs. This is the essence of the concept of spreading the risk in a system like workmen's compensation.

Larson, § 60.31(c).

We hold the Commission correctly determined plaintiff's earning capacity as an independent contractor under the fourth method

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listed in section 97-2(5) by averaging plaintiff's net income for the years 1988 and 1989. This interpretation most accurately reflects plaintiff's earning capacity and the amount he "would be earning were it not for the injury." § 97-2(5). Because we are affirming the Commission's decision on this issue, we find it unnecessary to address defendants' other contention which concerned the calculations by the Deputy Commissioner.

Affirmed.

Chief Judge ARNOLD and Judge MCCRODDEN concur.

VANN DALE HARGETT, CECIL GLENN HARGETT, GERALD KEITH HARGETT, AND FRANCES HARGETT DEASON, PLAINTIFFS-APPELLANTS
v. ROBERT L. HOLLAND, DEFENDANT-APPELLEE

No. 9220SC589

(Filed 20 July 1993)

1. Limitations, Repose, and Laches § 26 (NCI4th)— drafting of will—statute of limitations—accrual after testator's death

The statute of limitations did not begin to run on an action for negligently drafting a will until the testator's death. At the time of a will's execution, potential beneficiaries have no vested interests and may not have knowledge that they are to be recipients under a will; furthermore, a testator is free to modify or revoke a will at any time following its execution. Beneficiaries, as potential plaintiffs, would not realize any injury until the testator's death. N.C.G.S. § 1-15(c).

Am Jur 2d, Attorneys at Law §§ 219-221.

2. Limitations, Repose, and Laches § 26 (NCI4th)— drafting of will—statute of repose—triggering event—death of testator

The statute of repose on an action for negligently drafting a will did not begin to run until the testator's death where the defendant attorney's last act was his failure to fulfill his continuing duty to prepare a will properly reflecting the client's testamentary directions. N.C.G.S. § 1-15(c).

Am Jur 2d, Attorneys at Law §§ 219-221.

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[111 N.C. App. 200 (1993)]

Appeal by plaintiffs from order entered 27 March 1992 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 11 May 1993.

Brown, Hogin & Montgomery, by R. Kent Brown, for plaintiff appellants.

Dean & Gibson, by Rodney Dean and Suzanne B. Leitner, for defendant appellee.

COZORT, Judge.

Plaintiffs instituted this cause of action against defendant alleging that the defendant's negligent drafting of the will of Vann W. Hargett resulted in their receiving less of Vann Hargett's property than Vann Hargett contracted with defendant to provide for in the will. The will had been prepared by defendant in 1978 and executed by Vann Hargett on 1 September 1978. The testator died 7 November 1988. A declaratory judgment action to determine the beneficiaries of the remainder interest in the 80-acre parcel of land at issue was tried in 1990. The matter was resolved by this Court in an unpublished opinion, *Hargett v. Hargett*, 101 N.C. App. 574, 400 S.E.2d 780 (1991). After the decision of this Court in the declaratory judgment action was filed, plaintiffs instituted this action against defendant attorney.

The complaint was filed on 6 November 1991, within three years of the testator's death, but 13 years after the drafting of the will. Defendant moved to dismiss the action pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. The trial court granted defendant's motion in an order dated 27 March 1992, holding that the applicable statute of limitations period had expired prior to the commencement of this action. Plaintiffs appeal. We reverse.

The sole issue presented in this appeal is whether the trial court erred in holding, in an action alleging negligent drafting of a will, that the statute of limitations and the statute of repose in N.C. Gen. Stat. § 1-15(c) begin to run as to the plaintiff-beneficiaries at the time the will was executed.

[1] First, plaintiffs argue the statute of limitations cannot begin to run until after such time as the beneficiaries have suffered injury, *i.e.*, following the testator's death. Plaintiffs contend that prior to the testator's death, they would not have had standing to initiate a negligent drafting claim. We agree.

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N.C. Gen. Stat. § 1-15(c) (1983) provides:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the Defendant giving rise to the cause of action[.] . . . Provided further, that in no event shall an action be commenced more than four years from the last act of the Defendant giving rise to the cause of action[.]

In *Pierson v. Buyher*, 330 N.C. 182, 409 S.E.2d 903 (1991), our Supreme Court held that a three-year statute of limitation did not begin to run against an insurance agent for negligent tax advice until the death of the decedent and the actual harm to the beneficiaries of the policy, even when the harm occurred more than three years following the date of the issuance of the policy. The court first noted that the rights of the beneficiary did not vest until the death of the insured. *Id.* at 185, 409 S.E.2d at 905. The court then stated:

[I]t is well settled that *when an act is not necessarily injurious or is not an invasion of the rights of another, and the act itself affords no cause of action, the statute of limitations begins to run against an action for consequential injuries resulting therefrom only from the time actual damage ensues.*

Id. at 186, 409 S.E.2d at 905, (quoting *Shearin v. Lloyd*, 246 N.C. 363, 367, 98 S.E.2d 508, 511-12 (1957) (emphasis in original) (citations omitted)).

In holding that “[u]ntil a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie,” the Supreme Court made this analysis:

In this case, plaintiff had no more than an *expectancy* at the time his mother purchased the insurance policy, no more than the *possibility* of future injury. *Maybe* he would be the beneficiary of the insurance policy when his mother died. *Maybe* he wouldn’t. *Maybe* there would be adverse tax consequences at the time of his mother’s death. *Maybe* there wouldn’t. *Maybe* he would suffer a monetary loss. *Maybe* he wouldn’t.

Id. at 186, 409 S.E.2d at 906 (emphasis in original).

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This Court's analysis in *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657 (1984), also lends support to plaintiff's position. In *Snipes*, we held that the statute of limitations in N.C. Gen. Stat. § 1-15(c) did not begin to run against an attorney who gave a client negligent tax advice until the client was assessed by the Internal Revenue Service. In so holding, the *Snipes* Court explained:

[a]lthough the statute of limitations set out in G.S. 1-15(c) begins to run at the time of the last negligent act or breach of some duty, and not the time actual damage is discovered or fully ascertained, this statute still requires as an element of the cause of action for malpractice that plaintiff suffer some loss or injury, whether it be apparent or hidden. Plaintiff's cause of action against defendants was not complete and did not fully arise until he was assessed by the I.R.S.

Id. at 71, 316 S.E.2d at 661.

We find no reason to hold contrary in this case to the Supreme Court's holding in *Pierson* and this Court's opinion in *Snipes*. At the time of a will's execution, potential beneficiaries have no vested interests and may not have knowledge that they are even to be recipients under a will. Furthermore, a testator is free to modify or revoke a will at any time following its execution. It is clear that beneficiaries, as potential plaintiffs, would not realize any injury until the testator's death.

Our decision follows a majority of jurisdictions which have addressed this issue and have found that a cause of action in favor of a beneficiary to a will does not accrue until the testator's death. *See, e.g., Heyer v. Flaig*, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969); *Price v. Holmes*, 198 Kan. 100, 422 P.2d 976 (1967); *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66 (1979); *McLane v. Russell*, 159 Ill. App. 3d 429, 512 N.E.2d 366 (1987); *Shideler v. Dwyer*, 275 Ind. 270, 417 N.E.2d 281 (1981).

We hold that the statute of limitations did not begin to run until the testator's death. We now turn to the issue of when the four-year statute of *repose* begins to run and whether the plaintiff's action was barred by the statute of *repose*.

[2] The statute of repose provides in pertinent part, "in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c). The triggering event for the statute of repose is

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therefore the last act or failure to act which becomes the basis for the malpractice suit. For purposes of this specific legal malpractice action concerning the negligent drafting of a will, we find the triggering event or "last act" of defendant occurred at the testator's death. The defendant's last act in this case was his failure to fulfill his continuing duty to prepare a will properly reflecting the client's testamentary directions.

We find the facts in the case below analogous to those in *Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 294 S.E.2d 409, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 219 (1982). In *Sunbow*, the plaintiff sued the defendant attorney for professional malpractice for defendant's negligent failure to perfect the plaintiff's security interest in certain collateral. This Court held that the attorney had a continuing duty to file a financing statement to protect his client's interest in the collateral. The Court stated:

We believe that an attorney who represents a party as alleged in this action has a duty to file the financing statement after the transaction is closed, which duty continues so long as the filing of the financing statement would protect some interest of his client. If the financing statement in this case had been filed a sufficient period of time prior to the date of filing of the petition in bankruptcy, the plaintiff would not have lost his lien. It is on that date that the [statute] began to run.

Id. at 753, 294 S.E.2d at 410. Although we note the *Sunbow* case addresses the triggering period for the statute of limitations rather than the statute of repose, we find the reasoning pertaining to the attorney's continuing duty applicable to the present case. The failure of defendant to correct an error in the will he prepared for the testator was the cause of plaintiffs' injury. It is well-settled that an attorney who engages in the practice of law

is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954) (citations omitted).

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The crucial question here is whether the attorney's *failure to act before the testator's death* qualifies as the "last act" which triggers the running of the statute of repose. We hold that it does. In so holding, we note that the language of N.C. Gen. Stat. § 1-15(c) itself contemplates the failure to act as a triggering device: "Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of *or failure to perform professional services* shall be deemed to accrue at the time of the occurrence of the last act of the defendant" (Emphasis added.)

In the present case, had defendant corrected the mistake in the will any time before the testator's death, he would have met the continuing duty imposed on him to correct any error in the document. Here defendant's alleged failure to make such a correction resulted in a breach of duty to his client at the time of the testator's death. Under these narrow circumstances, we find the four-year statute of repose does not begin to run until the testator's death. Accordingly, the plaintiffs' cause of action would be barred four years following the death of the testator, and thus is not barred in this case because the action was filed within four years of the testator's death.

We hold that the statute of limitations and the statute of repose in § 1-15(c), which govern an action alleging negligent drafting of a will, begin to run at the death of the testator. The trial court's order to the contrary is reversed, and the matter is remanded for further proceedings.

Reversed and remanded.

Judges WELLS and JOHN concur.

LASSITER v. FAISON

[111 N.C. App. 206 (1993)]

PERCY McALLIE LASSITER, PLAINTIFF-APPELLANT v. BUSTER FAISON, ADMINISTRATOR OF THE ESTATE OF VIVIAN I. WALDEN, DEFENDANT-APPELLEE

No. 926SC693

(Filed 20 July 1993)

Limitations, Repose, and Laches § 126 (NCI4th)— personal injury action against decedent's estate—statute of limitations

Plaintiff's personal injury claim against a deceased driver's estate was not barred by the three-year statute of limitations of N.C.G.S. § 1-52 where it was filed more than three years after the cause of action accrued but less than six months after defendant was appointed as administrator of the estate, and no notice to creditors of the estate had been published at the time plaintiff's action was commenced. N.C.G.S. §§ 1-22, 28A-19-3, 28A-14-1.

Am Jur 2d, Limitation of Actions §§ 194-196.

Appeal by plaintiff from judgments entered 18 February 1992 and 2 March 1992 in Northampton County Superior Court by Judge Cy A. Grant. Heard in the Court of Appeals 27 May 1993.

On 12 July 1988, plaintiff was riding as a passenger in a vehicle owned by himself and driven by Felix Taylor when plaintiff's vehicle collided with an automobile driven by Vivian I. Walden. Plaintiff, Mr. Taylor, and Ms. Walden each sustained bodily injuries. Sometime after the crash that same day, Ms. Walden died as a result of her injuries.

At the time of the collision, Ms. Walden's vehicle's liability insurance policy was issued by the Interstate Casualty Insurance Company (Interstate). Subsequent to the collision, Interstate was declared insolvent, and, on 5 March 1990, an order of rehabilitation was entered in Wake County Superior Court. The North Carolina Insurance Guaranty now occupies the position of Interstate as liability insurer of Ms. Walden. Plaintiff's automobile was insured by Integon General Insurance Corporation (Integon). Plaintiff's policy with Integon included uninsured motorist coverage.

On 26 June 1991, the Clerk of Northampton County Superior Court appointed Buster Faison as Administrator of the Walden estate. On 18 October 1991, plaintiff filed a personal injury action against Mr. Faison, as Administrator of Vivian Walden's estate,

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seeking damages for the injuries he suffered in the 12 July 1988 crash. On 5 November 1991, Integon, as plaintiff's uninsured motorist insurance carrier, appeared as an unnamed party and filed a motion to dismiss plaintiff's claim, contending that because more than three years had passed between the time the cause of action arose and the time plaintiff filed his complaint, plaintiff's action was barred by the applicable statute of limitations. On 2 December 1991, Administrator Faison filed a motion to dismiss, also pleading the bar of the statute of limitations.

During the 10 February 1992 session of the Northampton County Superior Court, Judge Grant heard defendants' motions to dismiss. Disposing of defendants' motions to dismiss as motions for summary judgment, Judge Grant found that plaintiff's cause of action against the Walden estate was barred by the applicable statute of limitations and entered summary judgments in favor of both Administrator Faison and Integon. Plaintiff filed notice of appeal from both summary judgment orders on 6 March 1992.

Felton Turner, Jr. for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by J. McLain Wallace, Jr., for defendant-appellee Faison.

Baker, Jenkins, Jones & Daly, P.A., by Robert C. Jenkins and Roger A. Askew, for defendant-appellee Integon General Insurance Corporation.

WELLS, Judge.

On appeal, plaintiff contends that the trial court committed error by concluding that plaintiff's claim was barred by the applicable statute of limitations and granting summary judgment in favor of defendants. We agree.

In the case at bar, plaintiff's cause of action arose against Vivian I. Walden on 12 July 1988. Buster Faison was appointed Administrator of the Walden estate on 26 June 1991. Plaintiff filed his complaint against the Walden estate on 18 October 1991, three years and three months after his cause of action arose but less than six months after Faison's appointment as Administrator. At the time plaintiff's action was commenced, no notice to creditors had been published for the Walden estate.

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Unless otherwise provided for by statute, N.C. Gen. Stat. § 1-52 prescribes a three-year statute of limitations for personal injury cases. In cases where plaintiff's personal injury action arose against a living person who became deceased before the general three-year statute of limitations had run, N.C. Gen. Stat. § 1-22, provides in pertinent part:

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

. . .

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3.

N.C. Gen. Stat. § 1-22 modifies the operation of the general three-year statute of limitations applicable to plaintiff's claim to comport with that "time specified for the presentation of claims in G.S. 28A-19-3." In *Ingram v. Smith*, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972), this Court considered § 1-22 and wrote:

[1] G.S. 1-22 is an enabling not a disabling statute. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases which, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. *Benson v. Bennett*, 112 N.C. 505, 17 S.E. 432 (1893).

G.S. 1-22 was not intended to be a restriction on the statute of limitations so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course, but for this section, it would not be barred until a later date. *Benson v. Bennett*, *supra*.

[2] In addition, in counting the time of the statute of limitations, where the debtor is deceased, the time from his death until

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the appointment of the personal representative is *not included*, provided that the estate is administered within ten years after the death. *Humphrey v. Stephens*, 191 N.C. 101, 131 S.E. 383 (1925); *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963).

In *Hodge v. Perry*, 255 N.C. 695, 122 S.E.2d 677 (1961), our Supreme Court held:

“The general rule is unquestionably that when the ‘statute of limitations once begins to run nothing stops it.’ But the statute (Revisal, sec. 367) has made an exception where a party dies. It provides that if the debt is not barred at the time of the debtor’s death, action can be brought against his personal representative (if the cause of action survive), though the period of limitation has then elapsed, if within one year after issuing of letters of administration.” *Matthews v. Peterson*, 150 N.C. 134, 63 S.E. 721; *Irvin v. Harris*, 182 N.C. 656, 109 S.E. 871; s. c., 184 N.C. 547, 114 S.E. 818; *Humphrey v. Stephens*, 191 N.C. 101, 131 S.E. 383, and cases cited therein; *Winslow v. Benton*, 130 N.C. 58, 40 S.E. 840; *Benson v. Bennett*, 112 N.C. 505, 17 S.E. 432.

Having instituted this action against the administrator within one year after his qualification, plaintiff’s right to recover is the same as if he had instituted the action against the decedent immediately preceding his death. The respective rights of the parties are fixed as of the date of decedent’s death; and, in respect of the statute of limitations, the interval between decedent’s death and the institution of the action has no legal significance.

The court below correctly ruled that plaintiff, if entitled to recover, was entitled to recover for the services rendered by her during the three years immediately preceding the decedent’s death.

See also Gelder & Assoc., Inc. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981).

G.S. § 1-22 directs us to G.S. § 28A-19-3, which reads in pertinent part:

§ 28A-19-3. Limitations on presentation of claims.

(a) All claims against a decedent’s estate which arose before the death of the decedent, . . . founded on contract, tort,

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or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. Provided further, if the expiration of said 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to each creditor, if any, shall be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor.

On 12 July 1988, the date this action arose, N.C. Gen. Stat. § 28A-14-1 read in pertinent part as follows:

§ 28A-14-1. Notice for claims.

(a) Every personal representative and collector within 20 days after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be a[t] least six months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. . . . When any collector or personal representative of an estate has published or mailed the notice provided for by this section, no further publication or mailing shall be required by any other collector or personal representative.

(b) Every personal representative and collector within 90 days after the granting of letters shall send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 90 days.

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Applying the foregoing statutes to the case at bar, and considering the fact that no notice of claims was published by the personal representative of the Vivian I. Walden estate previous to plaintiff's filing of this action, it is clear that plaintiff's claim was not barred by the three-year statute of limitations set out in G.S. § 1-52 and that the trial court erred by granting summary judgment for defendants.

Reversed and remanded.

Judges COZORT and JOHN concur.

PAULINE B. NATIONS v. JOHNNY H. NATIONS, SR.

No. 9227DC593

(Filed 20 July 1993)

1. Rules of Civil Procedure § 60 (NCI3d) — motion for relief from judgment — findings not required

Although it would be the better practice to do so, the trial court is not required to make findings of fact when ruling on a Rule 60(b) motion for relief from judgment unless findings are requested by a party.

Am Jur 2d, Judgments § 782.

2. Rules of Civil Procedure § 60.2 (NCI3d) — denial of relief from judgment — issues raisable on appeal

The trial court properly denied defendant's Rule 60(b) motion to set aside an equitable distribution judgment where the errors of law alleged to have been committed by the trial court in entering the judgment were issues which could have been raised in defendant's prior appeal to the Court of Appeals.

Am Jur 2d, Appeal and Error § 545.

Appeal by defendant from order entered 18 March 1992 in Gaston County District Court by Judge Timothy L. Patti. Heard in the Court of Appeals 11 May 1993.

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Tim L. Harris & Associates, by Robert D. Jenkins and T. Scott White, for plaintiff-appellee.

Kelso & Ferguson, by Lloyd T. Kelso, for defendant-appellant.

GREENE, Judge.

Plaintiff Pauline B. Nations (Mrs. Nations) and defendant Johnny H. Nations, Sr. (Mr. Nations) were married on 7 November 1976, and established a marital residence in Kings Mountain. Two children were born of the marriage. Mrs. Nations filed a complaint seeking absolute divorce and equitable distribution on 31 August 1986. Mr. Nations answered, and counterclaimed for custody of one of the children and for child support. A judgment of absolute divorce was entered 30 September 1988. The judgment stated that all issues of equitable distribution and child custody were to be determined at a later date. An equitable distribution order was signed 12 April 1990, and provided that the parties stipulated that the only property pertinent to the equitable distribution was the marital residence and property located in Jackson County, North Carolina. The trial court found as a fact that the parties had entered into a separation agreement on 9 October 1982. By the terms of that agreement, Mr. Nations was to execute and deliver to Mrs. Nations a deed to the marital residence. Mrs. Nations agreed to execute a limited power of attorney for the purpose of effectuating the transfer to Mr. Nations of the property in Jackson County. A deed of separation was prepared by attorney Basil L. Whitener (Whitener), who represented both Mr. and Mrs. Nations. Mrs. Nations subsequently signed the power of attorney and Mr. Nations executed the general warranty deed to the marital residence and left it with Whitener. After these documents were executed, the Nations resumed their marital relationship.

Subsequent to the resumption of marital relations, Mr. Nations recorded the power of attorney and executed a deed to the Jackson County property to himself. Mr. Nations then retrieved from Whitener the general warranty deed conveying the marital property to Mrs. Nations. Mr. Nations never advised Mrs. Nations that he had removed the general warranty deed from Whitener's office. Based on these findings of fact, the trial court concluded that the Nations had entered into a binding separation agreement on 9 October 1982, which was terminated to the extent that it remained executory at the time the Nations resumed the marital relationship.

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The trial court further concluded that the general warranty deed conveying the marital property to Mrs. Nations was valid, that its execution created the presumption of delivery, and that Mr. Nations had not rebutted the presumption. The trial court further concluded that Whitener was the agent of both Mr. and Mrs. Nations, and that when Mr. Nations gave the deed to Whitener, delivery was accomplished. Based on the above, the trial court ordered that the property located in Jackson County was the separate property of Mr. Nations, and the marital residence was the separate property of Mrs. Nations. The court further ordered that Mr. Nations "immediately sign a general warranty deed conveying . . . [the marital residence] to [Mrs. Nations.]"

Mr. Nations made a motion for a new trial on 7 May 1990, which was denied on 24 July 1990. Mr. Nations then filed notice of appeal from the equitable distribution order on 27 July 1990. This Court, in an unpublished decision filed 7 May 1991, held that the equitable distribution order was entered on 12 April 1990, and that Mr. Nations failed to file his motion for a new trial within ten days of the entry of judgment as required by Rule 59. As such, the motion for a new trial was ineffective, and it therefore did not toll the running of the thirty days within which Mr. Nations was required to give notice of appeal from entry of judgment. Because Mr. Nations did not file his appeal within thirty days of entry of judgment, it was not timely and was dismissed.

Mrs. Nations, subsequent to the decision on appeal, filed, on 14 January 1992, a motion to compel compliance with the trial court's order that Mr. Nations execute a general warranty deed conveying the marital residence to her. The motion prayed that Mr. Nations be found in contempt of the trial court's order, and that the trial court compel Mr. Nations to sign the deed over to Mrs. Nations as ordered. Mr. Nations made a counter-motion for relief from the equitable distribution order pursuant to Rule 60(b), in which he alleged that the order was not entered on 12 April 1990, but rather on 30 April 1990, and that his motion for a new trial of 7 May 1990 was therefore filed within ten days of the entry of judgment and should have tolled the time in which Mr. Nations was allowed to file notice of appeal. Specifically, Mr. Nations alleged that he had "not been afforded an opportunity to have the decision of the trial court reviewed on appeal" and requested the trial court

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determine that the decision by the North Carolina Court of Appeals to dismiss the appeal of the defendant was not proper on the record, and should make clear on the record that the Order signed April 12, 1990 was not "entered" until it was filed and served on counsel for the defendant on April 30, 1990.

He further alleged that the equitable distribution judgment had been entered under a misapprehension of the law.

The trial court, in an order entered 18 March 1992, without making any findings of fact denied Mr. Nations' Rule 60(b) motion. The trial court also granted Mrs. Nations' motion to compel, ordering Mr. Nations to convey legal title to the marital residence to Mrs. Nations on or before 31 March 1992.

Mr. Nations appeals the trial court's order, assigning as error the trial court's failure to grant his Rule 60(b) motion and the trial court's grant of Mrs. Nations' motion to compel.

The issues are (I) whether the trial court is required to make findings of fact to support its denial of a Rule 60(b) motion for relief from judgment; and, if not (II) whether, based on the evidence, the trial court could have made findings of fact to support its conclusion that the Rule 60(b) motion should be denied; and (III) whether the trial court correctly granted Mrs. Nations' motion to compel.

I

[1] Defendant first argues that the order of the trial court denying his Rule 60(b) motion must be vacated because the trial court failed to find facts and set forth those facts in its order.

Rule 60(b) of the North Carolina Rules of Civil Procedure allows a party, on motion to the trial court, to seek relief from any judgment or order of the trial court. N.C.G.S. § 1A-1, Rule 60(b) (1990). Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party. N.C.G.S. § 1A-1, Rule 52(a)(2) (1990); *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992).

The record reveals no request by the parties that the trial court find facts as to defendant's Rule 60(b) motion. Accordingly,

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because no such request was made, we are not compelled to vacate the trial court's order due to the lack of findings of fact.

II

[2] Although the lack of findings in the order denying the Rule 60(b) motion is not grounds for reversal, the order must be reversed unless there is evidence in the record from which the court could have made findings to support the order. *Grant*, 106 N.C. App. at 125, 415 S.E.2d at 380. In this case, because the trial court denied Mr. Nations' Rule 60(b) motion, the question is whether there is any evidence in the record to support the granting of the motion. If not, the lack of evidence supports denial of the motion.

Mr. Nations attempts by his use of Rule 60(b) to have the trial court set aside an equitable distribution judgment earlier entered on the grounds that the judgment was erroneous. "Erroneous judgments may be corrected only by appeal, and a motion under [Rule 60] cannot be used as a substitute for appellate review." *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 674 (1990) (citation omitted). Because Rule 60(b) cannot be used as a substitute for appeal, the trial court, after an appeal is dismissed, "may deny a [Rule 60(b)] motion for relief that is based on a ground that was open to the movant on the appeal." 7 James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 60.30[2], at 60-339 (1993) (footnote omitted); *see Draughon v. Draughon*, 94 N.C. App. 597, 599, 380 S.E.2d 547, 548 (1989) (setting order aside under Rule 60(b) because plaintiff lost right of appeal not permitted); *cf. Poston v. Morgan*, 83 N.C. App. 295, 300, 350 S.E.2d 108, 111 (1986) (where, because of gross negligence of attorney, appeal was not perfected, Rule 60(b) may provide relief). In this case, the errors of law alleged to have been committed by the trial court in entering the equitable distribution judgment were issues which could have been raised in the first appeal to this Court. Therefore, the trial court did not abuse its discretion in denying Mr. Nations' Rule 60(b) motion, as the record can support no other conclusion. *See Vuncannon v. Vuncannon*, 82 N.C. App. 255, 258, 346 S.E.2d 274, 276 (1986) (Rule 60(b) order will not be disturbed on appeal absent an abuse of discretion).

We note that Mr. Nations, wisely, did not pursue, in his brief and oral argument to this Court, his allegation in the motion that

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"[t]he trial court should determine that the decision by the North Carolina Court of Appeals . . . was not proper."

III

Mr. Nations also assigns as error the trial court's grant of Mrs. Nations' motion to compel. He argues only that the reasons which justify the grant of his Rule 60(b) motion also "support . . . his contention that the trial court erred in compelling him to execute a deed." Having rejected Mr. Nations' argument on the Rule 60(b) motion, we likewise reject this assignment of error.

Affirmed.

Judges JOHNSON and WYNN concur.

STATE OF NORTH CAROLINA v. NORMA SUE HONAKER

No. 9221SC477

(Filed 20 July 1993)

1. Judges, Justices, and Magistrates § 26 (NCI4th)— statement by trial judge—recollection by attorney—insufficient to require recusal

The trial judge did not err by failing to recuse himself from an automobile forfeiture hearing where defendant produced no evidence of bias other than her attorney's recollection that the judge had made the statement "that car is gone" when the State moved for forfeiture, and the trial judge stated that he did not recall making the statement. Defense counsel's recollection of the statement was not substantial evidence that might reasonably call the court's objectivity into question.

Am Jur 2d, Judges §§ 86 et seq.

Disqualification of federal judge, under 28 USC § 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved. 2 ALR Fed 917.

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2. Constitutional Law § 129 (NCI4th); Narcotics, Controlled Substances, and Paraphernalia § 48 (NCI4th)— remission of vehicle forfeiture—no right to jury trial

There is no right to a jury trial of a claim under N.C.G.S. § 90-112.1 for remission of forfeiture of a vehicle used in violation of the controlled substances laws. Such a claim is in essence a civil action governed by Article I, Section 25 of the N.C. Constitution rather than a criminal case for which Article I, Section 24 guarantees the right to a jury trial.

Am Jur 2d, Jury §§ 10, 51, 52.

Distinction between petty and serious offenses for purposes of federal constitutional right to trial by jury—Supreme Court cases. 103 L. Ed. 2d 1000.

3. Narcotics, Controlled Substances, and Paraphernalia § 42 (NCI4th)— vehicle used in felony—forfeiture—sufficiency of evidence

The trial court's determination that defendant's vehicle was used in a felony and was subject to forfeiture under N.C.G.S. § 90-112 was supported by (1) the testimony of defendant's husband that he alone was involved in trafficking in cocaine and that he had previously pled guilty to certain drug offenses, including maintaining defendant's car for the purpose of violating the Controlled Substances Act, and (2) evidence that the husband used defendant's vehicle while carrying a backpack containing a large amount of cash and checks, since this evidence was sufficient to support an inference that defendant's husband was carrying proceeds from his drug transactions when he used defendant's car.

Am Jur 2d, Drugs, Narcotics, and Poisons § 27.25.

Forfeitability of property held in marital estate under Uniform Controlled Substances Act or similar statute. 84 ALR4th 620.

4. Narcotics, Controlled Substances, and Paraphernalia § 42 (NCI4th)— forfeiture of vehicle—sufficiency of findings

The trial court's findings in a vehicle forfeiture proceeding were an adequate substitute for the simple required finding on whether defendant had "knowledge, or reason to believe that . . . [her vehicle] was being used or would be used in

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violation of the laws of this State relating to controlled substances." N.C.G.S. § 90-112.1(b).

Am Jur 2d, Drugs, Narcotics, and Poisons § 27.25.**Forfeitability of property held in marital estate under Uniform Controlled Substances Act or similar statute. 84 ALR4th 620.**

Appeal by defendant from order entered 21 November 1991, by Judge Thomas W. Seay, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 1993.

A Forsyth County grand jury indicted defendant on charges of possession with the intent to traffic in cocaine, conspiracy to traffic in cocaine, and the lesser included misdemeanor of maintaining a building for keeping and selling controlled substances. The jury returned verdicts acquitting defendant of the first two charges and finding her guilty of the third. Subsequent to the judgment suspending sentence, defendant filed a petition, pursuant to N.C. Gen. Stat. § 90-112.1 (1990), seeking the return of her automobile which was seized in the course of defendant's arrest. The trial court entered an order directing that, pursuant to N.C. Gen. Stat. § 90-112 (1990), the automobile be forfeited to the Forsyth County Sheriff's Department. From that order, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for the State.

Dean B. Rutledge for defendant appellant.

MCCRODDEN, Judge.

Defendant presents for our review three arguments which raise these issues: (I) whether the trial judge prejudged the forfeiture of defendant's automobile and should, therefore, have recused himself; (II) whether the trial court erred in denying defendant's motion for trial by jury of the forfeiture question; and (III) whether the trial court erred in ordering forfeiture of defendant's automobile where (a) the vehicle was not used in the commission of a felony, (b) the evidence was insufficient to show that defendant's vehicle was used in a violation of N.C.G.S. § 90-112, and (c) the trial court did not include findings with respect to defendant's knowledge and reasonable belief about the illicit use of the vehicle. We have reviewed defendant's arguments and affirm the trial court's order.

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I

[1] Defendant first argues that the trial judge erred by failing to recuse himself. When the State made the motion to forfeit defendant's property, including the vehicle, the trial court stated "that car is gone." Defendant asserts that this statement indicates that the court had prejudged the matter and was biased against defendant. We find no merit in this argument.

In criminal proceedings, N.C. Gen. Stat. § 15A-1223 (1988) governs the issue of disqualification of judges. That statute 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) [p]rejudiced against the moving party or in favor of the adverse party

N.C.G.S. § 15A-1223.

Upon a motion that a judge recuse himself, the burden is upon the movant to "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist 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." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (citation omitted). Hence, a party moving for recusal must produce substantial evidence that the judge's impartiality may reasonably be questioned.

In the case at hand, at the hearing on the motion to recuse, defendant produced no evidence of any bias other than her attorney's recollection that the judge had made the statement that "that car is gone." Appellant did not offer the transcript of the hearing which contained the further statement of the trial judge, upon defense counsel's interjection, that, "of course I will give you an opportunity to be heard. I don't ever mean to cut anybody off." The judge stated that he did not recall making the statement that "that car is gone" at the hearing on the State's motion to forfeit. We do not believe that defense counsel's recollection of the statement, which the trial judge did not remember making and which was only a partial recollection of the judge's remarks,

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was substantial evidence that might reasonably call the court's objectivity into question. This assignment of error is overruled.

II

[2] Appellant next argues that the court erred in denying her motion for trial by jury. In *State v. Morris*, 103 N.C. App. 246, 405 S.E.2d 351 (1991), this Court explicitly held that there is no right to a jury trial in actions under N.C.G.S. § 90-112.1. Appellant urges us to find that she was entitled to a trial by jury, notwithstanding our opinion in *Morris*. Appellant argues that the *Morris* Court mistakenly found that the right was governed by Article 1, Section 25 of the North Carolina Constitution which pertains to civil cases, and mandates trial by jury only for those actions that were recognized at the time of the ratification of the Constitution, instead of Article 1, Section 24 which guarantees the right to a jury trial in criminal cases. Appellant asserts that remission proceedings under Section 90-112.1 are in the nature of criminal actions. We do not agree. An action under Section 90-112.1 is in the nature of an action for replevin. It is in essence a civil action and, as such, the right to a jury trial, if any, is governed by Article 1, Section 25 of the North Carolina Constitution. Thus, under *Morris*, appellant was not entitled to a trial by jury for her remission action.

III

[3] Finally, defendant argues that the court erred in ordering the forfeiture for three reasons. The first two reasons are that the record is devoid of any evidence sufficient to support findings that (a) the vehicle was used in a felony and (b) it was used in violation of Section 90-112.

The record reflects the following evidence. Defendant's apartment was searched pursuant to a search warrant that also provided for the search of two cars, including defendant's 1985 Ford Escort. In the course of the search of the apartment, police officers discovered \$100.00 in cash, \$288.00 in food stamps, about 22 grams of crack cocaine, about six and a half grams of cocaine, a small leather bag containing drug paraphernalia, several sets of scales, and an unspecified amount of Inositol, a white, powdery food substitute.

A short while after the search had begun, defendant's husband returned to the apartment, carrying a backpack. In the backpack, officers found \$4,939.00 in cash, several checks, some of which were

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blank, a leather bag containing jewelry, bank statements, credit cards, and a key to a safety deposit box.

The safety deposit box had been leased by defendant, at her husband's request, and contained \$22,568.00 in cash.

Defendant testified, denying any knowledge of her husband's involvement with cocaine and any personal involvement with cocaine. She stated, however, that she had given her husband permission to drive her car.

Defendant's husband testified that he alone was involved with trafficking in cocaine and that he had previously pleaded guilty to trafficking in cocaine, conspiracy to traffic in cocaine, maintaining a dwelling for the purpose of violating the Controlled Substances Act, and maintaining defendant's car for the purpose of violating the Controlled Substances Act.

We conclude that the husband's testimony concerning his guilty pleas and his use of the defendant's vehicle while carrying a backpack containing a large amount of cash and checks were adequate to support a finding that defendant's husband was carrying proceeds from his drug transactions when he drove up in appellant's vehicle. Thus, the court's findings that the vehicle was used in the commission of a felony and that, pursuant to Section 90-112, it was subject to forfeiture, were not in error.

[4] Defendant's third argument that the trial court's findings of fact were inadequate to support the order is based upon the court's failure to make a finding of fact as to appellant's knowledge, or reason to know, of her husband's use of the vehicle in relation to a felony violation of the Controlled Substances Act. We agree that, under this Court's interpretation of Section 90-112.1(b), the trial court must find, among other things, whether the defendant had "knowledge, or reason to believe, that . . . [the forfeited item] was being used or would be used in the violation of laws of this State relating to controlled substances . . ." We conclude, however, that the trial court's findings, although not in the language of the statute, were sufficient on this issue to support the order of forfeiture.

State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980), involved the seizure of petitioner's automobile which had been used, unbeknownst to petitioner, by two men whom petitioner did not know and who were subsequently convicted of drug-related felonies.

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The trial court found only that the car was used in violation of the Controlled Substances Act and that petitioner owned the vehicle. Based on those findings, the trial court concluded that the petitioner had failed to show that he had no reason to believe that his vehicle would be used in a drug-related felony. This Court found that a claimant under Section 90-112.1 has the right to have the fact-finder determine the essential issue of the case, *i.e.*, whether the petitioner had reason to know of the use of his vehicle to transport controlled substances. The Court stated that "factual determinations concerning what he knew, or had reason to believe, or to what uses of his vehicle he actually or impliedly consented, *must* be made before the fact-finder can answer the essential issue and before it can conclude that the petitioner has failed to carry his burden." 45 N.C. App. at 675, 263 S.E.2d at 838.

At the conclusion of the hearing on forfeiture, the trial court made somewhat tortuous findings which we believe constitute an adequate substitute for the simple, required finding on whether or not defendant had "knowledge, or reason to believe, that . . . [her vehicle] was being or would be used in the violation of laws of this State relating to controlled substances." Consequently, we overrule this final assignment of error.

No error.

Judges JOHNSON and ORR concur.

LEAH GAY HINES DOBOS v. JEFFREY DONALD DOBOS

No. 9221DC952

(Filed 20 July 1993)

1. Divorce and Separation § 460 (NCI4th) — child custody — notice of hearing — content of notice insufficient — proper notice waived

The trial court properly denied defendant's motion under N.C.G.S. § 1A-1, Rule 60(b) to set aside a child custody order on the ground that defendant did not receive proper notice of the hearing on plaintiff's motion to modify custody where the record reveals that, although the content of the notice of hearing was insufficient to comply with the requirement

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that the motions state the grounds and the relief sought, defendant's attorney was present and participated in the hearing and the record contains no indication that defendant's attorney either objected to the introduction of plaintiff's evidence of changed circumstances or sought a continuance of the matter.

Am Jur 2d, Divorce and Separation §§ 982, 1008.

2. Divorce and Separation § 447 (NCI4th) — child custody — change of circumstances — no adverse affect on child — custody not modified

There was competent evidence to support the trial court's findings that defendant had not met his burden of showing substantial changed circumstances in a child custody proceeding where plaintiff had moved with the child to Texas to live with her parents and had remarried, but plaintiff continues to reside full-time with the child, is the primary care-giver, provides safe and ample living arrangements and a stable environment for the child, and the parties continued to comply with the same visitation schedule as before the move to Texas. The court found, in effect, that the changes which have occurred have not adversely affected the welfare of the child.

Am Jur 2d, Divorce and Separation §§ 1003, 1011 et seq.

Remarriage as basis for modification of amount of child support or custody provision in divorce decree. 89 ALR2d 106.

Appeal by defendant from orders entered 18 June 1992 in Forsyth County District Court by Judge R. Kason Keiger. Heard in the Court of Appeals 9 July 1993.

Wendell Schollander and David F. Tamer for plaintiff-appellee.

White and Crumpler, by G. Edgar Parker and Joan E. Brodish, for defendant-appellant.

GREENE, Judge.

Defendant appeals from orders entered 18 June 1992, denying defendant's motions for modification of a custody order entered 31 July 1990 and to set aside the aforementioned custody order pursuant to N.C.G.S. § 1A-1, Rule 60(b).

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Plaintiff and defendant were married on 29 June 1985, and on 8 April 1986, the parties' only child was born. On 28 September 1989, plaintiff instituted an action in Forsyth County District Court for relief from domestic violence and custody of the parties' daughter, who was three years old at the time. On 5 October 1989, the parties entered into a consent order pursuant to which they agreed to alternate custody of the minor child. Plaintiff subsequently sought a divorce from bed and board.

On 11 May 1990, plaintiff filed and served on defendant's attorney a notice of hearing to be held on 6 June 1990, at which plaintiff would seek "such relief as to the court may seem just and proper." Plaintiff and her attorney and defendant's attorney were present at the hearing, at which plaintiff presented, among other things, evidence of changed circumstances affecting the welfare of the parties' child. After the hearing, in an order entered 31 July 1990, the trial court granted plaintiff a divorce from bed and board and modified the consent order of 5 October 1989, pursuant to which the parties had agreed to alternate custody of the child, due to "changed circumstances presented by the evidence" at the hearing. The court granted plaintiff sole care, custody, and control of the minor child and awarded plaintiff attorney's fees in the amount of \$500.00. The record reveals no objection by defendant's attorney to the introduction of evidence at the hearing regarding changed circumstances, and defendant did not appeal from this order.

Subsequently, child support and visitation orders were entered in the cause, pursuant to which defendant, who by this time had moved from North Carolina to Ohio, was awarded visitation with the child one weekend per month, two three-week periods each summer, and certain holidays. Plaintiff subsequently moved with the child from North Carolina to Texas. On 3 January 1992, defendant moved to modify the 31 July 1990 custody order, alleging substantial and material change in circumstances, specifically, plaintiff's relocation to Texas and her remarriage. On 3 April 1992, defendant moved pursuant to N.C.G.S. § 1A-1, Rule 60(b) to have the 31 July 1990 custody order set aside on the ground that defendant was not served with notice of the hearing. After a hearing on defendant's motions before the Honorable R. Kason Keiger, the court entered orders on 18 June 1992. With regard to defendant's motion to modify the previous custody order, the court found that certain changes had occurred since entry of the 31 July 1990 custody

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order, but concluded that defendant had failed to meet his burden of showing changed circumstances sufficient to justify a modification of the 31 July 1990 custody order, and denied defendant's motion. With regard to defendant's Rule 60(b) motion, the court found that defendant had full actual notice of the hearing on 6 June 1990, and a full opportunity to be heard, and concluded that, therefore, the 31 July 1990 custody order was not void on the ground of lack of notice to defendant. From these orders, defendant appeals.

The issues presented are whether (I) the court abused its discretion in denying defendant's Rule 60(b) motion; and (II) the evidence supports the trial court's findings in its order denying defendant's motion for modification of custody, and whether the findings support its conclusions.

I

[1] Defendant argues that the trial court abused its discretion in denying defendant's Rule 60(b) motion to set aside the 31 July 1990 custody order on the ground that defendant did not receive proper notice of the hearing on plaintiff's motion to modify custody, and therefore the order is void.

"Subject to the provisions of G.S. 50A-3, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances" N.C.G.S. § 50-13.7(a) (1987). Such motion, to be proper, must be made "on 10 days notice to the other parties and after compliance with G.S. 50A-4," N.C.G.S. § 50-13.5(d)(1) (1987 & Supp. 1992), "shall state the grounds therefor, and shall set forth the relief or order sought," N.C.G.S. § 1A-1, Rule 7(b)(1) (1990), and shall be served upon either the party or his attorney of record. N.C.G.S. § 1A-1, Rule 5(a), (b) (1990). Where a party is given neither proper notice of a motion to modify custody nor an opportunity to be heard, an order modifying a previously entered custody order is void and may be set aside. *See* N.C.G.S. § 1A-1, Rule 60(b)(4) (1990). However, a party entitled to notice of such a motion may waive notice by attending the hearing of the motion and participating in it. *Brandon v. Brandon*, 10 N.C. App. 457, 461, 179 S.E.2d 177, 180 (1971).

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The record in the instant case reveals that, although plaintiff's "Notice of Hearing" was not served on defendant himself, plaintiff properly served the notice on defendant's attorney, and did so in a timely manner in that it was served by mail on 11 May 1990, more than ten days prior to the scheduled hearing. However, despite the fact that a motion may properly be stated in a written notice of hearing on the motion, *see* N.C.G.S. § 1A-1, Rule 7(b)(1) (1990), the content of plaintiff's notice of hearing, seeking "such relief as to the court may seem just and proper," is insufficient to comply with the requirement that the motion state the grounds therefor and the relief or order sought. Defendant's attorney, however, was present at and participated in the hearing, and the record contains no indication that defendant's attorney either objected to the introduction of plaintiff's evidence of changed circumstances or sought a continuance of the matter. Accordingly, defendant waived proper notice of plaintiff's motion to modify custody, and therefore the trial court properly denied defendant's motion to set aside the 31 July 1990 custody order.

II

[2] Defendant argues that the trial court's order denying defendant's motion to modify the 31 July 1990 order granting plaintiff custody of the parties' minor child should be reversed on the ground that the court's findings are not supported by the evidence, the evidence does not support the court's conclusions, and the trial court "grossly abused its discretion."

"Once the custody of a minor child is judicially determined, that order of the court cannot be altered until it is determined that (1) there has been a substantial change in circumstances [adversely] affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992) (citations omitted). The party seeking modification has the burden of showing the necessary change in circumstances. *Id.* at 78, 418 S.E.2d at 679. Because modification of a custody order requires a two-step inquiry, unless the movant meets his burden of showing changed circumstances adversely affecting the welfare of the child, the trial court never reaches the "best interest of the child" question. *Id.* at 77, 418 S.E.2d at 678.

This Court has previously determined that neither remarriage nor a change in a custodial parent's residence is itself a substantial

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change in circumstances justifying a modification of a custody decree. *Hassell v. Means*, 42 N.C. App. 524, 531, 257 S.E.2d 123, 127, *disc. rev. denied*, 298 N.C. 568, 261 S.E.2d 122 (1979); *Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679. However, evidence that the remarriage or relocation is detrimental to the child's welfare is a substantial change of circumstances which would support modification of a custody order. *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985); *Barker*, 107 N.C. App. at 79, 418 S.E.2d at 679.

In the instant case, the trial court found that certain changes in the life of plaintiff and the child had taken place since the entry of the 31 July 1990 custody order, specifically, plaintiff's move with the child to Texas to live with plaintiff's parents, and plaintiff's remarriage. The court found, however, that plaintiff continues to reside full-time with the child and is the primary caregiver, and provides safe and ample living arrangements and a stable environment for the child; and that the parties continue to comply with the same visitation schedule established prior to plaintiff's move to Texas. In effect, the court found that, although changes have occurred, they have not adversely affected the welfare of the parties' child. The court concluded based on these findings that defendant had not met his burden of showing substantial changed circumstances. Because there is competent evidence in the record to support the court's findings, which in turn support its conclusion, we are bound by them. *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E.2d 77, 80 (1967). We therefore reject defendant's assignments of error in this regard.

Affirmed.

Judges EAGLES and LEWIS concur.

FOGLEMAN v. D&J EQUIPMENT RENTALS

[111 N.C. App. 228 (1993)]

JOEL GREGORY FOGLEMAN AND TAMMY MICHELLE FOGLEMAN v. D&J
EQUIPMENT RENTALS, INC.

No. 9218SC418

(Filed 20 July 1993)

**1. Master and Servant § 89 (NCI3d)— workers' compensation—
settlement with third party—no waiver of employer's right
to consent**

The employer and its workers' compensation carrier did not waive their right to consent to an employee's settlement of his personal injury claim against a third party by indicating to the court that the amount of the settlement was sufficient; rather, they were merely saying that, since the amount of the settlement exceeded the amount of their lien and they would presumably be made whole, they had no objection to the settlement amount.

Am Jur 2d, Workers' Compensation §§ 374, 454.**2. Master and Servant § 89.4 (NCI3d)— workers' compensation—
settlement with third party—subrogation lien—modification
by court—unconstitutional retroactive application of statute**

Where plaintiff worker was injured and workers' compensation benefits were paid to him prior to the effective date of the amendments to subsections (h) and (j) of N.C.G.S. § 97-10.2, 1 October 1991, the subrogation lien of the employer and its insurance carrier against the proceeds of a settlement with a third party vested prior to the amendments, and the trial court's modification of the amount of the lien pursuant to the amendments was an unconstitutional retroactive application of the statute. Furthermore, the settlement agreement was void under the version of the statute in effect when the lien vested since defendant employer did not give written consent thereto.

Am Jur 2d, Workers' Compensation § 416.

Appeal by A. A. Ryan Ornamental Iron, Inc. and Liberty Mutual Insurance Company from order entered 27 January 1992 in Guilford County Superior Court by Judge William H. Freeman. Heard in the Court of Appeals 30 March 1993.

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[111 N.C. App. 228 (1993)]

Smith, Helms, Mulliss & Moore, by Richmond G. Bernhardt, Jr. and Deborah L. Hayes, for defendant/appellants, A. A. Ryan Ornamental Iron, Inc. and Liberty Mutual Insurance Company.

Smith, Follin & James, by Norman B. Smith and Margaret Rowlett, for plaintiff/appellees.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Larry I. Moore, III and David L. Goode, for defendant/appellee, D&J Equipment Rentals, Inc.

MCCRODDEN, Judge.

This action arises out of a claim made by plaintiffs for injuries that plaintiff Joel Fogleman (Fogleman) sustained under circumstances warranting coverage under the Workers' Compensation Act, N.C. Gen. Stat. §§ 97-1 to -101 (1991). The dispositive issue raised by the case is whether it was error for the trial court to apply in this case the amended version of N.C.G.S. § 97-10.2, pertaining to subrogation procedure, which became effective 1 October 1991.

The particular facts giving rise to this case are as follows. On 13 February 1989, Fogleman, a welder employed by appellant A. A. Ryan Ornamental Iron, Inc. (Ryan), was injured when he fell from a platform that was being raised by a crane. Defendant D&J Equipment Rentals, Inc. (D&J) had provided the crane and an operator to Ryan for its use in the course of steel erection work. Following the accident, appellant Liberty Mutual Insurance Company (Liberty), Ryan's workers' compensation insurance carrier, admitted liability and paid workers' compensation benefits to Fogleman in the amount of \$16,771.94 for temporary total disability and health care expenses. For Fogleman's permanent partial disability to the back, Liberty agreed to pay benefits amounting to \$9,600.00. Fogleman also asserted a claim for permanent partial disability due to brain injury, a claim for which maximum recovery was \$20,000.00. Liberty denied that Fogleman had received a compensable injury to his brain.

In addition to the workers' compensation claim, Fogleman filed a civil complaint against D&J, alleging negligence in the operation of the crane. D&J's answer denied negligence, asserted contributory negligence of Ryan and Fogleman, and further asserted that

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Fogleman's recovery should be reduced by the amount of workers' compensation benefits that Fogleman received.

On the morning of 21 January 1992, the day set for trial, D&J and Fogleman reached a settlement agreement by which D&J agreed to pay Fogleman \$77,500.00 in exchange for a release and dismissal of this action. Liberty did not participate in the settlement negotiations or the settlement agreement. Pursuant to N.C.G.S. § 97-10.2(j), the court then heard arguments concerning the adjustment of Liberty's subrogation lien on the settlement funds.

On 27 January 1992, the trial court filed an order finding, *inter alia*, that Liberty had paid \$16,771.94 in benefits to Fogleman and had agreed to pay \$9,600.00 more; that there was no agreement between Liberty and Fogleman as to whether the claim for brain injury would be compensated; that "it is likely that plaintiff Joel Gregory Fogleman would incur additional health care expenses in the future which would become the obligation of Liberty Mutual Insurance Company under the workers' compensation laws." In addition the court found:

The court in its discretion, pursuant to the provisions of N.C.G.S. § 97-10.2(j), determines that the lien of Liberty Mutual Insurance Company should be adjusted and compromised, so that Liberty Mutual Insurance Company shall be entitled to have a recovery out of the settlement proceeds received by plaintiff Joel Gregory Fogleman, only to the extent and in the event the total amount it pays in workers' compensation benefits to or for the benefit of Joel Gregory Fogleman, shall exceed the sum of \$26,371.94.

This order allowed Liberty to retain its lien only to the extent of benefits it might pay in the future, over and above any amounts it had previously agreed to pay. From this order, Liberty and Ryan appeal.

[1] Citing Article IV, Section 13 of the North Carolina Constitution, appellants argue that the trial court's application of the amended section 97-10.2 was unconstitutionally retroactive. It is clear that the trial court applied the amended version of section 97-10.2(h) to the case at hand. That version reads, in pertinent part:

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have

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a lien to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death . . . and such lien may be enforced against any person receiving such funds. . . . [N]o release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply . . . [i]f either party follows the provisions of subsection (j) of this section.

. . . .

(j) Notwithstanding any subsection in this section . . . in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and *with or without the consent of the employer*, the judge shall determine, in his discretion, the amount, if any, of the employer's lien

N.C.G.S. § 97-10.2 (emphasis added). Prior to 1 October 1991, section 97-10.2(h) provided that “[n]either the employee . . . nor the employer shall make any settlement . . . without the written consent of the other [unless] . . . the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees” Appellants in this case gave no written consent to the settlement agreement, a fact which, under the unamended statute, would have produced a different result, as we discuss below. We note and reject appellees' contention that appellants waived their right to consent by indicating to the court that the amount of the settlement was sufficient. A common sense reading of the record indicates that appellants were merely saying that, since the amount of the settlement exceeded the amount of their lien and they would presumably be made whole, they had no objection to the settlement amount.

Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively. *Lee v. Penland-Bailey Co.*, 50 N.C. App. 498, 500, 274 S.E.2d 348, 350 (1981). The application of a statute is

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deemed retroactive “when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment.” *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). Under this definition, the trial court’s application of the amended statute was retroactive.

A statute, however, “is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect.” *Booker v. Medical Center*, 297 N.C. 458, 467, 256 S.E.2d 189, 195 (1979). We believe that applying the amended version of N.C.G.S. § 97-10.2 interfered with appellants’ vested right in their subrogation lien and with their right to consent to, or withhold consent from, appellees’ settlement.

[2] Appellees do not contest that the appellants’ lien against any settlement proceeds had vested at the time of the amendment, at least to the extent that they had paid or had committed to pay benefits to Fogleman. Rather, appellees contend that the amendment of the statute was merely a procedural change that left appellants’ lien intact. We disagree. “Regardless of its procedural subject matter, no rule of procedure or practice may constitutionally be applied to abridge substantive rights.” *Gardner*, 300 N.C. at 718, 268 S.E.2d at 471. Appellants’ right to its subrogation lien was a substantive right.

In addition, in *Pollard v. Smith*, the North Carolina Supreme Court held that, under the then-existing version of section 97-10.2(h), a settlement agreement that was reached without the consent of the employer was void. 324 N.C. 424, 426, 378 S.E.2d 771, 773 (1989). If the settlement were void, then subsection (j), under which a subrogation lienholder’s lien might be modified, would not even come into play. *Cf. Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 300 (1990) (allowing subrogation lien to be totally abrogated where lien holder had consented to the settlement). We believe that the holding in *Pollard* endowed subrogation lienholders, like appellants, with the right not to have their lien abridged without their consent. The amended version of section 97-10.2 affected that right by allowing a party to apply to Superior Court to have it determine the amount of the lien, *regardless of whether the lienholder had consented*. Because appellants paid workers’ compensation bene-

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fits to Fogleman prior to 1 October 1991, their lien and their right not to have that lien abridged under subsection (j) without their consent vested before the effective date of the amended version of section 97-10.2.

The trial court's application of the amended version of section 97-10.2 deprived appellants of vested rights and, thus, was unconstitutionally retroactive. The trial court should have applied the version of section 97-10.2 that was effective when appellants' lien vested, *i.e.*, the version prior to amendment. In so doing, it would have concluded, based upon the uncontested fact that appellants did not give written consent, that the settlement agreement was void. *Pollard*, 324 N.C. 424, 378 S.E.2d 771.

Given this result, we need not address the remainder of appellants' arguments. We reverse the order of the trial court and remand for proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and ORR concur.

FRED DENNIS GILBERT, PLAINTIFF/APPELLANT v. PEGGY FREDELL GILBERT,
DEFENDANT/APPELLEE

No. 9227DC598

(Filed 20 July 1993)

1. Divorce and Separation § 172 (NCI4th)— equitable distribution—not asserted prior to judgment of divorce—not preserved by wording of complaint and judgment

The issue of equitable distribution was not preserved by the wording of a complaint or by the judgment where it was undisputed that defendant did not file any claim, counterclaim, motion, or separate action for equitable distribution before the judgment of absolute divorce. The issue of equitable distribution can only be preserved if it was asserted prior to the judgment of absolute divorce; even if the judge here had reserved the issue of equitable distribution through the wording in the judgment, he would only have done so on behalf of

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plaintiff since defendant did not assert her claim prior to the divorce judgment. Only plaintiff was entitled to later assert a claim for equitable distribution in this case. N.C.G.S. § 50-11(e).

Am Jur 2d, Divorce and Separation §§ 439 et seq., 957.

Default decree in divorce action as estoppel or res judicata with respect to marital property rights. 22 ALR2d 724.

Divorce decree as res judicata in independent action involving property settlement agreement. 32 ALR2d 45.

2. Divorce and Separation § 172 (NCI4th)— equitable distribution—not asserted prior to judgment of divorce—equitable estoppel

Equitable estoppel applied to preclude a plaintiff from objecting to defendant's assertion of a claim for equitable distribution where defendant argued that she did not assert her equitable distribution claim initially because the language in plaintiff's complaint stating that they would reach an agreement regarding the distribution of their property led her to believe it was unnecessary to assert her claim, and, when they did reach such agreement, defendant relied on the agreement to her detriment by paying all of the subsequent mortgage payments without ever receiving title to the property from defendant.

Am Jur 2d, Divorce and Separation §§ 439 et seq., 957.

Default decree in divorce action as estoppel or res judicata with respect to marital property rights. 22 ALR2d 724.

Divorce decree as res judicata in independent action involving property settlement agreement. 32 ALR2d 45.

3. Divorce and Separation § 144 (NCI4th)— equitable distribution—unequal distribution of property—consideration of only one statutory factor

The trial court did not err in an equitable distribution action which resulted in an unequal distribution of property by making findings regarding only the factor in N.C.G.S. § 50-20(c)(6). The only evidence before the court related to the marital residence and the 1986 agreement between the

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parties and the trial court was only required to consider factors relevant to the evidence presented by the parties.

Am Jur 2d, Divorce and Separation §§ 915 et seq.**4. Divorce and Separation § 173 (NCI4th)— equitable distribution— hearing— presentation of evidence**

There was no error in an equitable distribution hearing where plaintiff contends that he was not permitted to present any evidence, it was noted in the transcript that the reporter was not present after a recess and that the transcript was typed from a tape-recording of the proceedings, there is no record of what happened after the court recessed, the trial court referred in its order to testimony given by plaintiff, plaintiff did not provide a narration of the unrecorded proceedings or any evidence indicating that he was precluded from presenting evidence other than the statement in his brief, and it must be presumed that the trial judge acted correctly and permitted plaintiff, who was without counsel, to present evidence.

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

Appeal by plaintiff from Order entered 6 April 1992 by Judge George W. Hamrick in Lincoln County District Court. Heard in the Court of Appeals 12 May 1993.

Lewis & Shuford, P.A., by Robert C. Lewis, for plaintiff-appellant.

Sigmon, Sigmon, and Isenhower, by W. Gene Sigmon, for defendant-appellee.

LEWIS, Judge.

In this case we must determine whether a wife who failed to assert her claim for equitable distribution prior to the judgment of absolute divorce may raise the claim at a later point. We conclude that she may, because under the facts of this case her husband is barred by the doctrine of equitable estoppel from challenging her claim.

On 14 June 1984 plaintiff husband filed an action for absolute divorce. The complaint stated that although the parties had marital property subject to equitable distribution, equitable distribution

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would not be necessary because the property would be divided later by agreement of the parties, subject to the agreement of the court. Defendant wife, without counsel, did not file a motion or separate action to assert a claim for equitable distribution, and a judgment of absolute divorce was entered on 2 August 1984. In its judgment the court noted that there was marital property subject to equitable distribution but that it would be divided by the parties, subject to the court's agreement. Neither party appealed that judgment.

In 1986 the parties reached the agreement contemplated in the earlier divorce proceeding. In substance, the agreement provided that plaintiff would convey the marital residence to defendant if defendant would assume and pay the mortgage payments. Although defendant has complied with the agreement and has made all of the mortgage payments since then, plaintiff has failed to convey title to the property. Consequently, on 10 March 1992 defendant filed a Motion in the Cause requesting the court either to enforce the agreement to convey the residence or to proceed with an equitable distribution of the marital property. On 6 April 1992 the court entered an Equitable Distribution Order, from which plaintiff now appeals, alleging the court had no authority to enter such order. Plaintiff contends that defendant was precluded from requesting equitable distribution, because she did not assert that claim before the judgment of absolute divorce was entered on 2 August 1984.

[1] We begin our analysis with the legislative mandate that “[a]n absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce” N.C.G.S. § 50-11(e) (Cum. Supp. 1992). It is undisputed that defendant did not file any claim, counterclaim, motion, or separate action for equitable distribution before the judgment of absolute divorce. According to the statute, then, defendant should have been precluded from asserting an equitable distribution claim after the entry of the divorce judgment.

Defendant argues, however, that the issue of equitable distribution was preserved by the wording in both the complaint and the judgment acknowledging that the property was subject to equitable distribution. We find no support for this contention. The issue of equitable distribution can only be preserved if it was asserted

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prior to the judgment of absolute divorce. § 50-11(e). The cases relied upon by defendant are not instructive.

In *Stone v. Stone*, 96 N.C. App. 633, 386 S.E.2d 602 (1989), *disc. rev. denied*, 326 N.C. 805, 393 S.E.2d 906 (1990), the trial court stated in its judgment that the issue of equitable distribution was reserved for a later date, and noted that both parties had applied for equitable distribution. See *Lutz v. Lutz*, 101 N.C. App. 298, 303, 399 S.E.2d 385, 388, *disc. rev. denied*, 328 N.C. 732, 404 S.E.2d 871 (1991) (discussing *Stone*). This Court pointed out that neither party appealed from the judgment, and vacated the judgment of another trial judge which had overruled the first judge's determination to reserve the equitable distribution issue for a later hearing. 96 N.C. App. at 635, 386 S.E.2d at 604. Significantly, both parties in that case had filed for equitable distribution prior to the judgment of absolute divorce, thereby complying with section 50-11(e). See *Lutz*, 101 N.C. App. at 303, 399 S.E.2d at 388.

In *Lutz v. Lutz*, the Court stated that "the bare reservation by a trial court of the issue of equitable distribution only preserves the claim of equitable distribution for the party who has asserted the right prior to judgment of absolute divorce." *Id.* Thus, even if the judge here had reserved the issue of equitable distribution through the wording in the judgment, he would only have done so on behalf of plaintiff since defendant did not assert her claim prior to the divorce judgment. Only plaintiff was entitled to later assert a claim for equitable distribution in this case.

[2] Although defendant did not timely raise her claim for equitable distribution, and although the issue was not preserved by the trial court on her behalf, defendant argues plaintiff should be estopped from denying his own contract and from asserting the defense that defendant never properly asserted an equitable distribution claim. According to *Harroff v. Harroff*, 100 N.C. App. 686, 398 S.E.2d 340 (1990), *disc. rev. denied*, 328 N.C. 330, 420 S.E.2d 833 (1991),

[e]quitable estoppel is defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right . . . (citations omitted).

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Id. at 692, 398 S.E.2d at 344. In *Harroff* the wife had neglected to assert her claim for equitable distribution before entry of the divorce judgment. This Court reversed the trial court's order of summary judgment against the wife's later claim for equitable distribution, because the husband's possible breach of fiduciary duty and misrepresentations may have caused her to forego pleading the claim in the first place. If on remand it was determined that the wife had failed to assert her claim due to misrepresentation, the Court stated that the husband would be equitably estopped from pleading section 50-11(e) as a bar to her claim for equitable distribution. *Id.* at 693, 398 S.E.2d at 344-45; *cf. Lutz*, 101 N.C. App. at 303-04, 399 S.E.2d at 388-89 (Court did not apply doctrine of equitable estoppel because no detrimental reliance).

Although the case at hand does not include allegations of breach of fiduciary duty or misrepresentation, we find that the principle of equitable estoppel should nevertheless apply. Defendant argues she did not assert her equitable distribution claim initially because the language in plaintiff's complaint stating that they would reach an agreement regarding the distribution of their property led her to believe it was unnecessary to assert her claim. When they did reach such agreement, defendant relied on the agreement to her detriment by paying all of the subsequent mortgage payments without ever receiving title to the property from defendant. We agree that equitable estoppel applies to preclude plaintiff from now objecting to defendant's assertion of a claim for equitable distribution.

[3] Finally, plaintiff argues that the court's unequal distribution of property in the equitable distribution order is not supported by sufficient findings of fact. When a court makes an unequal division of property, it must consider the factors listed in N.C.G.S. § 50-20(c). Plaintiff points out that the court only considered one of the statutory factors, subsection (c)(6).

In *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988), the Court stated that under section 50-20(c) findings regarding the statutory factors "must be made and considered, *when evidence concerning them is introduced . . .*" *Id.* at 406, 368 S.E.2d at 600 (emphasis added). Thus, the trial court was only required to consider factors relevant to the evidence presented by the parties. In this case the evidence before the court related to the marital residence and the 1986 agreement between the par-

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ties. The court correctly considered this evidence in connection with the factor listed in subsection (c)(6) of section 50-20. That subsection covers:

[a]ny equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker; . . .

N.C.G.S. § 50-20(c)(6) (Cum. Supp. 1992). No other factors were at issue in this case, thus the court did not err in making findings only regarding subsection (c)(6).

[4] Plaintiff contends that he was not permitted to present any evidence at the equitable distribution hearing. We are unable to determine from the record whether or not this contention is true. On page 6 of the transcript, after the court had called a thirty-minute recess, it was noted that the reporter was not present during the proceedings, and that the transcript was typed from a tape-recording of the proceedings, which was the extent of what was made available. There is no record of what happened after the court recessed. Defendant points out, however, that in paragraph 5 of its Order the trial court refers to testimony given by the plaintiff. Plaintiff has not provided a narration of the unrecorded proceedings or any evidence indicating he was precluded from presenting evidence other than the statement in his brief. We must presume the trial judge acted correctly and permitted plaintiff, who was without counsel at the equitable distribution proceeding, to present evidence.

The judgment of the trial court is hereby affirmed.

Affirmed.

Judges EAGLES and MCCRODDEN concur.

STATE v. BUCKOM

[111 N.C. App. 240 (1993)]

STATE OF NORTH CAROLINA v. GARY DEVON BUCKOM

No. 928SC1318

(Filed 20 July 1993)

Criminal Law § 880 (NCI4th) — inability of jury to agree — instruction on expense of retrial — prejudicial error

The trial court's instruction that the jury should try to reconcile its differences because of the expense of a retrial, given after the foreperson announced that the jurors were unable to agree, constituted prejudicial error.

Am Jur 2d, Trial §§ 1593, 1603.

Judge LEWIS dissenting.

Appeal by defendant from judgment entered 24 January 1992 by Judge Knox V. Jenkins, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 9 July 1993.

Defendant was indicted and convicted on two counts of armed robbery. Defendant was sentenced to consecutive twenty-five year terms with the North Carolina Department of Correction.

The jury in this case began deliberations at 11:55 a.m. on 24 January 1992, a Friday. During the day, the jury requested and received exhibits, took a lunch break, and a short recess. At approximately 4:32 p.m. the following transpired:

(JURY RETURNS 4:32 P.M.)

THE COURT: Mr. Foreman, is the jury making progress?

FOREMAN: I don't know, sir.

THE COURT: Pardon?

FOREMAN: No, sir, we're hung up now.

THE COURT: Do you feel that some additional time would — is this as to both charges?

FOREMAN: Both charges.

THE COURT: Let me ask you this. I don't want to know which way, for guilt or innocence. I don't want to know that so be careful when you answer my question and I'll try to phrase it very carefully.

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Would you give me the numerical division without which way it is. For instance, if it's eight-four, ten-two, whatever.

FOREMAN: Do you want me to give it in figures the way it is but not what way it's going?

THE COURT: Yes.

FOREMAN: Nine-three.

THE COURT: On both counts?

FOREMAN: Both counts.

THE COURT: Do you feel that further deliberations would be of some value?

FOREMAN: I don't think so.

THE COURT: Well, let me give you some further instructions, please. I would ask that you listen very carefully.

No juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. In the course of deliberation, each of you should not hesitate to re-examine your own views and change your opinion if it is erroneous. Each of you must decide the case for yourself but only after impartial consideration of the evidence with your fellow jurors.

Y'all have a duty to consult with one another and to deliberate with a view on reaching an agreement if it can be done without violence to individual judgment. Members of the jury, it is your duty to try to reconcile any differences that you have in order to reach a verdict. *The main purpose of that is that it will be expensive again to have to get another jury to try this case over.* I'm not saying this to try to coerce you in any way to reach an agreement or cause someone to change any conviction they might have. It is your duty to try to reconcile any differences that you have and I'll let you go back for a little while and see if you can follow this charge.

It's now 25 minutes till five. Would anyone need to make a telephone call prior to going back in the jury room?

FOREMAN: How long are you talking about?

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THE COURT: Did everyone hear the charge I just gave you?

JURY PANEL: Yes, sir.

THE COURT: Well, the Bailiff will notify you. If you would, go back to the jury room and continue your deliberations.

(JURY RETIRES 4:37 p.m.)

After retiring the jury returned at 4:48 p.m. for further instruction on the crime of armed robbery. At 5:31 p.m. the jury returned with a unanimous verdict finding the defendant guilty of the crimes charged.

Attorney General Michael F. Easley, by Assistant Attorney General Karen E. Long, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender, Benjamin Sendor, for the defendant-appellant.

EAGLES, Judge.

In his first assignment of error defendant argues that the trial court erred by "instructing the jury, as part of an anti-deadlock instruction, that 'the main purpose' of trying to reconcile differences in further deliberations was to avoid an expensive retrial." We agree.

The trial judge's instruction that the jury should try to reconcile its differences because of the expense of a retrial, given after the foreperson announced they were unable to agree, constituted prejudicial error under opinions of both our Supreme Court and this Court. *E.g. State v. Lipford*, 302 N.C. 391, 276 S.E.2d 161 (1981); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980); and *State v. Johnson*, 80 N.C. App. 311, 341 S.E.2d 770 (1986). Accordingly, defendant must receive a new trial.

We do not address the defendant's remaining arguments as they may not arise at retrial.

New trial.

Judge GREENE concurs.

Judge LEWIS dissents.

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[111 N.C. App. 240 (1993)]

Judge LEWIS dissenting.

I respectfully dissent from the majority opinion that the trial judge's instruction established prejudicial error. Our Supreme Court stated in *State v. Alston*:

One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe the jury was misled.

294 N.C. 577, 243 S.E.2d 354, 365 (1978). A new trial is not warranted by a mere acknowledgement of the expense and inconvenience of retrial in the jury instructions unless the charge as a whole is coercive. *State v. Darden*, 48 N.C. App. 128, 268 S.E.2d 225 (1980), *State v. Jones*, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

In the case at hand, the sole basis for the majority opinion granting retrial is the isolated sentence, "[t]he main purpose of that is that it will be expensive again to have to get another jury to try this case over." It is conceded that this sentence standing alone could seem undesirable. However, when viewed as a whole the overall effect of the instruction was to inform, not to coerce. Faced with a deadlocked jury, the judge gave the additional instruction to outline the present situation of the trial. The trial judge properly adhered to N.C.G.S. § 15A-1235(c) (1992) by clearly stating that jurors should not surrender their honest convictions. The trial judge properly stated in cautionary language that he did not intend to coerce a verdict. Emphasis was placed on the importance of working towards agreement, but not necessarily reaching one.

In *Jones*, the Court found no error in the following instruction when the jury failed to agree:

that if this case is not brought to a verdict as I previously instructed you that another judge and another jury in another week will try this case again.

47 N.C. App. at 562-563, 268 S.E.2d at 11. Neither was error found in *Darden* where a similar instruction was at issue. 48 N.C. App. at 134, 268 S.E.2d at 227. The trial judge stated to a deadlocked jury:

I presume that you realize what a disagreement means: it means that more time of the court will have to be consumed in the trial of this action again.

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Id. We find the instruction at issue in the case at bar no more coercive than either of these.

The sentence stressed by the majority is not coercive when the instructions are reviewed in their entirety. Upon careful review of the record, I would affirm the decision of the trial court and find no prejudicial error. Therefore I respectfully dissent.

BOBBY RAY CAGLE AND NANCY CAGLE, PLAINTIFFS v. WILLIAM PRESTON
TEACHY, JR., DEFENDANT

No. 9219SC703

(Filed 20 July 1993)

1. Appeal and Error § 118 (NCI4th)— denial of summary judgment—no immediate appeal by insurer

Plaintiffs' automobile insurer, an unnamed party under N.C.G.S. § 20-279.21, had no right to immediately appeal the denial of its motion for summary judgment made on the ground that plaintiffs' uninsured motorist coverage had been exhausted since no substantial right of the insurer was affected. Assuming that the insurer considers itself prejudiced by having the issue of insurance coverage heard before the jury which is also weighing the issue of liability, it has options other than an immediate appeal available to it, including severability of the issues or bifurcation of the trial.

Am Jur 2d, Appeal and Error § 104.

2. Appeal and Error § 118 (NCI4th)— denial of summary judgment—no immediate appeal despite certification

The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under Rule 54(b).

Am Jur 2d, Appeal and Error § 104.

Appeal by unnamed party Commercial Union Insurance Company from order denying its motion for summary judgment entered 6 March 1992 by Judge Russell G. Walker, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 27 May 1993.

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[111 N.C. App. 244 (1993)]

Hodgman, Elam, Gordon & Churchill, by Robert S. Hodgman, for plaintiff-appellee.

John T. Manning for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Knox Proctor and David P. Sousa, for Commercial Union Insurance Company, unnamed party-appellant.

JOHN, Judge.

Plaintiffs brought this action to recover for personal injuries to Mr. Cagle and loss of consortium to Mrs. Cagle resulting from an automobile collision. Pursuant to N.C.G.S. § 20-279.21, plaintiffs served their complaint upon Commercial Union Insurance Company [hereinafter "Commercial Union"], their own insurer, which thereafter appeared in this matter as an unnamed party under the statute.

In their complaint, plaintiffs asserted that Commercial Union had issued to them two insurance policies and made allegations concerning the coverage provided. Commercial Union filed an answer and later moved for summary judgment on the grounds that all uninsured motorist coverage afforded plaintiffs by the policies had been exhausted. The trial court denied the motion, but provided in its order that "there is no just reason for delay of an appeal," and "this Order is final, as to Commercial Union Insurance Company, for purposes of Rule 54(b) of the North Carolina Rules of Civil Procedure." Commercial Union consequently appealed. We dismiss the appeal.

Although the issue is not raised by the parties in their briefs, we are required to determine whether Commercial Union's appeal is properly before us. It is the duty of an appellate court to dismiss an appeal on its own motion if there is no right to appeal. *Equitable Leasing Corp. v. Myers*, 46 N.C.App. 162, 164, 265 S.E.2d 240, 242 (1980).

[1] Basically, the right to appeal is available through two channels. *Brown v. Brown*, 77 N.C.App. 206, 207, 334 S.E.2d 506, 507 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). First, while orders denying a motion for summary judgment are ordinarily interlocutory and not appealable, *Tridyn Industries, Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 488-89, 251 S.E.2d 443, 445-46 (1979), G.S. § 1-277 and G.S. § 7A-27 permit appeal if a substantial right of one of the parties would be prejudiced should the appeal

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not be heard prior to final judgment. G.S. § 7A-27(d); *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C.App. 20, 24, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). Essentially, “a right is substantial only when it ‘will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.’” *Brown*, 77 N.C.App. at 208 (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C.App. 331, 335, 299 S.E.2d 777, 780 (1983)). No hard and fast rules exist for determining which appeals affect a substantial right. *Estrada v. Jaques*, 70 N.C.App. 627, 640, 321 S.E.2d 240, 249 (1984). Our Supreme Court has observed that “[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought is entered.” *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (quoting *Waters v. Qualified Personnel*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). We have conducted such a consideration of the record herein and find it reveals no “right” which will be clearly lost or irremediably adversely affected if Commercial Union’s appeal is not presently resolved.

Assuming *arguendo* that Commercial Union considers itself prejudiced by having the issue of insurance coverage heard before a jury which is also weighing the issue of liability, and further regards this perceived potential for prejudice as a “right” sufficiently “substantial” under the statute, it nonetheless has other options or “remedies” available to it other than current consideration of its appeal. These include severability of the issues or bifurcation of the trial. Each is available to a party upon proper motion and subject to a discretionary ruling of the trial court. G.S. § 1A-1, Rule 49(b) and G.S. § 1A-1, Rule 42(b). Yet it would be both presumptuous and premature for us either to anticipate such motions or the rulings of the trial court, or to determine whether a particular ruling might constitute an abuse of the court’s discretion. For the reasons stated, therefore, we hold no “substantial interest” exception is present in this case to permit appeal under G.S. § 1-277 and G.S. § 7A-27 of the court’s order denying defendant’s summary judgment.

[2] Second, Rule 54(b) of the Rules of Civil Procedure allows appeal if the specific action of the trial court from which appeal is taken is *final* and the trial judge expressly determines that there is no just reason to delay appeal. G.S. § 1A-1, Rule 54(b); *Brown*, 77 N.C.App. at 207. A final judgment is one which disposes

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of the cause as to all the parties, leaving nothing to be determined between them in the trial court. *Beam v. Morrow*, 77 N.C.App. 800, 802, 336 S.E.2d 106, 107 (1985), *disc. review denied*, 316 N.C. 192, 341 S.E.2d 575 (1986). An interlocutory order, on the other hand, is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. *Cunningham v. Brown*, 51 N.C.App. 264, 267, 276 S.E.2d 718, 722 (1981).

As noted above, the denial of a motion for summary judgment is not a final judgment and is generally (unless affecting a "substantial right") not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b). *Henderson v. LeBauer*, 101 N.C.App. 255, 264, 399 S.E.2d 142, 147, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991). While the court below did attempt to certify there was no cause for delay and also stated its order constituted a "final" judgment as to Commercial Union, a trial court cannot by denominating its decision a "final judgment" confer appeal status under Rule 54(b) if its ruling is not indeed such a judgment. *Tridyn*, 296 N.C. at 491, 251 S.E.2d at 447. We hold that the trial court's order denying Commercial Union's motion for summary judgment did not constitute a "final" judgment and is therefore not appealable pursuant to Rule 54(b). *See Beam*, 77 N.C.App. at 802, 336 S.E.2d at 107-08.

For the reasons stated, therefore, the appeal of unnamed party Commercial Union is ordered dismissed and this cause is remanded to the trial court.

Appeal dismissed.

Judges WELLS and COZORT concur.

NATIONWIDE MUTUAL INS. CO. v. ANDERSON

[111 N.C. App. 248 (1993)]

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. QUEEN ANN ANDERSON, ADMINISTRATRIX OF THE ESTATE OF KEVIN ANDERSON, DAVID WILEY, WAYNE ENOCH, AND KIM WILEY, DEFENDANTS

No. 9115SC965

(Filed 20 July 1993)

1. Evidence and Witnesses § 22 (NCI4th)— judicial notice— superior court assignments

The Court of Appeals may take judicial notice of superior court assignments.

Am Jur 2d, Evidence §§ 52, 61.

2. Judgments § 40 (NCI4th)— order entered out of session—lack of consent of parties

A summary judgment order signed by the trial judge after his commission to hold court in the county expired was void where the record reveals no consent by the parties to entry of the order out of session or any other facts giving rise to a fair implication of such consent.

Am Jur 2d, Judgments §§ 58 et seq.

Appeal by defendants from judgment signed 2 July 1991 and filed 5 July 1991 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 13 October 1992.

Reynolds, Bryant, Patterson & Covington, P.A., by Lee A. Patterson, II, for plaintiff-appellee.

Harris & Iorio, by Douglas S. Harris, for defendant-appellant.

ORR, Judge.

Defendants appeal from an order granting summary judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, in favor of plaintiff Nationwide Insurance Company. The motion was heard on 3 June 1991. The court rendered its decision on 2 July 1991, finding that the plaintiff was entitled to judgment as a matter of law. The order was filed with the clerk on 5 July 1991. Defendant argues on appeal that Judge Hudson lacked jurisdiction in Alamance County on the date the order was entered. We agree and therefore do not reach the merits of defendant's other assignments of error.

NATIONWIDE MUTUAL INS. CO. v. ANDERSON

[111 N.C. App. 248 (1993)]

This case arose out of a wrongful death action against Wayne Enoch alleging negligence in his handling of a gun which resulted in the death of seventeen year-old Kevin Anderson. The complaint was filed on 21 April 1989 by Queen Ann Anderson, Administratrix of the Estate of Kevin Anderson. The uncontroverted facts are that on 5 July 1988, Wayne Enoch, Kim Wiley and Kevin Anderson were guests in the home of David Wiley. Wayne Enoch, while in the course of handling a loaded shotgun, inadvertently bumped it against the doorjamb. The gun discharged into Kevin Anderson, mortally wounding him.

On 4 December 1990, Nationwide Mutual Insurance Company filed a declaratory action in which they conceded that Wayne Enoch was residing in the home of John W. Gwynn, Jr., and that their homeowner's policy on Mr. Gwynn's home covered "other persons under the age of twenty-one and in the care of any person named above" but maintained that although Mr. Enoch was under the age of twenty-one that he was, nevertheless, not legally within the definition of "in the care of any person named above."

Arguments for and against the summary judgment motion were heard on 3 June 1991. The trial court made no ruling in the case that day. On 4 June 1991, counsel for the plaintiff submitted a letter to the trial court, with attachments entitled "Facts Helping to Establish That Enoch Was Not Covered Under the Homeowner's Policy." On 5 July 1991, the trial court entered judgment against the defendants, Queen Ann Anderson, Administratrix of the Estate of Kevin Anderson, David Wiley, Wayne Enoch and Kim Wiley, jointly and severally.

The recent decision by this Court in *Capital Outdoor Advertising v. City of Raleigh*, 109 N.C. App. 399, 427 S.E.2d 154 (1993), is dispositive in this case. "[E]xcept 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.'" *Id.* at 400, 427 S.E.2d at 155, quoting *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984). An order entered inconsistent with this rule is null and void. *Id.* at 401, 427 S.E.2d at 155. "The consent to entry of an order must [be] 'in a writing signed by [both] parties or their counsel, or [alternatively that] the judge should recite the . . . consent in the order or judgment . . . ; or such consent should appear by fair implication from what appears in the record.'" *Id.*, quoting *Godwin v. Monds*,

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101 N.C. 354, 7 S.E. 793 (1888). Failure to object to the entry of an order does not constitute consent. *Id.* Consequently, in order for a trial court to render a judgment or order “out of county, out of term”, he must have either the express consent of the parties, or he must have recorded the fact of consent for the record, or there must be a clear indication in the record.

This general rule in North Carolina, applied in both civil and criminal cases, is simply that

[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.

Boone, at 287, 311 S.E.2d at 555 (quoting *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923)). While as this Court points out in *Capital City Advertising, supra*, this may be “a very strict rule, which for the most part, does not seem to serve any useful purpose and in fact often interferes with the proper administration of justice . . .”, this is an area for the General Assembly to determine, not the courts.

[1, 2] In applying the aforementioned rules to the current case, we first note that we may take judicial notice of the superior court assignments. *Baker v. Varsler*, 239 N.C. 180, 79 S.E.2d 757 (1954). We therefore note that Judge Hudson held a commission to hold the courts of the Fifteen-A District, covering Alamance County, for the term ending 30 June 1991. As of 1 July 1991, Judge Hudson had no jurisdiction over pending matters in Alamance County without the consent of the parties. The superior court judge had no power to make an order and such an order was “a nullity and should be stricken from the record.” *State v. Alphin*, 81 N.C. 566 (1879). The record reveals no consent in the present action, nor any other facts giving rise to a “fair implication” of such consent. The motion to amend, referenced in appellee’s brief, does not appear in the record on appeal, and in any event is not enough from which to imply some sort of consent or stipulation. The July 5 order does not reference any consent between the parties, nor is there any separate stipulation by the parties in the record. The

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order, therefore, was completely null and void and of no legal effect. As we have stated, 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. *Boone*, 310 N.C. at 287, 311 S.E.2d at 556. Since the order in the case at bar did not meet these requisites, the order of the court granting summary judgment is vacated and the case remanded for a determination during a duly designated term of court.

As indicated above, we do not reach the petitioner's remaining assignments of error.

Vacated and Remanded.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION

No. 9210UC864

(Filed 20 July 1993)

Telecommunications § 1.1 (NCI3d)— telephone service—request for EAS—extent of polling—order not appealable

A Utilities Commission order authorizing only county seat polling rather than countywide polling with regard to a request for Extended Area Service (EAS) was not immediately appealable where the areas, if any, which will receive EAS have not yet been determined.

Am Jur 2d, Administrative Law §§ 571 et seq.

Appeal by Public Staff—North Carolina Utilities Commission from order entered 3 March 1992 by the North Carolina Utilities Commission. Heard in the Court of Appeals 18 June 1993.

Dwight W. Allen, General Counsel, for intervenor-appellee Carolina Telephone and Telegraph Company.

A. S. Povall, Jr., General Attorney, for intervenor-appellee Southern Bell Telephone and Telegraph Company.

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Hunton & Williams, by Edward S. Finley, Jr., for intervenor-appellees Southern Bell Telephone and Telegraph Company and Carolina Telephone and Telegraph Company.

Burns, Day & Presnell, by F. Kent Burns and Daniel C. Higgins, for intervenor-appellee Service Telephone Company.

Public Staff, Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, for intervenor-appellant Public Staff—North Carolina Utilities Commission.

GREENE, Judge.

The Public Staff—North Carolina Utilities Commission (Public Staff) appeals from an order of the North Carolina Utilities Commission (the Commission) entered 3 March 1992.

In September, 1991, Public Staff, based on requests received for "Extended Area Service" (EAS) for Columbus County, that is, county-wide toll-free telephone service, requested that the Commission require Carolina Telephone and Telegraph Company and Southern Bell Telephone and Telegraph Company to determine the level of increased local rates if county-wide toll-free service was implemented, and that Service Telephone Company also present additional information. The Commission granted the request, and on 23 and 25 October, 1991, data was presented showing the level of increased rates. The telephone companies also presented the results of toll call studies, which showed a low number of calls per customer for the routes subject to the request for toll-free calling, the average being one call per customer per month.

On 24 February 1992, Public Staff requested that the Commission order polls of the subscribers of six exchanges to determine the need for county-wide EAS. On 3 March 1992, the Commission issued an order in response to this request, which stated in pertinent part that

[t]he Commission does not believe that there is sufficient community of interest to move forward to polling Columbus County for county-wide EAS. However, the Commission does believe that sufficient community of interest exists to authorize polling for county-seat calling in Columbus County in exchanges which do not currently have it.

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The Commission, citing its Rule R9-7(d), which permits the Commission to rely upon toll call studies to help initially limit or narrow an EAS request, ordered a county-seat poll to determine the desire for EAS. From this order, Public Staff appeals.

The dispositive issue is whether the Commission's decision to order only county-seat, as opposed to county-wide, polling with regard to the requested EAS is ripe for judicial review.

Pursuant to N.C.G.S. § 62-90, "[a]ny party to a proceeding before the Commission may appeal from any *final* order or decision of the Commission," provided certain requirements are followed. N.C.G.S. § 62-90(a) (1989) (emphasis added). "An order [of an administrative agency] is not final but interlocutory when . . . the cause is retained for further action." 2 Am. Jur. 2d *Administrative Law* § 585, at 413 (1962).

Our Courts on several occasions have refused to become "prematurely involved in the administrative process and interfere in a decision-making process . . . which has not yet culminated in a final agency decision." *Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Management Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 789-90 (1991); see also *Richmond County v. The North Carolina Low-Level Radioactive Waste Management Auth.*, 108 N.C. App. 700, 425 S.E.2d 468 (1993). "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies." *Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967).

In the instant case, Public Staff seeks appellate review of a decision by the Commission regarding the scope of its factual investigation into the EAS request. The areas, if any, which will receive EAS have not yet been determined. Until the Commission has reviewed the evidence collected and has made a final determination as to the appropriate extent of EAS in Columbus County, an appeal by Public Staff is premature.

Dismissed.

Judges EAGLES and LEWIS concur.

STATE v. FARRIS

[111 N.C. App. 254 (1993)]

STATE OF NORTH CAROLINA v. WILLIAM MAURICE FARRIS

No. 9226SC822

(Filed 20 July 1993)

Criminal Law § 1442 (NCI4th)— probation revocation— credit for active sentence on special probation

A defendant who has served an active ninety-day sentence as a condition of special probation pursuant to N.C.G.S. § 15A-1351 is entitled to credit for that time on the sentence imposed upon revocation of his probation. The fact that the trial judge reduced defendant's original seven-year sentence to six years and nine months, a reduction of ninety days, does not satisfy the requirement that defendant be given a ninety-day credit. N.C.G.S. §§ 15-196.1, 15-196.3.

Am Jur 2d, Criminal Law §§ 547 et seq., 578, 621.

Appeal by defendant from judgment entered 22 May 1992 in Mecklenburg County Superior Court by Judge Robert M. Burroughs. Heard in the Court of Appeals 8 June 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Timothy D. Nifong, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Kathleen M. Arundell, for defendant-appellant.

GREENE, Judge.

William Maurice Farris (defendant) appeals from judgment and commitment to a term of six years and nine months imprisonment upon revocation of his probation.

Defendant pled guilty to one count of sale of cocaine pursuant to N.C.G.S. § 90-95 and was sentenced on 30 July 1990 to a term of seven years in prison, suspended, and placed on five years of supervised probation. Among the conditions of his probation were the requirements that he perform community service, abide by a curfew, remain drug free, and submit to tests to determine whether he had used any drugs. On 11 April 1991, defendant's probation officer submitted to the trial court a violation report citing several violations of the terms of probation. The trial court, on 31 May 1991, modified the original judgment by placing defend-

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ant on special probation, pursuant to N.C.G.S. § 15A-1351, and committing him to the custody of the sheriff for a period of ninety days. The order retained the earlier conditions of defendant's probation.

On 9 December 1991 and 20 February 1992, after defendant had satisfied his ninety-day commitment, his probation officer filed separate violation reports, each citing numerous violations of the terms of defendant's special probation. On 22 May 1992, the trial court found that defendant had violated conditions of his probation, revoked the probation and sentenced defendant to six years and nine months in the custody of the North Carolina Department of Correction.

Defendant appeals, arguing that the trial court's failure to give defendant credit for ninety days of time served violates the credit requirements of N.C.G.S. § 15-196.1.

The dispositive issue is whether a defendant who has served, pursuant to N.C.G.S. § 15A-1351, an active sentence as a condition of special probation is entitled to credit for that time on any sentence imposed upon revocation of probation.

It is without question that a defendant receiving a term of imprisonment is entitled to a credit for time "spent, committed to . . . any State or local correctional . . . institution as a result of the charge that culminated in the sentence" when the time in custody was "pending trial." N.C.G.S. § 15-196.1 (1983). The State contends, however, that a defendant is not entitled to a credit for time served as a condition of special probation because this imprisonment is "post-trial," and as such is not within the scope of Section 15-196.1. We disagree.

In pertinent part, Section 15-196.1 provides that

a sentence shall be credited with . . . the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced

N.C.G.S. § 15-196.1.

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There is no language in Section 15-196.1 which requires credit be given only for imprisonment served pre-trial. In fact, the examples given in the statute of the situations where a defendant must be given credit include "time spent in custody pending . . . trial de novo, appeal, retrial, . . . parole and probation revocation hearing." *Id.* In each of these examples, the custody for which credit is required is post-trial. Furthermore, a literal reading of the statute supports defendant's contention that credit is required for the ninety-day sentence he served because it came "as a result of" the "charge[s]" originated against defendant, which charges "culminated in the sentence [of six years and nine months]." Thus, a defendant who has served, pursuant to special probation, an active sentence, is entitled to credit for that time on any sentence imposed upon revocation of probation. Therefore, the defendant is entitled to a credit on the sentence imposed.

The fact that Judge Burroughs reduced defendant's original seven year sentence to six years and nine months, a total reduction of ninety days, does not satisfy the requirement that the defendant be given a ninety-day credit. A credit reduces "the time required to attain privileges . . . which are dependent . . . upon the passage of a specific length of time in custody," N.C.G.S. § 15-196.3 (1983), and a reduction in the sentence term did not accomplish that purpose. Accordingly, this matter is remanded to the trial court for amendment of the judgment granting the defendant ninety days of credit.

Remanded.

Judges JOHNSON and WYNN concur.

FOOD SERVICE SPECIALISTS v. ATLAS RESTAURANT MANAGEMENT

[111 N.C. App. 257 (1993)]

FOOD SERVICE SPECIALISTS, PLAINTIFF v. ATLAS RESTAURANT MANAGEMENT, INC. & H. RAY MARTINAT, & ROGER SEAGLE, & JAMES R. SIMPSON, II, DEFENDANTS

JAMES R. SIMPSON, II, & ROGER L. SEAGLE, THIRD-PARTY PLAINTIFFS v. J. C. FAW, THIRD-PARTY DEFENDANT

No. 9225SC690

(Filed 20 July 1993)

Appeal and Error § 205 (NCI4th); Rules of Civil Procedure § 60.2 (NCI3d) — correction of clerical error — date of judgment — time for notice of appeal

An appeal was dismissed where a judgment was signed on 13 December 1991 following a trial, that judgment contained a clerical error and reflected entry of judgment on 2 October 1991, the trial court sought to correct the judgment on its own initiative and modified the original judgment on 10 February 1992 to reflect judgment being entered on 21 January 1992, and plaintiff filed notice of appeal on 19 February 1992. While N.C.G.S. § 1A-1, Rule 60(a) allows the trial court to correct clerical mistakes, it does not grant the trial court the authority to make substantive modifications to an entered judgment. By changing the incorrect date of entry of judgment to a date other than 13 December 1991, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal. Plaintiff's notice of appeal was dismissed as untimely because the trial court lacked the authority to modify its judgment to reflect a date of entry other than 13 December 1991.

Am Jur 2d, Judgments §§ 199, 200, 207.

Appeal by plaintiff from judgment entered 13 December 1991 in Burke County Superior Court by Judge Beverly T. Beal. Heard in the Court of Appeals 27 May 1993.

On 4 October 1989, plaintiff, a corporation in the business of selling food products and other supplies to restaurants, filed this action pursuant to an account, seeking \$55,414.89 from Atlas Restaurant Management, Inc. and three individual guarantors, H. Ray Martinat, Roger Seagle, and James R. Simpson, II. The

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trial court granted partial summary judgment in favor of plaintiff on the issue of defendants' liability. The case went to trial for a determination of damages, and the jury returned a verdict for plaintiff in the amount of \$20,000.

Subsequent to trial, on 13 December 1991, Judge Beal signed the judgment and the judgment was filed 16 December 1991. As a result of a clerical error, the judgment Judge Beal signed on 13 December 1991 was dated incorrectly and reflected entry of judgment as being 2 October 1991 rather than 13 December 1991. The trial court, on its own initiative, sought to correct the judgment's clerical mistake. On 10 February 1992, the trial court modified the original judgment, so as to reflect judgment being entered 21 January 1992. On 19 February 1992, plaintiff filed notice of appeal from the judgment. Subsequently, defendants filed a motion to dismiss in this Court.

J. Stephen Gray for plaintiff-appellant.

Simpson, Aycock, Beyer & Simpson, P.A., by Louis E. Vinay, Jr., for defendant/third party plaintiff-appellee James R. Simpson, II.

Bell, Davis & Pitt, P.A., by D. Anderson Carmen, for defendant/third party plaintiff-appellee Roger L. Seagle.

Greeson and Grace, P.A., by Michael R. Greeson, Jr., for defendant-appellee J.C. Faw.

WELLS, Judge.

In a motion before this Court, defendants contend that plaintiff's appeal should be dismissed because plaintiffs failed to give a timely notice of appeal. We agree.

In the case at bar, the trial court made a clerical error as to the date of judgment. The judgment which was entered on 13 December 1991 was dated 2 October 1991. In an attempt to correct this clerical error, ostensibly pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a) of the North Carolina Rules of Civil Procedure, the trial court modified its judgment by changing the 2 October 1991 entry of judgment date to 21 January 1992. Rule 60 reads, in pertinent part, as follows:

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[111 N.C. App. 257 (1993)]

Rule 60. Relief from judgment or order.

(a) Clerical mistakes.—Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment. In *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985), *review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986), this Court wrote:

The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984); *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E.2d 715 (1975). We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

. . .

The relief granted on plaintiff's motion here clearly was substantive in nature and therefore not available under Rule 60(a).

More recently, in *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991), this Court stated that Rule 60(a) "allows correction of clerical errors, but does not permit errors of a serious or substantial nature. *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989)."

By changing the incorrect date of entry of judgment (2 October 1991) to a date other than 13 December 1991, the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the

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[111 N.C. App. 260 (1993)]

parties could file a timely notice of appeal. Rule 60(a) does not vest the trial court with such authority.

A proper application of Rule 60(a) would allow amendment to show a 13 December 1991 date of entry. Rule 3(c) of the North Carolina Rules of Appellate Procedure reads in pertinent part:

(c) **Time for Taking Appeal.** Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry.

Because the trial court lacked the authority to modify its judgment to reflect a date of entry other than 13 December 1991, plaintiff's 19 February 1992 notice of appeal was not timely. Therefore, plaintiff's appeal must be dismissed.

Dismissed.

Judges COZORT and JOHN concur.

JUDY A. LOCKAMY v. JOHNNY D. LOCKAMY

No. 9213DC827

(Filed 20 July 1993)

Divorce and Separation § 189 (NCI4th)— absolute divorce—destruction of right to equitable distribution

Plaintiff's failure to specifically apply for equitable distribution prior to a judgment of absolute divorce destroyed her statutory right to equitable distribution. A statement in the judgment of absolute divorce that "all matters of . . . Equitable Distribution of property are reserved for future disposition in a separate pending action" did not give the court jurisdiction to determine equitable distribution where no such separate pending action existed at the time of the judgment of divorce. Nor did the fact that both parties participated in the equitable distribution hearing confer jurisdiction on the court to determine equitable distribution. N.C.G.S. § 50-11(e).

Am Jur 2d, Divorce and Separation §§ 439 et seq., 957.

Default decree in divorce action as estoppel or res judicata with respect to marital property rights. 22 ALR2d 724.

LOCKAMY v. LOCKAMY

[111 N.C. App. 260 (1993)]

Appeal by defendant from order entered 5 March 1992 by Judge D. Jack Hooks, Jr. in Brunswick County District Court. Heard in the Court of Appeals 17 June 1993.

On 16 August 1989, plaintiff filed a complaint seeking primary custody of the minor children of her marriage with defendant, child support, a divorce from bed and board, and an order preserving marital assets. Defendant's responsive pleading included an answer and counterclaims for child custody and slander. Plaintiff filed a separate action for absolute divorce on 12 July 1990, also in Brunswick County, and a judgment of absolute divorce was entered the same day. An equitable distribution hearing on 28 August 1991 was heard in the original action and an order of equitable distribution was signed 5 March 1992 and filed 6 March 1992. From this order, defendant appeals.

Rountree & Seagle, by George Rountree, III and George K. Freeman, Jr., for defendant-appellant.

No brief filed for plaintiff-appellee.

ORR, Judge.

Defendant contends that the trial court lacked subject matter jurisdiction to hear any claim for equitable distribution because neither party asserted the right to equitable distribution before the judgment of absolute divorce, as required by N.C. Gen. Stat. § 50-11(e) (Supp. 1992). We agree.

N.C.G.S. § 50-11(e) provides that: "[a]n absolute divorce obtained within this state shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce"

The failure to specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution. *Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987); *Carter v. Carter*, 102 N.C. App. 440, 402 S.E.2d 469 (1991); *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E.2d 385, cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991); *Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

In her initial complaint out of which this appeal lies, plaintiff alleges in part in paragraph 14, "That the plaintiff anticipates that

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[111 N.C. App. 262 (1993)]

an action for an absolute divorce and equitable distribution shall be filed when it is appropriate to do so." In no subsequent pleading in this case nor in any other case does a request for an equitable distribution of marital assets occur.

We note that in its order of absolute divorce, the trial court found that "all matters of . . . Equitable Distribution of property are reserved for future disposition in a separate pending action." However, no such separate pending action existed at the time of the judgment of divorce on 12 July 1990. Likewise, the fact that both parties participated in the equitable distribution hearing does not save plaintiff. Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel. *Pulley v. Pulley*, 255 N.C. 423, 121 S.E.2d 876, *aff'd*, 256 N.C. 600, 124 S.E.2d 571, *appeal dismissed by*, 371 U.S. 22, 9 L.Ed.2d 96 (1961).

We therefore hold that the order of equitable distribution is reversed on the grounds that the trial court did not have subject matter jurisdiction to decide the issue.

Reversed.

Judges WELLS and MCCRODDEN concur.

KIMETHA RENA McNEIL, PLAINTIFF v. KIMBERLY RAY HICKS AND
ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. 9221SC757

(Filed 20 July 1993)

**Appeal and Error § 119 (NCI4th)— partial summary judgment
granted—certified for appeal—interlocutory**

An appeal was dismissed as interlocutory where a partial summary judgment was granted for plaintiff on the issue on uninsured motorist coverage by defendant Allstate, Allstate appealed, and the trial judge certified his order for immediate appeal. Such certification is not dispositional when the order appealed from is interlocutory. The avoidance of one trial is not a substantial right entitling a party to an immediate appeal from an interlocutory order; Allstate will not lose its

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[111 N.C. App. 262 (1993)]

right to appeal if and when plaintiff is awarded damages for which Allstate might be liable.

Am Jur 2d, Appeal and Error § 104.

Appeal by defendant from judgment entered 29 May 1992 in Forsyth County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 9 June 1993.

On the morning of 20 February 1991, plaintiff drove her vehicle to the intersection between Utah Drive (Rural Paved Road 2712) and Cole Road (Rural Paved Road 2699) in Forsyth County, North Carolina, and came to a full stop at the stop sign on Utah Drive. As plaintiff's vehicle sat stopped on Utah Drive, it was struck on the driver's side by a vehicle driven by Kimberly Ray Hicks. At the time of the collision, Ms. Hicks was traveling south on Cole Road at approximately 35 miles per hour. As she approached Cole Road's intersection with Utah Drive, Ms. Hicks negotiated a curve approaching the intersection and lost control of her vehicle as she travelled on the western shoulder of Cole Road, striking plaintiff's vehicle. Plaintiff suffered property damage to her vehicle and serious personal injuries as a result of the crash.

After the accident, Ms. Hicks stated that she lost control of her vehicle when she was forced to leave the road to avoid a head-on collision with a late model Chevrolet pick-up truck which was heading north on Cole Road and suddenly, without warning, crossed the center line and came into her lane of travel. The driver of the truck left the scene without stopping; his identity is unknown.

Plaintiff brought this action for personal injury and property damage against Ms. Hicks and Allstate Insurance Company (Allstate), issuer of plaintiff's uninsured motorist coverage, alleging the negligence of Ms. Hicks for driving into plaintiff's vehicle, and, in the alternative, alleging the negligence of an unidentified driver of a vehicle believed to be a Chevrolet pick-up truck for failing to keep right and forcing Ms. Hicks' vehicle off the road and into plaintiff's vehicle. Both Allstate and Ms. Hicks subsequently answered the complaint.

Following discovery, plaintiff moved for partial summary judgment against Allstate on the issue of uninsured motorist coverage by Allstate. On 29 May 1992, Judge Greeson entered partial sum-

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mary judgment in favor of plaintiff, finding Allstate obligated to provide uninsured motorist coverage to satisfy any appropriate claim plaintiff may be awarded pursuant to her action. Judge Greenson certified his order for immediate appeal. Allstate entered a timely notice of appeal.

David R. Tanis for plaintiff-appellee.

Henson, Henson, Bayliss & Sue, by Perry C. Henson, for defendant-appellant.

WELLS, Judge.

The trial court's order appealed from in this case is interlocutory, as it does not dispose of the case as to all parties, leaving nothing to be judicially determined between them in the trial court. *See Veasey v. City of Durham*, 231 N.C. 354, 57 S.E.2d 375, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). As such, it is not immediately appealable unless it affects a substantial right of defendant Allstate. N.C. Gen. Stat. § 1-277 (1983); G.S. § 7A-27 (1989). The avoidance of one trial is not a substantial right entitling a party to an immediate appeal from an interlocutory order. *See Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980), and cases cited and discussed therein.

In this case, defendant Allstate will not lose its right to appeal if and when plaintiff is awarded damages for which defendant Allstate might be liable.

Even though the trial court certified its order as being immediately appealable, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure, such certification is not dispositional when the order appealed from is interlocutory. *Leasing Corp., supra*.

For the reasons stated, this appeal must be dismissed.

Dismissed.

Judges COZORT and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 20 JULY 1993

ANDERSON v. NORMAN No. 9123DC1290	Wilkes (89CVD1608)	No Error
ARRINGTON v. WOODRUFF No. 937DC161	Wilson (91CVD1413) (91CVD1999)	No Error
BONNER v. R. N. ROUSE & CO. No. 9211SC218	Harnett (90CVS1051)	Affirmed
BROWN v. O'TOOLE No. 9214SC1164	Durham (91CVS4033)	Reversed & Remanded
CARROLL v. GENTRY No. 9310DC65	Wake (90CVD4814)	Affirmed
COMMERCIAL LIFE INS. CO. v. WYLIE No. 9226SC970	Mecklenburg (91CVS16165)	Dismissed
CROMER v. WAYNE POULTRY No. 9310IC132	Ind. Comm. (909611)	Affirmed
DENNY v. DENNY No. 927DC383	Wilson (91CVD872)	Remanded
DICK v. PARKER No. 9218DC461	Guilford (91CVD05205)	Affirmed
GRAY v. PHILLIP MORRIS No. 9310IC122	Ind. Comm. (961627) (100929) (100931)	Affirmed
GREEN v. PITT COUNTY MEM. HOSP. No. 923SC595	Pitt (90CVS2189)	Affirmed
HANSBROUGH v. RICHMOND STEEL & WELDING No. 9226DC623	Mecklenburg (89CVD4409)	Affirmed
IN RE FORECLOSURE OF SMITH No. 9215SC228	Orange (90SP98)	Vacated & Remanded
IN RE PATRICK C. No. 9228DC1058 No. 9328DC74	Buncombe (90J309)	Vacated in part; dismissed in part
IN RE TIMMONS No. 9218DC860	Guilford (89J003)	Affirmed

IN RE VITZA v. VITZA No. 9125DC868	Catawba (89J50) (89J51)	Affirmed
IN RE WILSON v. WEEKS No. 9318SC34	Guilford (91CVS04422)	Affirmed
KNOWLES v. KNOWLES No. 935DC155	New Hanover (81CVD2311)	Affirmed in part; reversed in part
ORANGE COUNTY v. KING No. 9115DC916	Orange (90CVD831)	Affirmed
PORTER v. SEBASTIAN No. 9223SC835	Wilkes (91CVS1645)	Affirmed
PRITSIS v. SPILLMAN No. 9321SC81	Forsyth (91CVS3651)	Affirmed
RAKESTRAW BROTHERS CONTRACTORS v. CARDINAL RETIREMENT VILLAGE No. 9218SC824	Guilford (89CVS2854) (89CVD3241) (89CVS3242) (89CVD3446) (89CVD4649) (89CVD4765) (89CVS4819) (89CVS5010) (89CVD5115) (89CVD5554) (89CVD5743) (89CVD5744)	Affirmed
ROBERTS v. ABR ASSOC., INC. No. 9210IC450	Ind. Comm. (701962)	Affirmed
ROGERS v. ROGERS No. 9330DC114	Haywood (84CVD626)	Affirmed
SEMENAS v. CHERNISKY No. 9220DC717	Moore (89CVD798)	Affirmed
SILVI CONCRETE PRODUCTS v. ARSHT No. 9214SC932	Durham (92CVS770)	Affirmed in part; reversed in part & remanded
SMITH v. FIRST UNION NATIONAL BANK No. 9215SC229	Orange (91CVS1508)	Appeal dismissed; remanded
STATE v. BOSWELL No. 9313SC82	Brunswick (89CRS2663) (89CRS2664)	Vacated

STATE v. BRUEHL No. 9211SC638	Lee (91CRS5557)	Affirmed
STATE v. CATOE No. 9220SC881	Union (90CRS001005)	No Error
STATE v. COOK No. 9212SC716	Cumberland (91CRS33909)	Affirmed
STATE v. FOREMAN No. 923SC557	Pitt (90CRS16326) (90CRS16327)	New Trial
STATE v. FORESTER No. 9217SC413	Rockingham (90CRS11096) (90CRS11840) (90CRS11841) (90CRS11842) (90CRS11843)	New Trial
STATE v. GREEN No. 935SC18	New Hanover (91CRS16873)	No Error
STATE v. HARRIS No. 914SC1218	Onslow (90CRS20465)	No Error
STATE v. HARRIS No. 924SC392	Onslow (90CRS20468)	No Error
STATE v. HARRIS No. 924SC1253	Onslow (90CRS20461) (90CRS20462) (90CRS20463) (90CRS20464)	No Error
STATE v. HOLMES No. 931SC141	Chowan (90CRS1420)	No Error
STATE v. KING No. 9316SC111	Hoke (91CRS3307) (91CRS3308)	No Error
STATE v. KIRKMAN No. 9218SC293	Guilford (84CRS20744) (84CRS20745) (84CRS65774) (84CRS65775)	The result is: Second-degree murder conviction — no error; assault with a deadly weapon conviction — no error; conviction of second-degree kidnapping of Valerie

		Chavis— no error; conviction of second-degree kidnapping of Theodosia Dunlap— reversed
STATE v. KNOX No. 9219SC867	Rowan (91CRS13815) (91CRS13816)	No Error
STATE v. LEWIS No. 935SC87	New Hanover (91CRS21076)	No Error
STATE v. LUTER No. 926SC801	Northampton (92CRS31)	No Error
STATE v. McCRAY No. 935SC45	New Hanover (92CRS6563)	No Error
STATE v. McDOUGAL No. 9318SC131	Guilford (91CRS38588)	No Error
STATE v. MOODY No. 9329SC237	Henderson (92CRS3075) (92CRS4608) (92CRS5584)	Dismissed
STATE v. NIXON No. 915SC1091	New Hanover (90CRS5396) (90CRS5397) (90CRS5398)	No Error in trial; remanded for resentencing
STATE v. OLIVER No. 9322SC104	Davidson (91CRS20654) (91CRS20655) (91CRS20656)	Remanded for resentencing
STATE v. PARKER No. 932SC37	Beaufort (92CRS6017)	No Error
STATE v. WINSTON No. 9310SC117	Wake (91CRS71782)	No Error
WADSWORTH v. WADSWORTH No. 937DC249	Nash (85CVD1031)	Reversed

MARTIN MARIETTA CORP. v. WAKE STONE CORP.

[111 N.C. App. 269 (1993)]

MARTIN MARIETTA CORPORATION, MARTIN MARIETTA AGGREGATES,
AND JOHN F. LONG, JR., PLAINTIFFS v. WAKE STONE CORPORATION
AND THOMAS B. OXHOLM, DEFENDANTS

No. 9110SC1162

(Filed 3 August 1993)

1. Libel and Slander § 13 (NCI4th) — permit to construct quarry — document prepared by competition — no libel per se

A document prepared by the individual defendant with regard to the conditional nature of plaintiff's permits to construct a quarry and with regard to the special treatment defendant felt plaintiff had received as compared to the treatment that defendant corporation had received when it had applied for permits was not defamatory on its face and did not constitute libel per se, since the statements in the document did not accuse plaintiff corporation or its vice-president of improper, unlawful, or unethical acts and practices to obtain the required permits to operate plaintiff's proposed Nash County quarry, but simply recited a history of the permit process in a way which was susceptible of only one meaning, a way which did not disgrace or degrade plaintiff or hold it up to public hatred, contempt or ridicule or cause it to be shunned or avoided.

Am Jur 2d, Libel and Slander § 315.**2. Unfair Competition § 1 (NCI3d) — permit to construct quarry — document prepared and disseminated by competition — unfair and deceptive trade practices claim — summary judgment improper**

The trial court erred in granting defendants' motion for summary judgment on plaintiffs' claim for unfair or deceptive trade practices where there was a genuine issue of material fact as to whether defendants' act of submitting to the Nash County Board of Commissioners a document with regard to the conditional nature of plaintiff company's permits to construct a quarry in Nash County and with regard to the special treatment defendants felt plaintiffs had received as compared to the treatment that defendant company received when it had applied for permits was done in an attempt willfully to destroy or injure plaintiff company's business in Nash County and as to whether defendants were attempting to eliminate

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any competition from plaintiff company in Nash County. N.C.G.S. §§ 75-1.1, 75-5(b)(3).

Am Jur 2d, Consumer and Borrower Protection §§ 280 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 496, 602, 696.

Appeal by plaintiffs from judgment entered 26 September 1991 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 October 1992.

In March 1991, plaintiffs filed a complaint against defendants Wake Stone Corporation and Thomas B. Oxholm, the Vice-President of Planning and Administration of Wake Stone. In their complaint, plaintiffs alleged that defendants libeled, slandered and disparaged plaintiffs in Nash County with statements concerning defendants' business. Additionally, plaintiffs alleged that defendants' statements constituted unfair and deceptive trade practices.

On 31 May 1991, defendants filed an answer to this complaint. In their answer, defendants asserted that the statements made by defendants were true, that the statements made by defendants constituted permissible expressions as opinions based on recited facts, and that defendants have the right to an absolute and qualified privilege.

In June 1991, defendants filed a motion for summary judgment, and on 26 September 1991, the trial court entered an order granting defendants' motion for summary judgment. From this order, plaintiffs appeal.

Petree Stockton & Robinson, by Ralph M. Stockton, Jr., Jeffrey C. Howard and Stephen R. Berlin, for plaintiff-appellants.

McMillan, Kimzey & Smith, by James M. Kimzey, Katherine E. Jean and Martha K. Walston, for defendant-appellees.

ORR, Judge.

In early 1989, Martin Marietta began the process of locating and opening a rock quarry in Nash County, North Carolina. This process included filing applications with state and local regulatory authorities for various permits that are required. On 1 December 1989, Martin Marietta filed an application for a state mining permit. On 26 February 1990, Steve Conrad, the Director of the Division

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of Land Resources of the North Carolina Department of Environment, Health, and Natural Resources (the DEHNR), notified Martin Marietta that an environmental assessment was needed in order to review their application for a mining permit because the widening of a state road associated with the proposed quarry would be considered a public expenditure of money.

On 27 February 1990, Assistant Attorney General Philip Telfer sent a memorandum to Conrad, the acting mining specialist within the Land Quality Section of the DEHNR, Tracy Davis, and to Charles Gardner, the Chief of the Land Quality Section of the DEHNR. This memorandum was in response to the DEHNR's inquiry about the requirements of the North Carolina Environmental Policy Act (NCEPA). In this memorandum, Telfer stated that the NCEPA requires that an environmental document be prepared where a project "has a potential for significant environmental impact."

Further, Telfer responded to the Land Quality Section's inquiry about whether a permit could be issued without considering the environmental document if conditions were placed on the permit that would mitigate environmental damage. On this issue, Telfer stated:

It is my opinion that conditions to be placed on the permit being issued may not be the basis for failing to require compliance with [NCEPA]. The purpose of [NCEPA] is to require consideration of environmental information prior to the State action, in this case the issuance of the permit. Thus, [NCEPA] requires the completion of the environmental documentation before it is determined what conditions the State will place on the permit. To do otherwise would vitiate [NCEPA].

On 2 March 1990, Conrad informed Martin Marietta by letter that further information was needed before determining whether NCEPA applied to its proposed quarry. On 23 March 1990, Telfer sent a memorandum to Conrad stating that if Martin Marietta placed a bond to cover any damage to the roads caused by it exceeding the posted weight limits, these weight limits would be removed. Further, Telfer stated that Martin Marietta had promised to place this bond. Based on these statements, Telfer told Conrad that a permit could be issued to Martin Marietta without an environmental assessment.

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On 26 March 1990, Acting Mining Specialist Tracy Davis sent a memorandum to Conrad with a proposed draft permit recommending that Martin Marietta's permit be approved with certain conditions. Davis noted that Martin Marietta had applied for an air quality permit and a NPDES (water discharge) permit but had not yet received them. The mining permit was issued the same day to Martin Marietta with the condition that Martin Marietta comply with the State water and air quality regulations. On 28 March 1990, Marvin Pridgen, the Nash County Planning Director, issued Martin Marietta a Land Use Permit.

Subsequently, the Nash County Board of Commissioners (the "Board") had been considering zoning the area containing plaintiffs' proposed quarry site. On 3 January 1990, Martin Marietta sent a letter to the Nash County Office of County Planning requesting that the tract of land including their proposed quarry site "be designated as a heavy industrial, mineral mining and processing category." On 16 January 1990, the Planning Board held a meeting to discuss, among other things, the proposed zoning of this land. On 19 March 1990, the Planning Board held another meeting where they discussed the zoning of this property, and the members voted unanimously to recommend that it be zoned as A-1, Agricultural District. Martin Marietta then applied to the Board for an exemption to the proposed zoning regulation so that it could place the quarry on this land as a non-conforming use.

Since the Spring of 1989, defendant Wake Stone has owned and operated a rock quarry in Nash County. After learning that Martin Marietta had been issued a conditional land use permit and that the Board was going to consider Martin Marietta's application for an exemption to the proposed zoning regulation, defendant Thomas Oxholm, Wake Stone's Vice President of Planning and Administration, telephoned Commissioner Martin, a member of the Board. Oxholm informed Commissioner Martin of the conditional nature of plaintiffs' permits and of the special treatment he felt Martin Marietta had received as compared to the treatment that Wake Stone had received when it had applied for permits.

At the request of Commissioner Martin, Oxholm put his comments in writing. Subsequently, the statements in this document (the "Document") are the subject of this complaint. The Document states:

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INFORMATION CONCERNING MARTIN MARIETTA CORPORATION'S MINING PERMIT AND RECEIPT OF A NASH COUNTY LAND USE PERMIT

1. MARTIN MARIETTA RECEIVED A MINING PERMIT DATED MARCH 26, 1990. THE PERMIT WAS ISSUED BY STEVE CONRAD, DIRECTOR OF THE DIVISION OF LAND RESOURCES. A DIVISION OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES. THE DEPARTMENT MAY DENY A PERMIT REQUEST UPON FINDING . . . :

“(3) THAT THE OPERATION WILL VIOLATE STANDARDS OF AIR QUALITY, SURFACE WATER QUALITY, OR GROUND WATER QUALITY”

SPECIFICALLY, THE DEPARTMENT REQUIRES A NUMBER OF ADDITIONAL PERMITS, WHICH IN THIS CASE INCLUDES A NPDES WATER DISCHARGE PERMIT AND A NSPS AIR POLLUTION DISCHARGE PERMIT. NEITHER OF THESE PERMITS HAVE BEEN ISSUED AND ARE NOT EXPECTED FOR AT LEAST 30 DAYS.

HOW CAN THE LAND RESOURCES DEPARTMENT ISSUE A MINING PERMIT BEFORE THEY KNOW WHETHER AN OPERATION WILL MEET THE CRITERIA OF ITEM 3 ABOVE?

PER TRACY DAVIS, ACTING MINING SPECIALIST, IT HAS BECOME STANDARD PRACTICE TO ISSUE THE PERMIT BEFORE AIR AND WATER PERMITS, WITH THE COMPANY BEING NOTIFIED THAT THE PERMIT IS ONLY VALID UPON THE RECEIPT OF THOSE ADDITIONAL PERMITS.

MARTIN MARIETTA PRESENTED THE MINING PERMIT TO MARVIN PRIDGEN AND REQUESTED A LAND USE PERMIT FOR ITS QUARRY PREPARATION KNOWING THAT THE PERMIT WAS NOT VALID UNTIL THE OTHER PERMITS WERE RECEIVED. THE LAND USE PERMIT WAS ISSUED BUT DUE TO WET WEATHER NO WORK HAS YET BEGUN.

IT SHOULD BE NOTED THAT THE PERMIT WAS SPECIALLY HANDLED BY STEVE CONRAD, BYPASSING TRACY DAVIS, AT THE REQUEST OF JOHN LONG, VICE PRESIDENT OF MARTIN MARIETTA AND A MEMBER OF THE NORTH CAROLINA STATE MINING COMMISSION. MR. CONRAD RETIRES FROM STATE GOVERNMENT ON FRIDAY, MARCH 30, 1990.

THE PERMIT USUALLY TAKES 30 DAYS TO BE ISSUED FOLLOWING THE RESOLUTION OF ALL PENDING MATTERS. IN THIS CASE THE

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PENDING MATTER WAS THE ENVIRONMENTAL ASSESSMENT STUDY REQUESTED OF MARTIN MARIETTA. THIS ISSUE WAS RESOLVED BY A LETTER FROM THE ATTORNEY GENERAL'S OFFICE TO STEVE CONRAD DATED FRIDAY, MARCH 23, 1990. ON THE FOLLOWING MONDAY THE PERMIT WAS DRAFTED, TYPED, REVIEWED, RECLAMATION BOND POSTED, APPROVED AND SIGNED BY MR. CONRAD. (NOTE: BE SURE TO SEE ATTACHED COPIES OF RELATIVE INFORMATION FROM THE MARTIN MARIETTA FILE INCLUDING A DRAFT OF THE CONDITION RESOLVING THE USE OF PUBLIC FUNDS FOR THE PROJECT, A.K.A. THE ENVIRONMENTAL ASSESSMENT ISSUE—THE DRAFT WAS WRITTEN BY STEVE CONRAD).

2. THE COUNTY IS CONCERNED ABOUT BEING SUED BY MARTIN MARIETTA FOR THEIR VESTED INTEREST IN THE QUARRY LOCATION. PER MR. DAVID OWENS AT THE INSTITUTE OF GOVERNMENT IN CHAPEL HILL . . . , AN ENTITY DOES NOT HAVE A VESTED INTEREST UNTIL ALL PERMITS ARE RECEIVED. THEN THEIR VESTED INTEREST [SIC] BECOMES EXPENDITURES FROM THAT TIME FORWARD. NOT PRIOR EXPENDITURES. FROM AN EXPLANATION OF THE FACTS OF THE PERMITTING VERSUS ZONING SITUATION MR. OWENS STATED THAT THERE WAS DEFINITELY NO CLEAR CUT CASE WHICH WOULD SET PRECEDENCE. THE ISSUANCE BY THE COUNTY OF THE LAND USE PERMIT COULD BE THE MOST DAMAGING EVENT SO FAR. ONLY THE PROMPT REVOCATION OF THAT PERMIT WOULD STOP ANY VESTED INTERESTS (EXPENDITURES) FROM ACCRUING.

3. WAKE STONE CORPORATION WAS TOLD BY MARVIN PRIDGEN THAT WHEN IT HAD ALL ITS PERMITS, IT COULD GET A LAND USE PERMIT FROM THE COUNTY. THE MINING PERMIT WAS ISSUED NOVEMBER 1, 1989. ALL OTHER PERMITS WERE RECEIVED JUST PRIOR TO CHRISTMAS, 1989. A LAND USE PERMIT WAS APPLIED FOR AND RECEIVED IN JANUARY, 1990. LAND PREPARATION COULD HAVE BEGUN ALMOST THREE MONTHS EARLIER.

4. WAKE STONE CORPORATION DOES NOT EXPECT THE COMMISSIONERS TO HANDLE THEIR COMPETITION FOR THEM. HOWEVER, WE BELIEVE IT ONLY FAIR THAT ALL APPLICATIONS BY INDUSTRY BE HANDLED FAIRLY AND IN THE SAME MANNER, NOT IN A WAY WHICH CAN BE BYPASSED BY POLITICAL INFLUENCE OR PRESSURE. WE BELIEVE THE VOTERS, TAXPAYERS AND ALL CITIZENS WOULD EXPECT THE SAME MANNER OF CONDUCT.

After Oxholm created this Document, Commissioner Martin came by Oxholm's office and picked it up. Then, Oxholm and John

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Bratton, the President of Wake Stone, distributed the Document to Commissioners Robert Siler, Claude Mayo, and Tommy May. Oxholm also delivered copies to Marvin Pridgen, to an attorney for Nash County, James W. Keel, Jr., and to a citizen opposing the Martin Marietta zoning exemption, Kathy Smith. Commissioner Siler took responsibility for delivering the Document to Commissioners Billy Morgan, Kermit Richardson and James Odom.

On 2 April 1990, a public hearing was held, and the Board voted to zone the tract of land including the plaintiffs' proposed quarry site as A-1 Agricultural. Additionally, the Board voted to exclude Martin Marietta from a list of proposed non-conforming uses for this area. On 9 April 1990, Marvin Pridgen revoked Martin Marietta's land use permit, thereby preventing Martin Marietta from opening their quarry.

Subsequently, plaintiffs filed this suit for libel and unfair and deceptive trade practices against defendants alleging that defendants' statements in the Document were the proximate and direct cause of the Board's decisions to zone the land containing their proposed site for a quarry, to remove Martin Marietta from the proposed list of non-conforming uses, and to revoke Martin Marietta's land use permit.

Defendants filed their answer, claiming that their statements were true, that their statements constituted permissible expressions as opinions based on recited facts, and that their statements were covered by an absolute and qualified privilege, and they filed a motion for summary judgment. On 26 September 1991, the trial court granted defendants' motion for summary judgment. For the reasons stated below we affirm in part and reverse in part the decision of the trial court.

I.

Plaintiffs contend that the trial court erred in granting defendants' motion for summary judgment as to all of their claims. 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). "Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no

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recovery." *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 450, 315 S.E.2d 514, 516, *disc. review denied*, 311 N.C. 755, 321 S.E.2d 134 (1984). "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).

II.

[1] First, plaintiffs contend the trial court erred in granting defendants' motion for summary judgment on plaintiffs' libel claim. We disagree.

Summary judgment would be proper for defendants if they could show that plaintiffs could not prove the existence of an essential element of their claim or that plaintiffs could not surmount an affirmative defense which would bar the claim. Plaintiffs allege that defendants' statements in the Document constitute libel *per se* based on the argument that these statements impeach them in their trade or profession.

[A] publication is libelous *per se*, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession.

Ellis v. Northern Star Co., 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990); *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938).

Further, "[w]hether a publication is one of the type that properly may be deemed libelous *per se* is a question of law to be decided initially by the trial court." *Ellis, supra*. Additionally, "[i]n a libel action, the defamatory statements must be false in order to be actionable, and an admission of the truth of the statement is a complete defense." *Brown v. Boney*, 41 N.C. App. 636, 647, 255 S.E.2d 784, 791, *disc. review denied*, 298 N.C. 294, 259 S.E.2d 910 (1979).

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In their complaint, plaintiffs alleged that the statements in the Document accused Martin Marietta and John Long of "various improper, unlawful and unethical acts and practices allegedly undertaken to obtain the required permits to operate Martin Marietta's proposed Nash County quarry" and that these statements damaged plaintiffs' business relationships. Based on these allegations, plaintiffs contend the Document is defamatory on its face and constitutes libel *per se*. We do not agree.

"[D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.'" *Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 317-18, 312 S.E.2d 405, 409, *cert. denied*, 469 U.S. 858 (1984) (emphasis in original) (quoting *Flake*, 212 N.C. at 786, 195 S.E. at 60).

In determining whether these statements are susceptible of only one meaning and that this meaning is defamatory so as to constitute libel *per se*, this Court must look at how the ordinary person would understand these statements.

The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.

In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

Renwick, 310 N.C. at 318, 312 S.E.2d at 409 (quoting *Flake*, 212 N.C. at 786-87, 195 S.E. at 60).

When viewed within the "four corners" of the Document and stripped of all innuendo and explanatory circumstances, we cannot say that the statements are of such a nature that the court can presume as a matter of law that they tend to disgrace and degrade plaintiffs or hold them up to public hatred, contempt or ridicule,

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or cause them to be shunned and avoided. Further, they are not susceptible of only one meaning which meaning is defamatory as a matter of law.

Additionally, as to plaintiff John Long, the only reference to John Long in the Document is found in the statement:

IT SHOULD BE NOTED THAT THE PERMIT WAS SPECIALLY HANDLED BY STEVE CONRAD, BYPASSING TRACY DAVIS, AT THE REQUEST OF JOHN LONG, VICE PRESIDENT OF MARTIN MARIETTA AND A MEMBER OF THE NORTH CAROLINA STATE MINING COMMISSION. MR. CONRAD RETIRES FROM STATE GOVERNMENT ON FRIDAY, MARCH 30, 1990.

The ordinary reader could interpret this statement just as the plain words state, that Long merely requested a member of the DEHNR to personally handle the permit himself so that it would be processed correctly and efficiently. No accusation of "various improper, unlawful and unethical acts and practices" in the context of the Document appear clearly on the face of the Document as plaintiffs allege.

Thus, these statements are not so "obviously defamatory" so as to sustain plaintiffs' action for libel *per se*. See, *Morris v. Bruney*, 78 N.C. App. 668, 674, 338 S.E.2d 561, 565 (1986) ("A publication is defamatory *per se* . . . if its injurious or defamatory character is *clear and obvious* from the words alone.") (Emphasis added.); See also, *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 395, 159 S.E.2d 896, 899 (1968) (holding that "the statement that one's automobile liability insurance policy has been cancelled because of 'unfavorable [sic] personal habits' is not so obviously defamatory as to meet the requirements" of the test for libel *per se*).

Plaintiffs argue, however, that these statements constitute libel *per se* based on the holding in *Ellis, supra*. In *Ellis*, the plaintiff company was a food broker. As such, the company's function was "to convince large-quantity food buyers, such as hospitals and school systems, to place orders with the company's clients who are in the business of selling foods." *Ellis*, 326 N.C. at 221, 388 S.E.2d at 128. The defendant company was a potato processor for which the plaintiff company was a food broker.

Subsequently, the plaintiff company received defendant company's potato pricing information over the telephone, and *Ellis*, the sole full-time employee of plaintiff company sent a price list

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based on this information to several potential buyers. The senior vice-president in charge of sales for defendant company sent a letter to several of the buyers who had received this price list which stated:

We have recently received copies of a price list sent to you from [plaintiff company] regarding pricing on [defendant company's] products. These prices were noted for *bids only*, delivered by [defendant company].

We at [defendant company] did not authorize such a price list and therefore cannot honor the prices as quoted. . . .

Id. at 222, 388 S.E.2d at 129 (emphasis in original).

Plaintiff company and Ellis filed an action against defendant company and its senior vice-president for sales alleging that this letter constituted libel *per se* and an unfair or deceptive act affecting commerce under N.C. Gen. Stat. § 75-1.1. The trial court directed a verdict in favor of defendants on all but the libel claims, and the jury found that the defendants had maliciously libeled the plaintiff company but had not libeled Ellis. Defendants appealed.

Defendants argued that the letter was not defamatory at all or, alternatively, that it was susceptible of both defamatory and nondefamatory interpretations. Our Supreme Court held that the letter constituted libel *per se* and stated:

The language “[w]e at [defendant company] did not authorize such a price list,” taken in the context of the entire letter, can only be read to mean that [plaintiff company], acting in its capacity as broker for [defendant company], did an unauthorized act. Whether that act was publishing certain unauthorized prices within a price list or publishing the entire price list itself without authorization is of no import; either reading is defamatory and impeaches [plaintiff company] in its trade as a food broker.

Id. at 224, 388 S.E.2d at 130. Further, the Court held that “a libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, which will justify an award of damages under N.C.G.S. § 75-16 for injuries proximately caused” so long as plaintiffs are able to show they suffered actual injury. *Id.* at 226, 388 S.E.2d at 131.

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Unlike the language in the present case, the language in *Ellis* which the Court determined constituted libel *per se* directly charged that the plaintiff company had committed an unauthorized act, no matter how the language was interpreted, and it impeached the company in its business as a food broker by potentially affecting its business relationship with buyers. In the present case, the language in the Document does not directly charge plaintiffs with an unauthorized act, or with improper, unlawful or unethical acts or practices as plaintiffs alleged. Further, the record contains no evidence to show that the language in the Document "impeached" Martin Marietta in its business of mining.

Accordingly, we find that plaintiffs' reliance on *Ellis* is unfounded and affirm the decision of the trial court granting defendants' motion for summary judgment as to plaintiffs' claim for libel.

III.

[2] Plaintiffs also contend that the trial court erred by granting defendants' motion for summary judgment on plaintiffs' claim for unfair or deceptive trade practices. We agree.

At the outset we again note the standard for granting a summary judgment motion. Defendants would be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that [defendants are] entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c).

In the present case, the affidavits, depositions, and answers to interrogatories show that there is no genuine issue as to the following facts: On 1 December 1989, Martin Marietta filed an application for a state mining permit so that it could operate a rock quarry on land located in Nash County. On 26 February 1990, Steve Conrad, the Director of DEHNR, notified Martin Marietta that an environmental assessment was needed in order to review their application. On 23 March 1990, Assistant Attorney General Telfer sent a memorandum to Conrad stating that Martin Marietta was going to place a reclamation bond to cover any damage to the roads caused by it exceeding the posted weight limits and that these weight limits could be removed. Based on these statements, Telfer also stated that a permit could be issued to

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Martin Marietta without an environmental assessment. On 26 March 1990, Martin Marietta posted a reclamation bond.

Also on 26 March 1990, Acting Mining Specialist Tracy Davis sent a memorandum to Conrad with a proposed draft permit recommending that Martin Marietta's permit be approved with certain conditions. Davis noted that Martin Marietta had applied for an air quality permit and a NPDES (water discharge) permit but had not yet received them. The mining permit was issued the same day to Martin Marietta with the condition that Martin Marietta comply with the State water and air quality regulations. On 28 March 1990, Marvin Pridgen, the Nash County Planning Director, issued Martin Marietta a Land Use Permit.

Further, since approximately May 1989, at the request of the Nash County Board of Commissioners, a committee formed from the County Planning Committee had been considering zoning certain unzoned lands, including the land containing the proposed quarry site. By letter dated 3 January 1990, Martin Marietta asked the Office of County Planning to zone this area as heavy industrial mineral mining and processing. On 16 January 1990, the Nash County Planning Board held a hearing on the zoning issue where a representative of Martin Marietta and some other citizens spoke in favor of the quarry. Numerous other people, however, expressed their concerns about the rock quarry.

On 19 March 1990, the Planning Committee held another hearing on the zoning issue. At this hearing, Martin Marietta asked the Committee to recommend zoning the area containing the proposed quarry site as MI conditional use to operate a rock quarry. The Committee rejected this proposal. Martin Marietta did not own the property at this time. Subsequently, the Planning Committee recommended to the Board of Commissioners that this area be zoned as A-1 Agricultural and that Martin Marietta be removed from the list of non-conforming uses because all their permits had not been issued.

A regular meeting of the Board of Commissioners was scheduled for 2 April 1990, at which the Board was to consider the recommendation of the Planning Committee. Before this meeting, the Vice-President of Planning and Administration of Wake Stone, defendant Oxholm, prepared the Document set out previously and gave it to the Chairman of the Board. At the meeting of 2 April 1990, the Board voted to affirm the Planning Committee's recom-

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mendation and zoned the area containing the proposed quarry site as A-1 Agricultural. Further, the Board voted four to three to exclude Martin Marietta from the list of non-conforming uses. By letter dated 9 April 1990, Marvin Pridgen informed Martin Marietta of the Board's decision and revoked their land use permit, thereby preventing Martin Marietta from opening the quarry. Martin Marietta contends that defendants' act of submitting this Document to the Board constitutes an unfair and deceptive trade practice under N.C.G.S. §§ 75-1.1, -5(b).

N.C. Gen. Stat. § 75-1.1(a) states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-5(b)(3) states:

(b) In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do . . . any of the following acts:

. . .

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing, Inc. of North Carolina v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991).

"The concept of 'unfairness' is broader than and includes the concept of 'deception.'" *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous [sic], or substantially injurious to consumers." *Id.* "Specifically, [a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.'" *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 411-12, 380 S.E.2d 796, 808, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989) (citations omitted). Additionally, "[w]hether a particular act

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is unfair or deceptive is a question of law for the court." *Id.* at 411, 380 S.E.2d at 808.

In the present case, the president of Wake Stone, John Bratton, testified in his deposition that when he found out that Martin Marietta and another mining company were interested in quarry sites in Nash County, he was of the opinion that it would be difficult for the market in Nash County to support three new quarry operations. Further, he testified that he followed the process of plaintiffs' application for a permit by contacting the Land Quality Section of the DEHNR and asking about the status of plaintiffs' application.

Subsequently, when Bratton found out Martin Marietta had received its mining permit and that the Nash County Board of Commissioners was going to vote on the zoning of the proposed quarry site, he helped Oxholm prepare the Document. Further, Bratton testified that he delivered the Document to various Commissioners the Friday evening before the Board meeting on Monday where the Commissioners decided to zone the land containing plaintiffs' proposed quarry site as A-1 Agricultural and to exclude Martin Marietta from the list of non-conforming uses. Bratton helped prepare the Document and delivered it, even though Bratton testified in his deposition that he had no basis to believe that Martin Marietta had acted improperly in obtaining their state mining permit or to believe that John Long exerted any improper influence to obtain this permit.

In Oxholm's deposition, when asked whether he meant to indicate in the Document to the Commissioners of Nash County that Martin Marietta had bypassed ordinary procedures through political influence to obtain the mining permit, Oxholm stated:

I CAN SEE HOW THE READING OF IT COULD GIVE THE INDICATION. THE FACT OF THE MATTER IS IN OUR KNOWLEDGE OF MARTIN MARIETTA AND HOW THEY OPEN MANY NEW QUARRIES IS THAT THEY ARE VERY ACTIVE WITH LAW FIRMS WITH POLITICAL INFLUENCE, AND THAT IT WAS NOT UNUSUAL FOR THEM TO USE A VERY HIGHLY POLITICAL LAW FIRM IN THE LOCATIONS WHERE THEY WENT, WHICH THEY DID IN THIS CASE; AND THAT THE APPEARANCE OF THINGS THAT OCCURRED IN THE LAST WEEK AT THE LAND RESOURCES DIVISION WERE VERY UNUSUAL.

Based on these facts, we hold that there is a genuine issue of material fact as to whether defendants' act of submitting the

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Document to the Board was done in an attempt to willfully destroy or injure plaintiffs' business in Nash County and as to whether Wake Stone was attempting to eliminate any competition from Martin Marietta in Nash County. Thus, there are genuine issues of material fact as to whether defendants' act constituted an unfair or deceptive trade practice which was in commerce and proximately injured the plaintiffs. *See*, N.C. Gen. Stat. §§ 75-1.1, -5(b).

Accordingly, we reverse the order of the trial court granting defendants' motion for summary judgment on plaintiffs' unfair or deceptive trade practice claim.

Affirmed in part, reversed in part.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA v. DANNY BLACK

No. 9128SC841

(Filed 3 August 1993)

1. Evidence and Witnesses § 120 (NCI4th)— Rape Shield Statute—prior sexual conduct—exclusion of cross-examination

In a prosecution of defendant for an alleged series of sexual assaults involving his two stepdaughters, the trial court properly applied the Rape Shield Statute in refusing to permit defendant to cross-examine one stepdaughter concerning whether she had previously engaged in sexual intercourse with two specific persons where the stepdaughter testified at the *in camera* hearing that she had not had sex with either person, no evidence was offered to contradict her testimony, and there was thus no evidence of sexual activity the relevance of which the trial court was obligated to determine. N.C.G.S. § 8C-1, Rule 412.

Am Jur 2d, Rape §§ 55 et seq.

2. Evidence and Witnesses § 2973 (NCI4th)— fraud committed by witness—admissibility to show truthfulness—trial not affected by exclusion

In a prosecution of defendant for an alleged series of sexual assaults involving his two stepdaughters, the trial court's

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error in refusing to permit defendant to cross-examine the victims' mother concerning alleged fraud in her dealings with government assistance programs was not prejudicial, although the proffered evidence appeared to have been probative of the witness's truthfulness, since defendant presented no argument suggesting that exclusion of this evidence affected the outcome of the trial. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 563 et seq.**3. Evidence and Witnesses § 3106 (NCI4th)— witness's corroborative statement—"new information"—statement admissible**

The trial court did not err by allowing a detective to read a statement given by the assault victims' brother for the purpose of corroborating the brother's earlier testimony, even though the statement may have included "new" information, since the "new" material simply gave a further description of one victim's appearance at the time of two incidents involving defendant, and it tended to add credibility to, and in no way contradicted, the brother's trial testimony.

Am Jur 2d, Witnesses §§ 632 et seq.**4. Evidence and Witnesses § 755 (NCI4th)— defendant's use of marijuana—evidence erroneously admitted—error cured by defendant's subsequent testimony**

Even if the trial court erred in allowing a doctor who examined the sexual assault victim to testify that the victim told her that defendant used marijuana, such error was cured where defendant subsequently took the stand and testified to his use of and addiction to marijuana.

Am Jur 2d, Appeal and Error § 806.**5. Rape and Allied Offenses § 4 (NCI3d)— rape of stepdaughters—evidence of Accommodation Syndrome—admission harmless error**

In a prosecution of defendant for sexual assaults of his stepdaughters, the trial court erred in allowing a doctor who examined one victim to testify that she suffered from "Accommodation Syndrome," since the court gave no limiting instruction and the jury was allowed to consider this evidence for substantive as well as corroborative purposes; however, de-

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defendant failed to show that absent the error there was a reasonable probability that a different result would have been reached.

Am Jur 2d, Rape § 68.3.**6. Evidence and Witnesses § 2180 (NCI4th)— cross-examination of medical witness— use of prior medical records not allowed— no error**

In a prosecution of defendant for sexually assaulting his stepdaughters, the trial court did not err in refusing to allow defendant to utilize one victim's prior medical records in cross-examination of the State's expert medical witness, since defendant sought to question the witness with regard to the contents of data which the expert had never before contemplated or used in any way to formulate her opinion and which also was not contained in any recognized learned treatise; an expert cannot be examined concerning information contained in documents not used in formulating the expert's opinion; and, if defendant wanted information concerning the contents of the prior records and implications thereof to any current diagnosis of sexual abuse, defendant could have called his own expert witness. N.C.G.S. § 8C-1, Rules 703, 705.

Am Jur 2d, Expert and Opinion Evidence §§ 74 et seq.**7. Rape and Allied Offenses § 5 (NCI3d)— second-degree rape— stepfather's authoritative position— victims' fear— sufficient showing of constructive force**

The trial court did not err in denying defendant's motion to dismiss the charges of second-degree rape, since evidence of the victims' fear of defendant combined with defendant's authoritative position as a stepparent would allow a jury reasonably to infer that defendant used his position of power to enforce his stepdaughters' participation in the sexual acts, thereby satisfying the element of constructive force.

Am Jur 2d, Rape § 4.**8. Rape and Allied Offenses § 6 (NCI3d)— second-degree rape— instructions on force proper**

In a prosecution of defendant for sexual assaults on his stepdaughters, the trial court's instruction to the jury on the element of force needed to support the charges of second-

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degree rape was proper where the instruction indicated that the jury "may find" the existence of constructive force in intrafamilial situations, and the jury was properly informed that it could not find defendant guilty of rape unless it also found that (1) the victims did not consent and (2) the sexual intercourse was against the victims' will.

Am Jur 2d, Rape § 7.

Appeal by defendant from judgments entered 6 March 1991 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James E. Magner, Jr., for the State.

Public Defender J. Robert Hufstader, by Assistant Public Defender Robert W. Clark, for defendant-appellant.

JOHN, Judge.

Defendant appeals the following convictions arising from an alleged series of sexual assaults involving his two step-daughters: (1) three counts of second degree rape; (2) three counts of incest; (3) three counts of taking indecent liberties with children; and (4) one count of crime against nature. After examining defendant's multiple assignments of error, we hold the trial court committed no prejudicial error.

The State's evidence tended to show defendant and the victims' mother began living together in 1975 and were married in 1978. The younger victim, Ms. B, who was fifteen years old at trial, testified defendant had vaginal intercourse with her in both the summer of 1989 and March of 1990. On each occasion, Ms. B went either to defendant's room or to the basement where defendant instructed her to take off her clothes and then had sexual intercourse with her. When Ms. B told defendant during the 1989 incident, "Danny, that hurts," he replied "[t]ake it like a woman." With regards to the 1990 occasion, defendant directed Ms. B's little brother to act as a lookout and make sure no one came in. Ms. B further testified concerning instances of anal intercourse while she was menstruating and instances of defendant placing his finger in her vagina. Ms. B stated that she was afraid of defendant, that defendant hit her when she informed him that she was going to

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tell someone, and that he threatened “[i]f anyone ever tried to have him sent to prison, that he would kill them or have them killed.”

The older victim, Ms. T, was twenty years old at the time of trial and testified defendant began sexually assaulting her when she was around six years old. In June of 1987, while other family members were absent, defendant ordered Ms. T to remove her clothes, whereupon he had sexual intercourse with her and ejaculated on her stomach. Regarding her fear of defendant, Ms. T stated, “I’ve been scared of him all my life. . . . He would just throw violent fits and stuff, punch holes in the walls, all kinds of stuff.” On more than one occasion Ms. T advised her mother of defendant’s conduct, but defendant convinced her mother nothing had happened or instructed Ms. T to tell her mother that she had lied.

Karen Black, the victims’ mother, testified Ms. T told her more than once that defendant was “messing” with her. Ms. Black further testified she received a phone call from defendant in March of 1990 in which he admitted “all of the stuff that [her daughters] had said he did.”

The victims’ stepbrother, who was fourteen years old at trial, testified his father had been alone with Ms. B in the basement, in defendant’s bedroom, and in the woods near a “transfer station.” On one occasion, defendant ordered him to watch for his mother and call out when she returned home.

Judy A. Hensley, a detective with the Asheville Police Department, testified she investigated the charges against defendant and interviewed the parties involved. Hensley was also permitted, for corroborative purposes, to read statements from each victim and from their stepbrother.

Dr. Andrea Gravatt, a pediatrician and Child Medical Examiner, was accepted as an expert witness in pediatrics as well as in the diagnosis and treatment of child sexual abuse. Dr. Gravatt testified she examined Ms. B on 20 March 1990 at the request of a social worker. Prior to the physical examination, Dr. Gravatt was informed by Ms. B that defendant had sexually abused her. The vaginal examination of Ms. B was conducted in part with the use of an adult size speculum, unusual considering her age, and Ms. B also exhibited diminished rectal tone, a condition consistent with a history of anal intercourse. Dr. Gravatt stated her opinion that

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the victim exhibited behavioral characteristics indicative of sexual abuse, as well as of Sexual Abuse Accommodation Syndrome, a phenomenon common in sexually abused children.

Defendant testified on his own behalf and denied the allegations against him. He also presented several witnesses who asserted he was a truthful person. The State presented rebuttal evidence tending to show defendant was not truthful.

I.

[1] By means of his first assignment of error, defendant contends the trial court erred by refusing to permit him to cross-examine Ms. B concerning whether she had previously engaged in sexual intercourse with either Clifton Stines or Frankie Orr. This contention is without merit.

The use of an alleged rape victim's prior sexual behavior as evidence is governed by North Carolina's Rape Shield Statute, N.C.R. Evid. 412. This statute was designed to protect the complainant from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from admitting evidence of sexual conduct which has little relevance. *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982). Under procedures mandated by this statute, the proponent of such evidence (herein, the defendant) must first apply to the trial court for a determination of the relevance of the complainant's sexual behavior. Rule 412(d). The trial court is then required to "conduct an *in camera* hearing . . . to consider the proponent's *offer of proof* and the argument of counsel . . ." Rule 412(d) (emphasis added).

Ms. B was the sole witness at the *in camera* hearing and she denied having sexual intercourse with both Stines and Orr. Although defendant's counsel asserted that Stines would testify to the contrary, Stines never testified nor was any other evidence offered to contradict Ms. B's testimony. Under these circumstances, the trial court properly refused to allow defendant to question Ms. B before the jury regarding her sexual relations with these men. Rule 412(d) contemplates that the party desiring to introduce evidence of a rape complainant's past sexual activity must *offer some proof* as to both the existence of such activities and the relevancy thereof. Since Ms. B's *denial* constituted the only "evidence" on this point, there was *no evidence of sexual activity*

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the relevance of which the trial court was obligated to determine. *See State v. Degree*, 322 N.C. 302, 306, 367 S.E.2d 679, 682 (1988). The type of cross-examination attempted by defendant is precisely that which Rule 412 was intended to prohibit and the trial court correctly applied the Rape Shield Statute. *Id.*

II.

[2] Defendant next argues the trial court erred by refusing to permit him to cross-examine Karen Black concerning alleged fraud in her dealings with government assistance programs. According to defendant, this line of questioning relates to a specific instance of misconduct involving deceit and therefore cross-examination was proper under N.C.R. Evid. 608(b). We agree that prohibiting cross-examination on this matter was error, but hold it to be non-prejudicial.

Rule 608(b) permits questioning of a witness with respect to specific instances of conduct (as opposed to opinion or reputation evidence) in the narrow situation where:

- (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates [her] character for truthfulness or untruthfulness; and
- (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination*.

State v. Morgan, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986) (emphasis in original). Even where these four criteria are established, the trial court may, in its discretion, exclude the proffered evidence if it determines that the risk of unfair prejudice substantially outweighs the probative value. *Id.* at 634, 340 S.E.2d at 90. Even where the trial court improperly excludes certain evidence, moreover, a defendant is not entitled to a new trial unless he can establish prejudice as the result of this error. *State v. Easterling*, 300 N.C. 594, 605, 268 S.E.2d 800, 807 (1980). The test for prejudicial error is whether a different result would have been reached if the error had not been committed. N.C.G.S. § 15A-1443(a) (1988).

Although the proffered evidence appears to have been probative of the witness' truthfulness, and even assuming the trial court erred by refusing to allow cross-examination, defendant has presented no argument suggesting that exclusion of this evidence

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affected the outcome of the trial. Moreover, we determine that it did not.

III.

[3] Defendant next maintains the trial court erred by allowing Detective Hensley to read a statement given by the victims' brother for the purpose of corroborating the brother's earlier testimony. Defendant argues he was prejudiced because the statement was in fact not corroborative. While we observe defendant has properly preserved his objection by specifically objecting to the allegedly incompetent portions of the detective's testimony, *see State v. Benson*, 331 N.C. 537, 548-49, 417 S.E.2d 756, 763-64 (1992), we nonetheless find his argument unpersuasive.

For the prior statement of a witness to be admissible for purposes of corroboration, it is not required that the earlier version be a mirror reflection of the account given by the witness at trial. "Corroborative" has been defined by our Supreme Court as meaning "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Higginbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985) (quoting *State v. Case*, 253 N.C. 130, 135, 116 S.E.2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed.2d 707 (1961)). A prior statement thus is corroborative if it tends to add weight or credibility to the testimony of the witness in court, *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986), and is substantially similar to the in-court testimony. *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). Additional or "new" information may even be introduced so long as it (1) tends to add weight or credibility to the witness' in-court testimony and (2) does not contradict this testimony. *State v. Ramey*, 318 N.C. at 469, 349 S.E.2d at 573-74.

The victims' step-brother testified *at trial* that he had once observed defendant and Ms. B go into the woods near the transfer station and that upon returning Ms. B "just [got] in the car." He further testified that on another occasion he witnessed Ms. B and defendant go into either the basement or defendant's bedroom, that defendant told him to yell if his mother returned, and that Ms. B's only response upon returning was to bite her nails. Review of this witness' *prior statement* as testified to by Hensley reveals only two instances of "new" information: (1) Ms. B was dusting off her skirt when she returned from the woods near the transfer station and (2) Ms. B was "sniffing as though she had been crying"

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on the occasion that defendant told him to watch for the victims' mother. This "new" material further describes the appearance of Ms. B at the time of the two incidents, tends to add credibility to, and in no way contradicts the step-brother's trial testimony. Therefore the trial court did not err in admitting this prior statement.

IV.

[4] Defendant further asserts he is entitled to a new trial because the trial court erroneously permitted Dr. Gravatt to testify Ms. B told her defendant used marijuana. We disagree.

Assuming *arguendo* that the trial court improperly allowed this comment during direct examination by the State, any error was cured by defendant's subsequent testimony. After the State rested, defendant took the stand and testified on direct examination to his use of and addiction to marijuana. He thus waived any objection to previous testimony on this same matter. *State v. Walker*, 54 N.C. App. 652, 655, 284 S.E.2d 155, 157-58 (1981).

V.

[5] Defendant next contends the trial court erred by allowing Dr. Gravatt to state that in her opinion Ms. B suffered from "Accommodation Syndrome." Defendant's contention is valid, however we hold this error to be non-prejudicial.

In *State v. Stallings*, 107 N.C. App. 241, 419 S.E.2d 586 (1992), this Court held that evidence of Accommodation Syndrome is inadmissible as *substantive evidence* to show that a first degree sexual offense had occurred. Citing the recent North Carolina Supreme Court decision of *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), this Court noted two difficulties exist in admitting such evidence. *First*, Accommodation Syndrome is not designed to determine if a child has in fact been abused; rather it assumes abuse has occurred. *Second*, there is potential for prejudice because the jury may accord too much weight to experts who voice medical conclusions "which [are] drawn from diagnostic methods having limited merit as fact-finding devices." *State v. Stallings*, 107 N.C. App. at 251, 419 S.E.2d at 592. Both *Hall* and *Stallings*, each decided after defendant's trial, indicate that while testimony of Accommodation Syndrome is not admissible as substantive evidence, it may be admitted for corroborative purposes, *provided*: the trial court determines (1) it should not be excluded under N.C.R. Evid. 403 *and* (2) this evidence would be helpful to the jury pursuant to

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N.C.R. Evid. 702. If admitted for corroborative purposes, the jury *must* be given a limiting instruction. *State v. Stallings*, 107 N.C. App. at 250, 419 S.E.2d at 592.

The court below gave no limiting instruction and therefore the jury was allowed to consider this evidence for substantive as well as corroborative purposes. Although this was error, defendant, like the defendant in *Stallings*, has failed to show that absent the error, there is a reasonable probability that a different result would have been reached. See G.S. 15A-1443(a). We observe the Accommodation Syndrome testimony related only to Ms. B. Excluding this inadmissible evidence, the jury's verdict was supported by the testimony of Ms. B, several witnesses who corroborated her account of the events, as well as medical and physical evidence of sexual abuse.

VI.

[6] Defendant also alleges the trial court erred by not permitting him to cross-examine Dr. Gravatt, the State's expert, with regards to defendant's exhibits 1 and 2. These exhibits were records of physical examinations of Ms. B conducted at ages five and nine; Dr. Gravatt did not review these records in formulating her opinion regarding sexual abuse. Defendant argues that since the information contained in these records could have had some bearing upon Dr. Gravatt's opinion, she should have been allowed to review this evidence and then explain how it would affect her opinion. We are not persuaded by defendant's argument.

N.C.R. Evid. 703 provides that the facts or data upon which an expert bases her opinion may be those (1) perceived by the witness or (2) made known to her at or before the hearing. The expert's opinion may even be based upon facts not otherwise admissible in evidence, provided the facts so considered are of the type reasonably relied upon by similar experts in forming opinions on the subject. *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988).

N.C.R. Evid. 705 mandates that the expert must disclose *the underlying facts or data which form the basis of her opinion* on cross-examination if so requested. Wide latitude is generally given to a cross-examiner in his attempts to discredit the expert witness, including questioning the expert in order to show that the facts

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or data forming the basis of the expert's opinion were incomplete. See 2 Gard, *Jones on Evidence* § 14:30 (1972).

McCormick, in his treatise on evidence, delineates the proper scope of cross-examination of an expert witness:

On cross-examination . . . opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect the expert's opinion. Similarly the expert may be cross-examined with respect to material *reviewed by the expert* but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry . . . the cross-examiner is not limited to facts finding support in the record. *It is, however, improper to inquire of the expert whether his opinion differs from another expert's opinion, not expressed in a learned treatise, if the other expert's opinion has not itself been admitted in evidence.* An expert witness may, of course, be impeached with a learned treatise, admissible as substantive evidence under Fed.R.Evid. 803(18). A hypothetical question may be employed upon cross-examination in the court's discretion.

McCormick, *McCormick on Evidence* § 13 (1992) (emphasis added).

In accordance with the aforementioned principles, the trial court properly allowed Dr. Gravatt to testify that she had learned of Ms. B's prior medical treatment at the Buncombe County Health Department; that she had never examined the records therefrom; and that in formulating similar opinions regarding other child patients, she often relied upon medical reports of other health care providers. In addition, on cross-examination defendant was permitted to elicit the following concessions from Dr. Gravatt:

Q. I'll ask if the giving of a physical exam of a child approximately two years after she has allegedly had sexual abuse

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would assist you in reaching your opinion as to whether such a child was sexually abused?

. . . .

A. Yes

Q. I'll ask if . . . at the time when [Ms. B] would have been nine years and ten months old, a physical examination and other medical investigation of this child would assist you in your confirming of your opinion or weakening of your opinion?

. . . .

A. It may.

. . . .

Q. If you were aware that from age three to age fifteen or so [Ms. B] had been seen by other health professionals and questioned about behavioral changes or difficulties and examined physically, that you would want to review that prior to giving an opinion as a scientific expert regarding her sexual abuse and the length of time it went on?

. . . .

A. Yes.

. . . .

Q. I'll ask you if by age nine years ten months you were to learn that [Ms. B] was asked about . . . behavioral changes . . . would that assist you in reaching your opinion as to whether or not she had been abused around [the] age of nine years and ten months?

. . . .

A. Yes

Defendant, however, desired to do more than cross-examine the State's expert concerning the facts and data upon which her opinion was based, or to utilize counter-hypotheticals to point out overlooked sources of information. Contrary to Professor McCormick's rules, defendant sought to question her with regard to *the contents of data which the expert had never before contemplated nor used in any way to formulate her opinion, and which*

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also was not contained in any recognized learned treatise. Defendant cites no authority in support of such a procedure, and we decline to countenance it.

Moreover, there exists authority contrary to defendant's position. The Fifth Circuit Court of Appeals has consistently held an expert may not be examined concerning information contained in documents not used in formulating the expert's opinion. *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1055-56 (5th Cir. 1981) (error to permit cross-examination of an expert by use of a particular report unless defendant established that the expert had relied on the report); *Bryan v. John Bean Division of FMC Corp.*, 566 F.2d 541, 545-47 (5th Cir. 1978) (error to allow cross-examination of expert by reading from reports of two non-testifying experts since the examination constituted the "hearsay opinion of an expert not subject to cross-examination"). See also *Box v. Swindle*, 306 F.2d 882, 886-87 (5th Cir. 1962).

Finally, we observe that although defendant subsequently introduced these exhibits during presentation of his evidence and although the record reflects at least one of the health care providers involved in the preparation of the reports was still employed by the local Health Department, defendant did not call an expert witness of his own. Such a witness could have testified regarding the contents of the reports or the implications thereof to any current diagnosis of sexual abuse, and indeed could have offered an opinion contrary to that of the State's expert. Defendant, however, failed to present any such expert testimony.

Based on the foregoing, we hold the trial court did not err in refusing to allow defendant to utilize Ms. B's prior medical records in cross-examination of the State's expert witness.

VII.

[7] In his next assignment of error, defendant maintains the trial court erred by denying his motion to dismiss the charges of second degree rape as to each victim. He insists the State failed to present sufficient evidence of "force," specifically of "constructive force," necessary to sustain a conviction under N.C.G.S. § 14-27.3. We disagree.

Upon review of a defendant's motion to dismiss for insufficient evidence, the evidence must be taken in the light most favorable to the State, and the State is entitled to every reasonable inference

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to be drawn therefrom. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). A person may be convicted of second degree rape where he engages in vaginal intercourse with another person "[b]y force and against the will of the other person." G.S. § 14-27.3(a)(1). The requisite force may be either *actual*, or *constructive* in nature. *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). Constructive force is demonstrated where there are threats or other actions on the part of the defendant which compel the victim's submission to vaginal intercourse. *Id.*

According to defendant, constructive force is present only where there is evidence that the threats or displays of force were made for *the specific purpose of compelling the victim's submission to sexual intercourse*. In sum, he argues that the State must prove some "nexus" between these prior acts of violence and the victim's "meek submission" to sexual acts. Defendant's argument might have merit if *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984), governed this case.

In *Alston*, it was held "absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, . . . general fear was not sufficient to show that the defendant used the force required to support a conviction of rape." *Id.* at 409, 312 S.E.2d at 476. However, our Supreme Court, observing that "[s]exual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse," *State v. Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681, has since determined that the *Alston* "general fear" rationale is inapplicable to an intrafamilial sexual abuse case involving children. In these situations, constructive force may be inferred from *circumstances surrounding the parent-child relationship* which indicate that the child acquiesced rather than risk the parent's wrath. *Id.* at 47-48, 352 S.E.2d at 681-82. "The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *State v. Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681. Under these conditions, "the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces." *Id.* at 48, 352 S.E.2d at 682.

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Moreover, while *Etheridge* dealt with a parent and a natural child, this Court has applied the constructive force doctrine enunciated therein to a circumstance where defendant was the live-in boyfriend of the victim's mother and participated in a simulated parent-child relationship. *State v. Morrison*, 94 N.C. App. 517, 522-23, 380 S.E.2d 608, 611-12, *disc. review denied*, 325 N.C. 549, 385 S.E.2d 507 (1989). Similarly, in the present case, defendant and the victims lived in the same household and in a parent-child relationship for several years.

In ruling on the sufficiency of the evidence of constructive force in *Etheridge*, the Supreme Court noted that in the incident charged defendant merely said "do it anyway" when his son initially refused to disrobe. *State v. Etheridge*, 319 N.C. at 48, 352 S.E.2d at 681. However, because abuse of the victim began at age eight and all such incidents occurred while the child lived as an unemancipated minor in his father's household, subject to parental authority and threats of discipline, "the state presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts." *Id.* at 48, 352 S.E.2d at 682.

In the case *sub judice*, defendant allegedly began abusing both step-daughters at an early age, and both testified they were afraid of defendant. Ms. B further testified defendant told her he would kill anyone who tried to have him sent to prison. According to Ms. B, during the summer of 1989 defendant "got" her from the swimming pool, "took" her back to the house, "told" her to go into either his room or the basement, and "told" her to take her clothes off and to lay down, at which time he had sexual intercourse with her. During this incident Ms. B complained "that hurts", and defendant placed his hand over her mouth and said "[t]ake it like a woman." She also testified that once when she was "little" she threatened "to tell" and defendant hit her. Ms. B stated defendant was "frightening," that "he was supposed to be my father," and explained she did not confide in a school worker "[b]ecause I was scared he was going to hurt me."

Ms. T testified as to several incidents of sexual abuse, beginning around age six. On one occasion in June of 1987, defendant locked the doors to the house, "told" Ms. T to take off her clothes and then had sexual intercourse with her. After concluding, he "told" her to unlock the door. Ms. T stated she complied with

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defendant's requests because she was "scared" and "[b]ecause he was so mean. He was crazy." According to Ms. T, defendant was prone to throwing violent fits. Further, when she revealed defendant's actions to her mother, he yelled at her and "made" her say she had lied.

The foregoing circumstances are indicative of the victims' rational fear of their step-father. Based on this fear combined with defendant's authoritative position as a step-parent, a jury could "reasonably infer that defendant used his position of power," to force his step-daughters' participation in the sexual acts—thereby satisfying the element of "constructive force." *State v. Etheridge*, 319 N.C. at 48, 352 S.E.2d at 682. Accordingly, the trial court did not err by denying defendant's motion to dismiss the charges of second degree rape.

VIII.

[8] Lastly, defendant contends the trial court erred by instructing the jury on the element of force needed to support the charges of second degree rape. This argument is without merit.

The trial court instructed:

The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force. And by force and against her will can include constructive force in the form of fear, fright or coercion. You may find that the youth and vulnerability of children, coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the defendant's purpose.

Contrary to defendant's assertion, this instruction does *not* mandate that *all instances* of sexual intercourse between parent and child will constitute "rape." *First*, the instruction indicates the jury "*may find*" the existence of constructive force in intrafamilial situations. *Second*, the jury was also properly instructed that they could not find defendant guilty of rape *unless they also found* (1) the victims did not consent *and* (2) the sexual intercourse was against the victims' will. Further, as we have indicated in discussing defendant's previous assignment of error, the trial court's instruction on constructive force accurately reflected existing North Carolina

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law and was supported by the evidence presented. *See* discussion of *State v. Etheridge* and *State v. Morrison*, *supra*.

Having fully examined each of defendant's arguments, we find no prejudicial error.

No error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. TROY NEWTON OWEN

No. 9229SC1065

(Filed 3 August 1993)

- 1. Criminal Law § 648 (NCI4th)— motion to dismiss at close of State's evidence— evidence introduced by defendant— failure to renew motion— waiver of right to appeal issue**

Where defendant introduced evidence after the State rested its case, he waived his motion for dismissal of the first-degree burglary charge made at the close of the State's evidence, and defendant's failure to renew his motion to dismiss at the close of all evidence constituted waiver of his right to appeal this issue. N.C. R. App. P. 10(b)(3).

Am Jur 2d, Appeal and Error §§ 545 et seq.

- 2. Evidence and Witnesses § 1274 (NCI4th)— waiver of rights— voluntariness— understanding— sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that defendant's waiver of his rights was freely, voluntarily, and understandingly made where the evidence tended to show that defendant indicated that he had read the waiver of rights; a detective in the sheriff's department read the waiver to defendant; defendant twice indicated that he understood it; there was no indication that defendant was confused about his rights or that he was under the influence of any drugs or alcohol; and the detective indicated that, though defendant appeared nervous, he was also responsive and able to communicate. Furthermore, though defendant had been hospitalized numerous times for mental problems and had been

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diagnosed as schizophrenic prior to the incidents which gave rise to these charges, there was not enough evidence to dispel the overall impression that defendant was alert, understood his rights, and had the mental capacity to waive them.

Am Jur 2d, Criminal Law §§ 633, 638.

3. Assault and Battery § 100 (NCI4th)— self-defense—defendant at fault in bringing on affray—no instruction required

Defendant was not entitled to an instruction on self-defense when he entered the victims' house and bedroom without permission and thus was at fault in starting the conflict, and defendant did not attempt to withdraw from the fight with the victim or attempt to communicate his desire to withdraw.

Am Jur 2d, Assault and Battery §§ 69 et seq.

4. Assault and Battery § 116 (NCI4th)— assault with deadly weapon with intent to kill—sufficiency of evidence of intent to kill

In a prosecution of defendant for assault with a deadly weapon with intent to kill, the trial court did not err in failing to submit to the jury the lesser-included offense of assault with a deadly weapon, since defendant was not entitled to the instruction on the lesser offense if the element of intent to kill was shown by the evidence; in this case, it was uncontroverted that defendant took a knife into the victims' house, threw one victim to the floor and held the knife to his throat; defendant threatened to kill the victim; and the knife was removed from the victim's throat only when the victim grabbed it and broke the blade.

Am Jur 2d, Assault and Battery §§ 48 et seq.

5. Burglary and Unlawful Breakings § 164 (NCI4th)— first-degree burglary—larceny as underlying felony—insufficiency of evidence

In a prosecution of defendant for first-degree burglary based on the underlying crime of larceny, the trial court erred in refusing to submit to the jury the lesser included offense of misdemeanor breaking and entering, since there was substantial evidence in the record to support defendant's contention that he did not have the intent to commit larceny when he broke and entered the premises, but instead broke and entered

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with the intent to retrieve his shotgun which he had earlier seen in the victims' house.

Am Jur 2d, Burglary §§ 44 et seq.

Appeal by defendant from judgments entered 29 May 1992 in Transylvania County Superior Court by Judge Zoro J. Guice, Jr. Heard in the Court of Appeals 7 July 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Francis W. Crawley, for the State.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, and Richard N. Adams, for defendant-appellant.

GREENE, Judge.

Troy Newton Owen (defendant) appeals from judgments and commitments, following jury verdicts, to terms of life imprisonment for first-degree burglary pursuant to N.C.G.S. § 14-51 and ten years imprisonment for assault with a deadly weapon with intent to kill pursuant to N.C.G.S. § 14-32.

Defendant was indicted for first-degree burglary based on the underlying crime of larceny, and assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tends to show that Kenneth McCall (Kenneth) and Angela McCall (Angela), husband and wife (the McCalls), were friends of defendant and defendant had visited them at their house on numerous occasions. Defendant entered the rear door of the McCalls' house during the early morning hours of 1 October 1991, while it was still dark. Prior to the time the McCalls retired on the previous evening, all of the doors and windows of the house were locked, with the exception of the rear door, which was closed. The McCalls had not given anyone permission to enter their house that night.

After defendant entered the house, Angela heard a noise and awakened Kenneth. Kenneth got out of bed and came face-to-face with defendant, whose voice Kenneth recognized when defendant said "I want my shotgun." Defendant began pushing and wrestling with Kenneth, and the altercation moved from the bedroom into the hallway and finally into the living room. Eventually, defendant subdued Kenneth and held him face down on the living room floor with a knife to his throat. Angela then emerged from the bedroom, and upon seeing her husband with the knife at his throat, moved

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toward a gun cabinet in the living room. Defendant then told Kenneth "if she gits [sic] the gun, you're dead." Angela then ran out of the house seeking help. At that point Kenneth grabbed the knife, which was still pressed to his throat, and in his attempt to push the knife away, broke the blade. Kenneth's hand was cut when he grabbed the knife. Defendant continued to hold Kenneth down and pull his hair for several minutes afterward. Meanwhile, Angela had sought help from J. B. Owen (Owen). When Owen and Angela entered the house, defendant released Kenneth, ran to his car and left. After defendant left, Kenneth discovered that items in the pockets of his pants, which he had left on the living room couch before going to bed the previous evening, were on the living room floor. Nothing was taken from the house.

Later in the day, after warrants for defendant's arrest were issued, defendant was brought to the office of Transylvania County Detective Keith Fisher (Fisher). Prior to questioning defendant, Fisher gave him a copy of the Transylvania County Sheriff's Department Interrogation Rights Waiver form. Fisher testified that defendant appeared calm, had no odor of alcohol about his person, and was able to communicate with Fisher "quite well." Defendant read the waiver form, and Fisher then read the form to defendant and explained it to him. Initially, Fisher felt that "[defendant] did not understand the Waiver portion of the rights and asked me to read and explain that to him again." Subsequently, defendant "indicated that he understood his rights and the Wiaver [sic] and signed the Rights Waiver." The State moved to play the taped interview for the jury.

The trial court conducted a voir dire to determine the admissibility of the tape. Examination of Fisher revealed that Fisher explained "either all or portions of" the waiver to the defendant twice, and that, although defendant appeared nervous, "he was normal. He was responsive, polite." The trial court found that defendant was properly advised of his rights and that he "freely, voluntarily and understandingly waived those rights" and concluded that the taped interview was admissible.

On the tape defendant stated that he drove to the McCalls' house, and upon arriving, took a knife from his vehicle and placed it in his back pocket. Defendant stated that the McCalls did not invite him in, but he entered a rear door anyway and called Kenneth's name several times. When Kenneth awakened and jumped out of

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bed, he was wearing his pants. Defendant asked Kenneth "where's my shotgun?" Kenneth "started for" a gun, and defendant and Kenneth scuffled on the living room floor, where defendant "got him down" but did not place the knife to Kenneth's throat. Defendant did not pull the knife out until "[Angela] started for the gun, then I come out and pulled [the knife]." Defendant told Kenneth "if she gets a gun, you're dead." When asked why he entered the McCalls' house, defendant stated "[t]o git [sic] my shotgun and ask [Kenneth] what was he doing with it in the first place." During the interview defendant made a brief, rambling reference to a hostile confrontation, apparently between himself and Kenneth, which had taken place several months prior to 1 October 1991. At the close of the State's evidence, defendant made a motion to dismiss, which was denied.

Defendant's evidence consisted of his testimony at trial, which was substantially the same as his statement given to Fisher, but also included a claim by defendant that he "did not go there intentionally that morning to hurt [Kenneth]. I just wanted my shotgun and wondered why it was at his house." Defendant had seen the shotgun at the McCalls' house on an earlier visit.

Further testimony from defendant's witnesses indicated that he has had numerous psychiatric hospitalizations, and had been diagnosed as schizophrenic. Defendant failed to renew his motion to dismiss at the end of all evidence.

Defendant's counsel requested that the jury be instructed on misdemeanor breaking and entering, assault with a deadly weapon, and self-defense. These requests were denied. The trial court instructed on first-degree burglary, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill. The jury returned verdicts of guilty of first-degree burglary and assault with a deadly weapon with intent to kill.

The issues presented are whether (I) defendant has waived his right to assert the trial court's denial of his motion to dismiss the charge of first-degree burglary on appeal; (II) defendant's waiver of his right against self-incrimination was effective; (III) the trial court erred in failing to instruct the jury on self-defense; and (IV) the trial court erred in failing to submit to the jury the issues

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of (A) assault with a deadly weapon and (B) misdemeanor breaking and entering.

I

[1] Defendant first argues that the trial court erred in failing to grant his motion to dismiss the charge of first-degree burglary made at the close of the State's evidence, as the State had not proven two of the necessary elements of first-degree burglary; first, that the breaking and entering alleged occurred at night; and, second, that defendant intended to commit a felony or larceny when he entered the McCalls' house. Defendant, however, introduced evidence after the State rested its case, thereby waiving his motion for dismissal. N.C. R. App. P. 10(b)(3) (1993). "Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal." *Id.* Defendant may preserve his right to appeal after such waiver by making a motion to dismiss at the close of all evidence, *id.*, but defendant failed to do so, and accordingly, defendant's right to appellate review on this issue is waived.

II

Defendant next contends that the trial court erred in admitting the incriminating statements in defendant's taped interview with Fisher into evidence because defendant indicated that he did not understand the waiver of his constitutional right against self-incrimination, and, in the alternative, that defendant's mental condition was such that he could not voluntarily consent to waive his rights.

[2] After having been advised of his constitutional rights, an accused may waive them if the waiver is voluntarily, knowingly, and intelligently made. *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979). When the admissibility of statements made pursuant to such a waiver is questioned, the trial court must conduct a voir dire hearing to determine whether the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), have been met. *See State v. Waddell*, 34 N.C. App. 188, 191, 237 S.E.2d 558, 560-61 (1977). At the conclusion of the voir dire, the trial court should make findings of fact in support of its ruling. *State v. Wade*, 55 N.C. App. 258, 259, 284 S.E.2d 758, 759-60 (1981). The trial court's findings "will not

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be disturbed on appeal if there is any competent evidence [in the record] to support them.” *Id.* at 260, 284 S.E.2d at 760.

The trial court conducted a voir dire, and found that defendant’s waiver of his rights was freely, voluntarily, and understandingly made. There is ample evidence in the record to support this finding. Although it is true that Fisher did make a statement that he initially had a concern as to whether defendant understood the waiver, Fisher indicated that he explained the waiver to defendant a second time, and that he was then satisfied that defendant understood it. A review of the taped interview reveals that defendant indicated that he had read the waiver, that Fisher also read the waiver to defendant, and that defendant twice indicated that he understood it. There was no indication that defendant was confused about his rights or that he was under the influence of any drugs or alcohol. Although Fisher testified that defendant appeared nervous, he also indicated that defendant was responsive and able to communicate. This evidence amply supports the trial court’s findings.

Defendant further contends that his mental state was such that an effective waiver of his rights was impossible. The record reveals that defendant had been hospitalized numerous times for mental problems, and that he had been diagnosed as schizophrenic prior to the incidents which gave rise to the charges. Evidence that a defendant is mentally disturbed is pertinent to a determination of whether a defendant’s waiver is effective, but “[p]ast indicia of mental instability are not necessarily dispositive on this issue.” *State v. Vickers*, 306 N.C. 90, 97, 291 S.E.2d 599, 604 (1982) (citation omitted), *overruled on other grounds*, *State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993). Rather, the defendant’s condition at the time the waiver was made will be considered. *See id.*

A review of defendant’s statement to Fisher reveals that he was able to understand and answer questions, appeared calm, and that, for the most part, defendant seemed lucid. Defendant was able to ask questions when he did not understand the inquiries made by Fisher. Defendant points to a short passage in the statement in which defendant appears to ramble about an incident which occurred several months prior to the incident which led to the charges against defendant. While defendant is correct in stating that this portion of the statement indicates some confusion on defendant’s part, it is not enough to dispel the overall impression

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that defendant was alert, understood his rights and had the mental capacity to waive them.

Accordingly, the trial court's finding of fact that defendant voluntarily, knowingly, and intelligently waived his rights is supported by competent evidence in the record, and that finding will not be disturbed.

III

[3] Defendant next argues that the trial court erred in refusing to give his requested jury instruction on self-defense. Defendant seeks a self-defense instruction based on his own testimony that, after he had entered the McCalls' house armed with a knife and without the McCalls' permission, Kenneth, upon seeing the defendant in his bedroom, "was tryin' [sic] to go for his gun . . . [and] I threwed [sic] him down" and put the knife to his throat. Defendant testified that he did this because "I didn[']t want [Kenneth] to hurt me." The trial court must instruct the jury on all essential features of a case, and where there exists evidence that the defendant acted in self-defense, "he is entitled to have this evidence considered by the jury under proper instruction from the court." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977) (citations omitted). Generally, one who is at fault in starting a confrontation is not entitled to a self-defense instruction. *Id.* Thus, one who "voluntarily, that is aggressively and willingly, [without legal provocation or excuse,] enters into a fight" will not be afforded an instruction on self-defense "unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so." *Id.* (citations omitted).

Defendant admits that he entered the McCalls' house and bedroom without permission. As such, defendant was at fault in starting the conflict. *See State v. Spruill*, 225 N.C. 356, 357, 34 S.E.2d 142, 143 (1945) (person has substantive right to evict trespasser from his home). Upon Kenneth's discovery of defendant, defendant "aggressively and willingly . . . enter[ed] into a fight" with Kenneth. Defendant did not attempt to withdraw from the fight, nor did he attempt to communicate his desire to withdraw. Accordingly, defendant was not entitled to an instruction on self-defense.

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IV

Defendant next argues that he was entitled to a jury instruction on the offenses of misdemeanor assault with a deadly weapon and misdemeanor breaking and entering.

The trial court is required to give instructions on other possible verdicts if (1) those charges for which the instruction is sought are lesser included offenses of the charge for which defendant was indicted, *see State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970); and (2) any evidence is presented which would permit the jury to convict the defendant of the lesser offense. *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The presence or absence of such evidence is the factor which determines whether the instruction must be given. *State v. Harrington*, 95 N.C. App. 187, 189, 381 S.E.2d 808, 809 (1989). Error in the failure to submit lesser offenses to the jury is not cured when the defendant is convicted of the greater offense, as it can never be known if the jury would have found the defendant guilty of the lesser offense if given the opportunity. *Id.*

A

[4] Assault with a deadly weapon, a misdemeanor punishable by not more than two years imprisonment, is a lesser included offense of the charge under which defendant was indicted, assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Weaver*, 264 N.C. 681, 683, 142 S.E.2d 633, 635 (1965); N.C.G.S. § 14-33 (Supp. 1992); N.C.G.S. § 14-32 (1986). Accordingly, if there was any evidence from which the jury could find defendant guilty of assault with a deadly weapon, it was error for the trial court to fail to submit that offense to the jury.

A person will not be found guilty of assault with a deadly weapon if "his conduct is covered under some other provision of law providing greater punishment" for the assault. N.C.G.S. § 14-33. Assault with a deadly weapon with intent to kill pursuant to N.C.G.S. § 14-32(c) is one such provision of law which provides a greater punishment for assault, in that it is punishable by imprisonment of up to ten years. N.C.G.S. § 14-32(c) (1986); N.C.G.S. § 14-1.1 (1986). Thus, if the additional element of intent to kill is shown by the evidence, defendant was not entitled to the instruction on the lesser offense.

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"Intent to kill is a mental attitude which must normally be proven by circumstantial evidence." *Harrington*, 95 N.C. App. at 189, 318 S.E.2d at 809 (citation omitted). Such "intent may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances." *State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946) (citations omitted).

In this case, it is uncontroverted that defendant took a knife into the McCalls' house, that he threw Kenneth to the floor and held the knife to his throat, that he threatened to kill Kenneth, and that the knife was removed from Kenneth's throat only when Kenneth grabbed it and broke the blade. The only evidence which would negate the intent to kill is the defendant's denial that he would have killed Kenneth. Therefore, on this record, we find no error in the trial court's refusal to submit the requested instruction.

B

[5] The crime of burglary exists when there is a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. *State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985). The felonious intent proven must be the felonious intent alleged in the indictment. *State v. Wilson*, 293 N.C. 47, 53-54, 235 S.E.2d 219, 223 (1977). In prosecutions for burglary when larceny is alleged as the underlying offense, "larceny shall be deemed a felony." N.C.G.S. § 14-51 (1986). The lesser included offense of misdemeanor breaking and entering must be submitted to the jury if there is substantial evidence that the defendant broke and entered for some non-felonious reason other than that alleged in the indictment. See *State v. Patton*, 80 N.C. App. 302, 305-06, 341 S.E.2d 744, 746-47 (1986).

In this case, the indictment alleges larceny as the felony underlying the charge of burglary. The defendant's evidence supports a contrary view of why he broke and entered the premises; specifically, that he did not have the intent to commit larceny, but instead broke and entered with the intent to retrieve his shotgun which he had earlier seen in the McCalls' house. There is substantial evidence in the record to support defendant's position. The McCalls testified that defendant had been a visitor in their house before, and thus could have seen the shotgun, and that as soon as they encountered defendant in their house on the night in question, he began to shout that he wanted his shotgun. Defendant testified

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that his only purpose for entering the house was to retrieve the shotgun. Thus the trial court erred in refusing to submit to the jury the lesser included offense of misdemeanor breaking and entering and defendant is entitled to a new trial on the burglary charge.

In so holding, we reject the State's argument that there is "uncontradicted" evidence that defendant did have the intent to commit larceny when he entered the house. This evidence consists of Kenneth's testimony that he had left his pants on the couch prior to retiring the evening that defendant entered the house, and after the defendant left, Kenneth found that the contents of his pants were "dumped out into the floor." This evidence is not uncontradicted, however, in that in his statement given on the day of the incident and his testimony at trial, defendant maintains that Kenneth was wearing his pants during their struggle. In addition, the State admits that the altercation between Kenneth and defendant took place in the living room, and a reasonable juror could believe that the pants were simply thrown about in that struggle and the contents thereby thrown on the floor.

No error—assault with a deadly weapon with intent to kill.

New trial—first-degree burglary.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. GUY TRACY PENDERGRASS

No. 9228SC752

(Filed 3 August 1993)

1. Criminal Law § 333 (NCI4th)— motion to sever—denial proper

The trial court did not err in denying defendant's motion to sever his trial from that of his codefendant since the State's evidence, provided through victim eyewitness testimony, was sufficient to establish the elements as to each crime with which defendant was charged; this testimony, independent of the codefendant's testimony, was plenary and overwhelming evidence of defendant's guilt; the codefendant's testimony merely corroborated the State's evidence; additionally, the code-

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defendant was not present in the dressing room of the victims' bridal store and thus did not testify with regard to any of the crimes committed therein and of which defendant was nevertheless convicted; therefore, any conflict in defendants' respective positions at trial was not of such a nature that, considering all of the other evidence in the case, defendant was denied a fair trial or prejudiced. N.C.G.S. § 15A-927(c)(2).

Am Jur 2d, Trial § 9.**2. Criminal Law § 76 (NCI4th)— pretrial publicity—no change of venue—no error**

The trial court did not abuse its discretion in denying defendant's motion for change of venue or special venire where results of a poll of former jurors taken by a university student failed to demonstrate that the actual jurors who sat in defendant's trial based their decision on any pretrial publicity; all of the selected jurors stated that they had heard of the case through the media; jurors nevertheless stated that they understood that defendant was presumed innocent and that they could be fair and impartial; and, accordingly, defendant failed to demonstrate that it was reasonably likely that the jurors based their decision upon pretrial information rather than the evidence presented at trial. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law § 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

3. Kidnapping and Felonious Restraint § 20 (NCI4th)— second-degree kidnapping of infant—unlawful confinement for purpose of facilitating felony—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for second-degree kidnapping of an infant where it tended to show that the codefendant pointed a gun at one victim's head while defendant ordered another victim to place her infant in a crib; when the baby began to cry, the codefendant pointed the gun at the baby and her mother while defendant refused the mother's pleas to hold her baby; after defendant forced the mother to put her baby in the crib, he then forced her into a dressing room where she was bound, gagged, and sexually assaulted; and there was thus substantial evidence that the baby was unlawfully confined, restrained,

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or removed for the purpose of facilitating the commission of the felony of sexual assault.

Am Jur 2d, Abduction and Kidnapping § 32.**4. Kidnapping and Felonious Restraint § 20 (NCI4th) — first-degree kidnapping — intent to commit sexual assault — sufficiency of evidence**

The trial court did not err in failing to dismiss the charges of first-degree kidnapping of two women for the purpose of facilitating the commission of first-degree sexual offense, since the fact that defendant separated three female victims from other victims, removed one victim's child, bound and gagged the victims, brought his own tying material and scissors, and cut off their clothes constituted substantial evidence of defendant's intent to sexually assault the victims.

Am Jur 2d, Abduction and Kidnapping § 32.

Appeal by defendant from judgments entered 21 January 1992 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 7 June 1993.

Defendant was charged in proper bills of indictment with one count of first degree rape, three counts of forcible sexual offense, two counts of first degree kidnapping and one count of second degree kidnapping. He entered pleas of not guilty to each of the charges. The State's evidence at trial tended to show the following: On 5 September 1991, Janie Miller was working at her family's business, "Here Comes the Bride," in Asheville, North Carolina. That morning, defendant Guy Pendergrass and codefendant Rhoda Bruington ("Bruington") came into the shop looking at wedding dresses for their purported wedding. After some time, Bruington pulled out a pistol and pointed it at Janie Miller.

Defendant ordered Janie Miller to place a note on the door of the store saying, "Be Back in One Hour." Subsequently, Janie Miller's daughter, Julia Miller Silver, entered the store and was forced to lie on the floor of the dressing room where she and her mother were bound and gagged by defendant. Soon thereafter, Kathleen Bennett entered the shop to return a tuxedo but was also tied up and forced by defendant to lie on the floor of the dressing room along with Janie Miller and Julia Miller Silver. Thereafter, Winston Pulliam and Anatoli Hofle entered the shop

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and were forced to lie on the floor in an area away from the dressing room where defendant tied them up, taped their mouths shut and took their wallets.

Subsequently, Jeanna Miller Waldroup, another daughter of Janie Miller, came into the shop with her five-month old baby whereupon Bruington pointed a gun at the baby's head. Upon defendant's order, Jeanna then put the baby into a crib located in the shop. Despite Jeanna's pleas to hold the baby because it suffered from a breathing disorder and because she was breast-feeding the child, defendant refused to allow her to hold the child. Defendant then forced Jeanna to the dressing room where Kathleen Bennett and Julia Miller Silver already lay bound and gagged and similarly forced Jeanna to lie on the floor where he bound and gagged her.

Meanwhile, acting on defendant's instructions, Bruington took Janie Miller at gunpoint from the dressing room to the office and forced her to write a check made payable to defendant in the amount of \$400.00, the amount in the shop checking account. Thereafter, Janie Miller's husband, John, came into the shop whereupon defendant also tied him up on the floor and taped his mouth shut. Having written the check to defendant, defendant retied Janie Miller on the floor but did not return her to the dressing room with the other three bound women who lay side by side.

Using scissors, defendant cut the clothes off of the three women in the dressing room. Defendant fondled Jeanna Waldroup's breasts and put his finger in her vagina. Defendant also fondled the breasts of Kathleen Bennett and moved the lips of her vagina with his fingers. Bennett told defendant that she was menstruating. Defendant fondled Julia Miller Silver's breast, inserted his finger in her vagina and then had vaginal intercourse with her while holding scissors to her throat and telling her to shut her eyes. After withdrawing his penis from her vagina, he ejaculated on her stomach and throat. During intercourse with Julia Miller Silver, defendant also held scissors to the throat of Jeanna Waldroup and told her to keep her eyes shut.

Defendant and Bruington then fled the bridal shop leaving their victims tied up and lying on the floor including the three young women in the dressing room who were left lying naked.

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At the joint trial of defendant and Bruington, Bruington testified to assisting in the robbery of the bridal shop but denied any knowledge of or participation in the sexual assaults of the women. Rather, Bruington testified that after their arrest, defendant told her that he did not rape any of the women but that he had "masturbated on the girl."

Defendant presented no evidence. The jury found defendant guilty of all charges. The trial court entered judgments sentencing him to imprisonment for three consecutive life terms plus 110 years. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Neil Dalton, for the State.

Assistant Public Defender William D. Auman for defendant-appellant.

MARTIN, Judge.

Defendant contends that the trial court erred (1) in denying defendant's motion to sever defendant's trial from that of his codefendant Rhoda Bruington, (2) in denying defendant's motion for change of venue, (3) in failing to dismiss the charge of second degree kidnapping of the infant, and (4) in failing to dismiss the charges of first degree kidnapping of two of the victims. We find no prejudicial error in defendant's trial.

[1] In his first assignment of error, defendant contends that the trial court erred in refusing to sever defendant's trial from that of his codefendant, Rhoda Bruington. Specifically, defendant argues that he was denied a fair trial because Bruington's testimony created an adversarial relationship between Pendergrass and Bruington as their defenses were irreconcilable and antagonistic.

With respect to severance, G.S. § 15A-927(c)(2) provides in relevant part:

(2) The court on the motion of the prosecutor, or on a motion of the defendant . . . must deny a joinder for trial or grant a severance of defendants whenever:

. . .

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote

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a fair determination of the guilt or innocence of one or more defendants.

Whether defendants should be tried jointly or separately is a decision within the sound discretion of the trial court. *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982). This exercise of discretion will not be disturbed on appeal unless defendant shows that the trial court abused its discretion in joining the defendants and that as a result of that joinder the defendant did not receive a fair trial. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

The fact that defendants in a joint trial may offer antagonistic or conflicting defenses does not necessarily warrant severance. *Id.* "The test is whether the conflict in the defendant's respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *Id.*, at 59, 347 S.E.2d at 734. The focus of this test is not whether the defendants contradicted one another, but whether one defendant has been prejudiced, therefore denying him a fair trial. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987). The defendant is not prejudiced if the State presents plenary evidence of defendant's guilt, independent of the codefendant's testimony, and defendant has the opportunity to cross examine the codefendant. *Id.*

Defendant argues that in this case only one of the codefendants (Rhoda Bruington) chose to take the stand, and in doing so she implicated him in the alleged crimes. Defendant asserts that Bruington's testimony directly implicated him in the kidnapping of the victims and indirectly implicated him in the rape and sex offense charges. Additionally, defendant complains that Bruington's defense strategy denied him a fair trial as Bruington's counsel portrayed defendant as the culprit in an effort to absolve Bruington. Specifically, Bruington testified that she did not have knowledge of the sexual assaults until she was arrested. On cross examination of the victims, Bruington's counsel asked about Bruington's role in the sexual assaults and kidnappings. The victims testified that Bruington was not involved in the sexual assaults and kidnappings. Bruington also testified that defendant planned the crime, obtained the flex-cuffs and gun used in the robbery and kidnappings, and that defendant gagged and tied the victims and removed them to another room.

While such testimony may be antagonistic to defendant's case, nevertheless, it does not necessarily warrant severance unless de-

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defendant was denied a fair trial. *Lowery*, at 59, 347 S.E.2d at 734. A review of the record demonstrates that the State's evidence, provided through victim eyewitness testimony, was sufficient to establish the elements as to each crime with which defendant was charged. This testimony, independent of Bruington's testimony, was plenary and overwhelming evidence of defendant's guilt. Bruington's testimony merely corroborated the State's evidence. Additionally, Bruington was not present in the dressing room of the bridal store and thus did not testify with regard to any of the crimes committed therein and of which defendant was nevertheless convicted. Therefore, any conflict in defendants' respective positions at trial was not of such a nature that, *considering all of the other evidence* in the case, defendant was denied a fair trial or prejudiced. Accordingly, we find no error in the denial of defendant's motion to sever his trial from that of his codefendant Rhoda Bruington.

[2] Defendant contends in his second assignment of error that the trial court erred in denying defendant's motion for change of venue or, in the alternative, for a special *venire* due to pretrial publicity and the prominence of one of the victims. We disagree.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976), *quoting Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L.Ed.2d 600, 620 (1966). To assure compliance with the due process requirements of *Sheppard*, G.S. § 15A-957 provides in pertinent part:

If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

- (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
- (2) Order a special *venire* under the terms of G.S. 15A-958.

A motion for a change of venue or special *venire* pursuant to G.S. § 15A-957 based on prominence of the victim and inflammatory publicity is addressed to the sound discretion of the trial court, *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325, *death sentence vacated*, 428 U.S. 904, 49 L.Ed.2d 1211 (1976), and will not be disturbed on appeal unless defendant shows that the trial court abused its

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discretion in denying this motion. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). The burden of showing prejudice that prevents a fair trial is on defendant. *Id.*

In order to obtain a change of venue, a defendant must establish that it is reasonably likely that prospective jurors would base their decision upon pretrial information rather than evidence presented at trial and would be unable to remove any preconceived impressions they might have formed. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983). In most cases, the defendant must specifically identify prejudice among the jurors who actually served in his case in order to carry his burden. *State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989). Even where evidence of pretrial publicity exists, factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. *State v. Madric*, 328 N.C. 223, 400 S.E.2d 31 (1991). Furthermore, if factual news articles are non-inflammatory and contain information that for the most part could be offered at defendant's trial, a motion for change of venue is properly denied. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984).

Defendant contends that pretrial publicity in this case warranted a change of venue or special *venire* as defendant would be unable to receive a fair trial in Buncombe County. However, the record does not contain specific evidence as to what was stated in the pretrial publicity other than the results of a telephone poll conducted by Jennifer King, a student at the University of North Carolina. Sixty-seven random people picked from a list of former jurors in Buncombe County participated in the poll from which it was concluded that ninety-seven percent had heard something about the case, seventy-seven percent could not or were not sure if they could give defendant a fair trial were they to sit on the jury, and sixty-six percent said that based on what they had heard they believed that people in Buncombe County thought defendant was guilty.

The results of this poll fail to demonstrate that the actual jurors who sat in defendant's trial based their decision on any pretrial publicity. Although opinion testimony of the community in which defendant will be tried as to whether defendant can receive a fair trial may be relevant, it is not determinative on the question. *Madric*, at 228, 400 S.E.2d at 35. "The best and most reliable evidence as to whether existing community prejudice will prevent a fair

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trial can be drawn from prospective jurors' responses to questions during the jury selection process." *Id.*, at 228, 400 S.E.2d at 34. In the case at hand, all of the selected jurors stated that they had heard of the case through the media. Nevertheless, the jurors stated that they understood that defendant was presumed innocent and that they could be fair and impartial. Accordingly, defendant failed to demonstrate that it is reasonably likely that the jurors based their decision upon pretrial information rather than the evidence presented at trial and thus, the trial court did not abuse its discretion in denying defendant's motion for change of venue or special *venire*.

[3] In his third assignment of error, defendant contends that the trial court erred in failing to grant his motion to dismiss the charge of second-degree kidnapping of the infant due to insufficient evidence. We disagree.

In ruling on a motion to dismiss, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). The trial court must determine whether there is substantial evidence of each essential element of the offense charged, and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). Furthermore, this evidence "must be existing and real, not just seeming or imaginary." *Earnhardt*, at 66, 296 S.E.2d at 652. The trial court's function is to determine whether the evidence permits a reasonable inference that defendant is guilty of the crime charged. *Id.* The trial court's concern is sufficiency of the evidence, not weight of the evidence. *Id.* Weighing the evidence is a function of the jury. *Id.*

G.S. § 14-39 provides in relevant part:

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

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(2) Facilitating the commission of any felony or facilitating the flight of any person from the commission of a felony.

Specifically, defendant argues that by simply asking the infant's mother to put her in the crib, he did not "confine, restrain, or remove" the infant within the meaning of the kidnapping statute. He also argues, alternatively, that the kidnapping was not for the purpose of "facilitating the commission of a felony" as stated in the indictment.

As to the unlawful confinement of a person under the age of sixteen years of age, the State must show that the person was unlawfully confined, restrained or removed from one place to another without the consent of a parent or legal guardian. *State v. Hunter*, 299 N.C. 29, 261 S.E.2d 189 (1980). "The term 'restrain' connotes restriction by force, threat or fraud with or without confinement." *State v. Moore*, 77 N.C. App. 553, 557, 335 S.E.2d 535, 538 (1985), *affirmed*, 317 N.C. 144, 343 S.E.2d 430 (1986). The restraint does not have to last for an appreciable amount of time and removal does not require movement for a substantial distance. *Id.* In the present case, the evidence showed that Rhoda Bruington pointed a gun at Janie Miller's head while defendant ordered Julia Miller Waldroup to place her infant in the crib. Also, when the baby began to cry, Bruington pointed the gun at the baby and at Mrs. Waldroup, while defendant refused Mrs. Waldroup's pleas to hold the child. Merely because Mrs. Waldroup placed the infant in the crib herself does not indicate "consent" in light of the evidence. Thus, we find substantial evidence that the Waldroup infant was unlawfully confined, restrained and removed within the meaning of G.S. § 14-39.

Defendant also contends, in the alternative, that the evidence failed to show that the kidnapping was for the purpose of facilitating the commission of a felony. Defendant was charged with kidnapping the Waldroup infant for the purpose of facilitating the first degree sexual offense of her mother. Specifically, defendant argues that because an infant cannot impede the commission of a felony, then the felony is not facilitated by kidnapping the child. However, with respect to facilitating the commission of a felony, the underlying felony does not have to be committed against the victim of the kidnapping. *Id.* at 558, 335 S.E.2d at 538. Rather, the kidnapping statute requires only that the kidnapping facilitate the commission of any felony. *Id.* In the instant case, defendant forced Mrs. Waldroup to put her baby in the crib and then forced her into the dressing

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room where she was bound, gagged, and sexually assaulted. Thus, there is substantial evidence to support a reasonable inference that the removal of the child facilitated the felony as the sexual assault on its mother may have been impeded if she were holding the infant. Defendant's motion to dismiss the second degree kidnapping charge was properly denied.

[4] In his final assignment of error, defendant contends that the trial court erred in failing to dismiss the charges of first degree kidnapping of Kathleen Bennett and Jeanna Waldroup for the purposes of facilitating the commission of first degree sexual offense due to the insufficiency of the evidence to support those charges. Rather, defendant argues that the kidnappings were committed for the purposes of facilitating armed robbery and that the sexual offenses were only an "afterthought." Therefore defendant argues that there is a fatal variance between the evidence and the indictments. We disagree.

Where the indictment alleges intent to commit a particular felony, the State must prove the particular intent of the felony alleged. *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986); *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982). Intent may be inferred from the surrounding circumstances and is determined by the jury. *Id.* A kidnapping is complete if defendant at any time during the confinement has the intent to commit the underlying felony. *State v. Franks*, 74 N.C. App. 661, 329 S.E.2d 717 (1985), *disc. review denied*, 314 N.C. 333, 333 S.E.2d 493 (1985); *State v. Whitaker*, 76 N.C. App. 52, 331 S.E.2d 752 (1985), *affirmed in part and reversed in part*, 316 N.C. 515, 342 S.E.2d 514 (1986).

The evidence in the case before us demonstrates that defendant forced the three females who were subsequently bound, gagged, and sexually assaulted into a dressing room separate from the other people in the bridal store. Defendant brought his own tying material and scissors to the bridal shop which he used to tie up the women who were sexually assaulted and to cut off their clothes. Janie Miller, who was not sexually assaulted, was initially placed in the dressing room but was later removed before the three remaining women were assaulted. The fact that defendant separated these three female victims, removed one victim's child, bound and gagged the victims, brought his own tying material and scissors, and cut off their clothes constitutes substantial evidence of defendant's intent to sexually assault the victims. Therefore, the trial

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court properly denied defendant's motion to dismiss the charges of first degree kidnapping of Kathleen Bennett and Jeanna Waldroup.

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge WYNN concur.

BARBARA A. MINTER, PLAINTIFF v. FRANK E. MINTER, DEFENDANT

No. 9121DC748

(Filed 3 August 1993)

1. Divorce and Separation §§ 119, 121 (NCI4th)— equitable distribution—assets classified as marital—inability to trace separate property—classification proper

Evidence was sufficient to support the trial court's finding that defendant failed to carry his burden of proof that certain assets were separate property, and the trial court properly classified the assets, including brokerage house accounts initially funded with inherited stocks, checking accounts, real property, limited partnerships, gold investments, and silver coins, as marital property, since defendant could not trace funds which might have been separate property initially but which became commingled with marital property.

Am Jur 2d, Divorce and Separation §§ 883, 890.

2. Divorce and Separation § 151 (NCI4th)— equitable distribution—separate property investments by husband—distributional factor to be considered

Separate property investments which defendant contributed to the marital estate over his twenty-five-year marriage to plaintiff should have been considered by the trial court as a distributional factor under N.C.G.S. § 50-20(c)(12).

Am Jur 2d, Divorce and Separation § 920.

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Appeal by defendant from judgment entered 9 November 1990 by Judge R. Kaison Keiger in Forsyth County District Court. Heard in the Court of Appeals 25 August 1992.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Joan E. Brodish, Dudley A. Witt, Christopher L. Beal and Robert G. Spaugh, for plaintiff-appellee.

Petree, Stockton & Robinson, by Lynn P. Burluson and Edwin W. Bowden, for defendant-appellant.

ORR, Judge.

Defendant raises three issues on appeal. First, that the trial court erred in concluding that the defendant failed to meet his burden of proof in showing that certain assets were separate in nature; second, that the trial court erred in determining that no portion of the assets were separate in nature; and third, that the trial court failed to consider the defendant's separate property contributions as a distributional factor pursuant to N.C. Gen. Stat. § 50-20(c). We disagree as to the first two issues but agree as to the third.

Barbara A. Minter (plaintiff-appellee) instituted this action for equitable distribution against Frank E. Minter (defendant-appellant) on June 11, 1986. In her complaint, she alleged that the parties had acquired certain marital property, including "the marital residence of the parties; other real estate; a corporation known as Salem Gymnastic Center, Ltd.; savings, stocks, and bonds; pension and retirement plans, automobiles, furniture, and other items of property." The defendant denied these allegations in his answer, contending that certain assets were traceable to separate property, and therefore not subject to equitable distribution.

Specifically, defendant asserted that the following accounts, real estate, and personal property were separate:

- (1) Smith Barney Vantage Account—This account was established in 1967. Inherited stocks, newly acquired stocks, the proceeds from dividends and the sale of the stocks were periodically deposited into the account from its inception in 1967.
- (2) Merrill Lynch Account—established as a stock trading account in the early 1960's. Proceeds from inherited and newly purchased stocks were deposited into this account.

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Both the "Vantage" account and the Merrill Lynch account were established and held in defendant's name only. Additionally, defendant established three checking accounts into which he deposited monies from various sources, including dividends from stocks.

(1) First Citizens Account—Defendant established a savings account in 1972, closing it in 1978. In 1975, he established a checking account, which was closed in 1979.

(2) IBM Credit Union Account—This account was established in 1978, and replaced the First Citizens account. During the years 1978-1985 dividends from IBM stock were deposited into this account, as were proceeds from the sale of IBM stock. These proceeds were automatically deposited into defendant's account by his employer on a quarterly basis.

(3) Wachovia Checking Account—This account was opened in 1981, and was initially funded with monies from the IBM Credit Union account. Deposits from the sale of stocks were also deposited into this account.

Using funds drawn from these accounts, defendant purchased the following real and personal property:

(1) Building and lot at 1901 Margaret Street and lot at 1907 Margaret Street—These purchases were primarily funded with monies from the IBM Credit Union Account. The lot at 1901 Margaret Street was purchased in August 1980. The building was constructed on the lot during the fall of 1980. The vacant lot at 1907 Margaret was purchased in January of 1981.

(2) Limited Partnerships—Defendant purchased six limited partnerships during the course of the marriage.

(3) Dreyfus Gold Deposits—Defendant purchased an investment called "Dreyfus Gold Deposits".

(4) Bagged Silver Coins—Defendant purchased these coins in 1981-82.

Defendant presented evidence showing that he purchased or inherited thirty-one different stocks prior to his marriage, and that at the time of the separation of the parties, he retained ownership of only three of the original stocks. He contended that the resulting assets that were presently owned at the time of separation were actually traceable to the three inheritances, one prior to his 1960

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marriage to plaintiff, and two additional inheritances, one in 1969, and the other in 1975.

The evidence included testimony by the defendant, records, reports, and stipulations by the parties, as well as the testimony of an expert witness retained by the parties to review the transactions in the disputed accounts. The evidence tended to show that the defendant traded and invested from the "Vantage" and the Merrill Lynch accounts in both inherited and newly purchased stocks and investment ventures; that he opened an account with First Citizens Bank in 1972 and again in 1975; that with proceeds from dividends and the First Citizens account he opened the IBM Credit Union account, and thereafter, in 1981 established a checking account at Wachovia Bank & Trust, using funds from the IBM Credit Union account. With funds from the IBM and Wachovia accounts, he purchased the lots and building on Margaret Street. Similarly, he purchased the six limited partnerships as well as the Dreyfus Gold Deposits investments and bagged silver coins with funds from those accounts.

At the close of all the evidence, the trial court found that:

"With respect to defendant's above-mentioned Wachovia Bank and Trust Company checking account, IBM Credit Union account, Vantage account, Smith Barney IRA account, Merrill Lynch account, Shearson Lehman account, Dreyfus Gold deposits, and Bagged Silver Coins, defendant failed to trace said assets to a non-marital source of funds or property. In addition, defendant comingled marital assets and funds in the above mentioned Wachovia checking account, IBM Credit Union account, Vantage account, and Merrill Lynch account. Defendant failed to meet his burden of proving that the assets set forth in this paragraph are his separate property, and the Court finds that said assets are marital property."

The court further found that the

"real estate located on Margaret Street was deeded to the defendant, individually, during the marriage of the parties. Defendant failed to trace said the [sic] Margaret Street property and the funds used to purchase said property to a non-marital source of funds or property. Defendant failed to meet his burden of proving that the Margaret Street property is

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his separate property, and the Court finds that the above-described Margaret Street commercial real estate is marital property.”

As to the limited partnerships, the court also found that “Defendant failed to meet his burden of proof of proving that the assets . . . are his separate property. . . .”

Having determined all of the above-mentioned property to be marital, the trial court then determined that an equal distribution was not equitable. The court then made findings of fact concerning the parties’ education, income, age, separate assets, the comparative health of the parties, as well as other considerations. The court then ordered the defendant to pay to plaintiff the sum of \$255,724.74 as a distributional award, and further ordered that the marital house be deeded to the plaintiff.

I.

[1] Defendant contends in his first two assignments of error that the evidence presented at trial supports a finding that all or a portion of the disputed assets were separate property and that the trial judge committed reversible error in finding the property to be marital.

In deciding equitable distribution issues, the trial court is required, pursuant to N.C. Gen. Stat. §§ 50-20 *et seq.*, to identify, classify, then distribute all property belonging to the marital estate. The trial court is further required to make written findings of fact indicating that he has considered the evidence presented by the parties in making his identification and classification of the property. *Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565 (1992), *reversed in part on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993).

The first step is classification by the trial court of all property owned by the parties as marital or separate as defined by the statute. N.C.G.S. § 50-20(a) (1992); *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987). Marital property is defined as “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties,” N.C.G.S. § 50-20(b)(1) (1992), but does not include property determined to be separate under N.C.G.S. § 50-20(b)(2). Separate property includes all real and personal property acquired by a spouse before marriage or acquired

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by a spouse by bequest, devise, descent, or gift during the course of the marriage. N.C.G.S. § 50-20(b)(2) (1992). "Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." *Id.*

Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987). "The trial court must classify and identify property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). "The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate." *Id.* "A party may satisfy her burden by a preponderance of the evidence." *Id.*

The party who claims that the property is marital must show by the preponderance of the evidence that the property was "acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and [is] presently owned." *Freeman v. Freeman*, 107 N.C. App. 644, 651, 421 S.E.2d 623, 626 (1992), quoting N.C. Gen. Stat. § 50-20(b)(1). "If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate." *Id.* The party seeking to show its separate nature must show by the preponderance of the evidence that the property was "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage; [was] acquired by gift from the other spouse during the course of marriage [where] such an intention is stated in the conveyance; [or was] acquired in exchange for separate property . . . unless a contrary intention is expressly stated in the conveyance." N.C.G.S. § 50-20(b)(2). If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property." *Haywood, supra*, 106 N.C. App. at 97, 415 S.E.2d at 569.

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The courts of North Carolina have recognized that at times a single asset may be acquired through contributions of both marital and separate property, and have adopted the source of funds approach to distinguishing such contributions. *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).

In the instant case, there was no dispute that the contested properties were acquired during the course of the marriage and before the date of separation and presently owned. N.C. Gen. Stat. § 50-20(b)(1). Once this showing had been made, the burden of proof necessary to show that the assets were marital had been met. The burden therefore shifted to the defendant husband to show that the source of the contested property was separate property, as defined by N.C.G.S. § 50-20(b)(2). Defendant presented evidence that he received three inheritances, consisting of stocks in various companies. However, on cross-examination, defendant gave the following testimony with respect to tracing of the contested assets:

Q. And as a result of selling all those stocks you inherited, there have been purchases of other stocks—

A. And real estate—

Q. —as a result of initial sales of those stocks you inherited. Correct?

A. That's right. Other stocks and real estate.

Q. And many of those stocks have been sold and other stocks bought and sold?

A. That's correct.

Q. And it would be impossible to trace every single sale from the stocks you inherited on—that you brought into the marriage as of date of marriage the exact monies from those stocks and those shares up to your assets that you claimed an interest in on date of separation. You could not trace dollar for dollar exactly what you would have had on date of separation, could you, Mr. Minter?

A. I could not. No way.

Q. Because there were so many transactions, weren't there?

A. A lot.

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Q. And with regard to the stocks you inherited from your aunt, you could not trace those monies and identify exactly where those stocks would be with respect to assets you have an interest in on date of separation, could you?

A. Could not.

Q. And other than the Exxon and RJR, Sealand, you could not trace the inherited stocks from your mother to your assets as of date of separation that you had in your name. From those shares, you could not do that other than those two, could you?

A. You mean exactly the dollar? No, I could not. The only one I could do exactly has not changed at all.

Defendant also testified that he could not tell what monies initially funded the Smith Barney account, but did state the account held IBM dividends or proceeds from the IBM Credit Union account. He further testified that he considered the IBM stock and its proceeds were "joint", and that on occasion he had transferred monies from the Credit Union account to the other accounts, including the initial deposit to fund the Wachovia account. He stated that the purchase of the house and lots on Margaret Street were made with funds from these accounts, as were the purchases of the gold and silver investments. He also stated that he had on the date of his marriage a zero balance in the Smith Barney (later the Vantage) account, and that he had no money in any kind of checking or savings account. The expert witness hired to review the investment transactions of the accounts testified that "it's a practical impossibility to trace every transaction for anyone for a period of twenty-six years or fifteen years, let's say."

Based on the above evidence, the trial court found that the assets were marital. The trial court found that the defendant's separate property included 1200 shares of RJR stock, valued at \$92,400.00, 1000 shares of Exxon stock, valued at \$47,750.00, 310 shares of Amoco stock, valued at \$19,956.25, 94 shares of Sealand stock, valued at \$2350.00, and household furnishings valued at \$44,800.00. Therefore, the court followed the statutory prescription in its findings of fact and awarded property that was shown by a preponderance of the evidence to be separate to the defendant. Only those assets as to which defendant did not meet his burden

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were included as marital, in keeping with the mandate of N.C.G.S. § 50-20.

Upon appellate review of a case heard without a jury, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992). While defendant did present some evidence tending to show that the property at issue might have had some separate property attributes, the trial judge determined that he failed to carry his burden of proof to the extent required by law. This Court has stated that "an equitable distribution order will not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in a obvious miscarriage of justice." *Morris v. Morris*, 90 N.C. App. 94, 97, 367 S.E.2d 408, 410 (1988) (quoting *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984)). We find that there was competent evidence in the record to support the trial court's finding that the defendant failed to carry his burden of proof, and therefore overrule defendant's first and second assignments of error.

II.

[2] The defendant next asserts that the trial court failed to consider defendant's contributions to the marital estate as a distributional factor under N.C.G.S. § 50-20(c)(12). As to this contention, we find merit in defendant's argument and accordingly remand for further findings of fact and conclusions of law based on the existing record without taking further evidence.

When dividing marital property, the trial court is required to consider the distributional factors and to make findings of fact supporting the division of property. *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). "In *any* order for the distribution of property made pursuant to this section, the court *shall* make written findings of fact that support the determination that marital property has been equitably divided." *Id.* at 403, 368 S.E.2d at 599 (emphasis in original). The factors that may be considered under § 50-20(c)(12) are those which relate to the source, availability, and use by a husband and wife of economic resources during the course of the marriage. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985). The separate property investments that appellant contributed to the marital estate over the twenty-five year marriage should have

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been considered by the trial court as a distributional factor under N.C.G.S. § 50-20(c)(12). *Haywood*, 106 N.C. App. at 95, 415 S.E.2d at 568.

In the case at bar, the court made extensive findings of fact reflecting the distributional factors. However, we are unable to discern from the record whether the court considered the separate property contributions of the appellant in making the award. "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986).

Since there are insufficient findings to determine the trial court's considerations of this factor, we remand for further findings of fact and entry of an appropriate order consistent with this opinion.

Remanded.

Judges WELLS and GREENE concur.

THE STATE OF NORTH CAROLINA EX REL. STATE ART MUSEUM BUILDING COMMISSION, PLAINTIFF v. THE TRAVELERS INDEMNITY COMPANY, DEFENDANT

No. 9210SC408

(Filed 3 August 1993)

1. Limitations, Repose, and Laches § 5 (NCI4th); State § 2.2 (NCI3d) — building art museum — State acting in governmental capacity — action to recover on performance bond not precluded by statute of limitations

The State was acting in its governmental capacity in constructing an art museum, even though the Building Commission was authorized to receive private as well as public funds; therefore, time limitations did not apply and did not preclude this suit against defendant surety to recover on a performance

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bond, since the relevant statutes did not expressly include the State.

Am Jur 2d, Limitation of Actions § 412.

2. Principal and Surety § 48 (NCI4th)— obligation on performance bond—contract provision—conditional acceptance of building—obligation not excused

Neither a provision in the State's contract with the builder nor the State's conditional acceptance of the building project discharged defendant from its obligation on a performance bond, since the contract provision in question meant that, if a performance bond contained any sort of time limitation, that time limitation would be set at twelve months; the performance bond in this case contained no time limitation at all; suing on the bond within twelve months was therefore not a condition precedent; the State's acceptance of the project was made conditional upon the completion of a 50-page punch list; and the fact that another contractor later completed the work did not preclude suit against the general contractor for its default, did not have the effect of rendering the State's acceptance final as to the general contractor, and did not have the effect of discharging the surety of its obligation.

Am Jur 2d, Contractors' Bonds § 191.

3. State § 2.2 (NCI3d); Principal and Surety § 53 (NCI4th)— cost of work not done by contractor—amount of State's retainage—amount paid to replacement contractor—existence of State Art Museum Building Commission—no genuine issues of material fact

In an action to recover on a performance bond issued by defendant as surety for the general contractor who built the State Art Museum, there were no issues of material fact as to whether the cost of the work left to be completed after the general contractor's default was less than the amount of retainage held by the State, whether the trial court properly assessed against defendant the amount paid to the replacement contractor, and whether the State Art Museum Building Commission still existed.

Am Jur 2d, Contractors' Bonds §§ 222, 223.

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4. Principal and Surety § 52 (NCI4th)— liability of surety for interest—surety liable for full amount of judgment against principal

Because a surety is liable for the full amount of the judgment against the principal, defendant, which issued a performance bond as surety for the general contractor who built the State Art Museum, should be liable for the full amount of the judgment against the general contractor, including the amount of interest awarded therein.

Am Jur 2d, Contractors' Bonds § 226.

Judge COZORT concurring in part and dissenting in part.

Appeal by defendant from Judgment entered 25 June 1991 by Judge Narley Cashwell, and by both parties from Judgment entered 17 February 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 March 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, and Assistant Attorney General Teresa L. White, for the State.

Burns, Day & Presnell, P.A., by Lacy M. Presnell III, Daniel C. Higgins, and Susan F. Vick, for defendant.

LEWIS, Judge.

In December 1989, the State, acting on behalf of the State Art Museum Building Commission (hereafter the "Building Commission" or the "Commission"), instituted this action to recover on a performance bond issued by defendant, the Travelers Indemnity Company (hereafter "Travelers"), as surety for Middlesex Construction Corporation (hereafter "Middlesex"). The State had earlier secured a judgment of \$373,603.18 against Middlesex, which judgment remains unpaid. In June 1991 the trial court granted partial summary judgment in favor of the State regarding Travelers' affirmative defenses of the statute of limitations, the statute of repose, laches, and discharge. In February 1992 the trial court entered summary judgment in favor of the State for the full amount of the Middlesex judgment plus interest. Travelers now appeals from both summary judgment orders, and the State appeals from the February 1992 order on the issue of the amount of interest awarded.

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In June 1977 the State contracted with Middlesex to serve as general contractor for the construction of the North Carolina Museum of Art. At that time Middlesex procured a performance bond from Travelers in compliance with the contract instructions to bidders. By July 1981 Middlesex had completed and had been paid for about 99% of the work. However, in November 1981 the State declared Middlesex to be in default due to its failure to complete "punch list" work at the museum. Travelers was notified of the breach, but opted not to take over the remaining work. The State hired another contractor to complete the job.

In March 1982 Middlesex filed suit against the Building Commission for breach of contract, and after dismissals and appeals, again filed suit against the Building Commission in January 1984. Travelers was notified of the lawsuit, but was not made a party to it. In March 1988 the court filed its judgment, which resulted in a net recovery for the Building Commission against Middlesex in the amount of \$373,603.18. Middlesex's insolvency and failure to pay the judgment precipitated the present action against Travelers as their surety.

In this appeal we must review two summary judgment orders from the trial court. First, Travelers appeals from the 25 June 1991 order dismissing its affirmative defenses. Second, Travelers and the State both appeal from the 14 February 1992 order awarding the State the amount of the judgment originally entered against Middlesex plus interest. 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 the various arguments before us, we conclude that in both instances the trial court correctly granted summary judgment for the State. However, we partially reverse the second summary judgment order on the issue of the amount of interest awarded to the State.

I. Travelers' appeal from Order of 25 June 1991

[1] In its summary judgment order of 25 June 1991 the trial court dismissed Travelers' affirmative defenses of the statute of limitations, the statute of repose, and laches. Although at the trial level Travelers argued that the State is no longer exempt from the running of time limitations, in oral argument before the Court of Appeals Travelers conceded that the case of *Rowan County Board of Education v. United States Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992), is dispositive on this issue. Travelers proceeded

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with its argument that the State's action was proprietary and not governmental, thereby rendering it subject to the time limitations in accordance with *Rowan*.

We begin with a review of *Rowan*. Historically the government has been exempt from the running of various time limitations under the doctrine of *nullum tempus occurrit regi*, or "time does not run against the king." See *Rowan*, 332 N.C. at 6, 418 S.E.2d at 652. However, N.C.G.S. § 1-30 states that "[t]he limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties." N.C.G.S. § 1-30 (1983). In *Rowan* the Supreme Court clarified the application of the doctrine of *nullum tempus* in light of section 1-30. The Court stated that:

We now clarify the status of this doctrine in this jurisdiction: *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State.

332 N.C. at 8, 418 S.E.2d at 653. However, *Rowan* maintained a governmental versus proprietary distinction to use in reviewing actions of the State. If the State was acting in a proprietary capacity, the time limitations do apply unless the relevant statute excludes the State. *Id.* at 9, 418 S.E.2d at 654. If the State's action was governmental, the time limitations do not apply unless the applicable statute expressly includes the State. *Id.* Thus, if we determine that the State was acting in its governmental capacity in constructing the art museum, then the time limitations did not apply and did not preclude the present suit against Travelers since the relevant statutes do not expressly include the State. See N.C.G.S. § 1-52(1), -(6) (Cum. Supp. 1992) (three year statute of limitations for contract actions and for actions against sureties); N.C.G.S. § 1-50(5)(b)1., -7. (Cum. Supp. 1992) (six year statute of repose for actions to recover for breach of contract to construct an improvement to real property and for actions against sureties).

Generally, the State acts in its governmental capacity when it is "promoting or protecting the health, safety, security or general welfare of its citizens." *Rhodes v. Asheville*, 230 N.C. 134, 137, 52 S.E.2d 371, 373 (1949). A court may also consider whether or not the State's action is for the "common good of all" and therefore governmental, or for pecuniary profit and therefore proprietary.

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Vaughn v. County of Durham, 34 N.C. App. 416, 420, 240 S.E.2d 456, 459 (1977), *disc. rev. denied*, 294 N.C. 188, 241 S.E.2d 522 (1978) (citation omitted).

The Legislature established the Art Museum Building Commission and authorized it to receive public as well as private funds towards the cost of building the museum. N.C.G.S. § 143B-58 (1990). The State points out that the General Assembly appropriated a total of over ten million dollars for the construction of the art museum. Travelers, however, relies on the fact that the Commission was authorized to receive private funds in its argument that the State was acting in its proprietary capacity.

We hold that the mere receipt of private funds does not render the State's actions proprietary, especially in light of the large appropriation of public funds in this case. A lawsuit to recover lost public funds is consistent with a governmental purpose. In *Rowan* the Court concluded that the Board of Education "was acting in a governmental capacity when it brought suit to recover lost tax money expended in the construction of public schools . . ." 332 N.C. at 16, 418 S.E.2d at 658. Similarly, we hold that the State was acting in its governmental capacity in suing to recover tax money lost in the construction of the art museum. Although the establishment and maintenance of the public schools in *Rowan* was obviously a governmental task, we believe the establishment of an art museum is also governmental in purpose. We note that the art museum is open for the education and enjoyment of the general public. The State's interest in providing cultural resources and educational opportunities renders the creation of an art museum a governmental function. "Life without industry is guilt and industry without art is brutality." John Ruskin, *Lectures on Art 3, The Relation of Art to Morals* (Feb. 23, 1870).

Because we find the State's action in building the art museum was governmental, and because the applicable time limitations do not expressly include the State, we hold the doctrine of *nullum tempus* is applicable. The trial court properly granted summary judgment to the State on Travelers' affirmative defenses.

II. Appeal from Judgment of 14 February 1992

A. Travelers' appeal

[2] Travelers also appeals from the summary judgment order of 14 February 1992, claiming that it was discharged and that ques-

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tions of material fact existed to preclude summary judgment. Travelers argues it was discharged because of the time limitation found in the contract itself and because the State had actually accepted the project from Middlesex.

Travelers argues the State failed to bring the present action within the time period set forth in the contract. Article 28 of the "General Conditions of the Contract," entitled "Performance Bond," stipulates that "[i]n all bonds, the provision that no suit, action, or proceedings by reason of any default whatsoever shall be brought on this bond after so many months shall be fixed at twelve (12) months." According to Travelers, instituting an action within 12 months of default was a condition precedent to the suit itself. Thus, the State's failure to sue within 12 months of Middlesex's 1981 default discharged Travelers' obligation on the bond.

We agree with the State that the provision does not apply to this case. We interpret the provision to mean that if a performance bond contains any sort of time limitation, that time limitation will be set at 12 months. However, the performance bond in this case contains no time limitation at all. Suing on the bond within 12 months was therefore not a condition precedent.

Travelers also argues it was discharged because the State had accepted the project from Middlesex. In the 1988 Judgment against Middlesex the court found that the State "accepted" the building subject to completion of 'punch list' work to be specified. This 'acceptance' was only a conditional acceptance." Travelers argues the condition became satisfied when the replacement contractor finished the punch list work, and the State's acceptance thereby became final.

The State emphasizes that its acceptance was made conditional upon the completion of a 50-page list of "punch work" items. The fact that another contractor later completed the work did not preclude suit against Middlesex for its default, did not have the effect of rendering the State's acceptance final as to Middlesex, nor did it have the effect of discharging the surety of its obligation. Furthermore, as the State points out, Travelers' responsibility related to the entire contract, not just the punch list work, and the judgment against Middlesex included damages for various other items. We conclude that neither the provision in the contract nor the State's conditional acceptance of the project discharged Travelers from its obligations.

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[3] Travelers also argues summary judgment was inappropriate in this case because there are issues of material fact to be resolved. Travelers claims that genuine issues exist over whether the cost of the work left to be completed after Middlesex's default was less than the amount of retainage held by the State. Other issues, according to Travelers, are whether the various damages awarded against Middlesex were properly assessed against Travelers, and whether the Art Museum Building Commission exists.

Travelers points out that it actually cost the State less to complete the punch list work than the amount of retainage it withheld. Thus, Travelers claims it has no liability under the performance bond because the State was not damaged by the default.

According to the contract, upon default the contractor and the surety become responsible for "[a]ll costs and charges incurred by the Owner, together with the costs of completing the work under the contract" Thus, notwithstanding the actual cost of completing the punch list work, if all the costs and expenses together exceeded the amount of the retainage, the State could properly recover the excess cost from Middlesex and Travelers. The State points out that the trial court allowed Middlesex credit for the amount of retainage in computing the damages awarded. The amount of the judgment represents excess costs associated with remedial contract costs, faulty work, and liquidated damages. We find no genuine issues of material fact regarding the amount of the judgment rendered against Middlesex and charged to Travelers.

Travelers claims genuine issues exist regarding the assessment of the damages against Travelers, specifically regarding the amount paid to the replacement contractor. We find this contention meritless. As stated above, the contract stipulates that Travelers, as surety, is responsible for all costs incurred due to Middlesex's default. "The obligation of the surety is ordinarily measured by the obligation of the principle." *Colonial Acceptance Corp. v. Northeastern Printcrafters, Inc.*, 75 N.C. App. 177, 179, 330 S.E.2d 76, 77 (1985). We note that the court carefully itemized its judgment against Middlesex, crediting Middlesex for any sums it was due, and only charging against it costs incurred as a result of its default. Travelers is clearly liable for the full amount of the Middlesex judgment.

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Finally, Travelers claims genuine issues exist as to whether the State Art Museum Building Commission is still a viable entity. Travelers claims the Commission was terminated according to N.C.G.S. § 143B-61.1 (1990), which provides that the Commission expires when it submits its final report. Travelers concedes that the Commission has not submitted a final report, but argues that its failure to meet regularly over the past ten years has somehow satisfied the requirement of filing a final report.

Section 143B-61.1 states that the Building Commission expires when it makes its final report, and that it must make such final report "120 days after the final resolution of all cases or claims in which the Commission is a party or that are brought under G.S. § 143-135.3 regarding the State Art Museum." According to this statute, the Commission may not submit its final report until the resolution of the present action. Even comatose, the Building Commission exists.

B. The State's Appeal

[4] The State argues that the trial court erred in awarding interest on the Middlesex judgment only from 28 December 1989, the date this action was filed, instead of from 28 March 1988, the date of the filing of the final judgment against Middlesex. The State points out that the judgment against Middlesex stipulated that the State was entitled to "interest at the rate provided by law from the date of filing of this judgment until paid." According to the State, as surety Travelers should be held liable for the full amount of the judgment against Middlesex, including the amount of interest awarded therein. *See Martin v. Hartford*, 68 N.C. App. 534, 537, 316 S.E.2d 126, 128, *disc. rev. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984) (surety's liability same as principal's as long as does not exceed amount of bond).

Travelers, on the other hand, emphasizes that the State elected not to sue Travelers when it brought suit against Middlesex. No claim was asserted against Travelers until the filing of this action in December 1989. Travelers contends that saddling it with interest which had accrued before it was even sued would amount to an award of pre-filing interest.

A judgment entered against a principal is conclusive and binding upon the surety even though the surety was sued separately from the principal. *George v. Hartford Accident and Indemnity*

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Co., 102 N.C. App. 761, 765-66, 404 S.E.2d 1, 3 (1991), *modified and aff'd*, 330 N.C. 755, 412 S.E.2d 43 (1992) (citation omitted). The following passage further explains this situation:

Where the very condition of the bond is the performance of a judgment against the principal, or that the surety will pay all damages that may be awarded in an action brought against the principal, or will answer for the principal in respect to some charge which the law lays on him, there is no question as to the conclusiveness, as against the surety, of a judgment against the principal, if binding upon the latter and free from fraud and collusion, assuming, of course, that it is the kind of judgment contemplated by the surety's undertaking.

102 N.C. App. at 766, 404 S.E.2d at 3 (quoting 74 Am. Jur. 2d *Suretyship* § 153 (1974)). Because a surety is liable for the full amount of the judgment against the principal, we hold that Travelers should be liable for the full amount of the judgment, which included interest from the date of the judgment, 28 March 1988. For this reason, we must reverse that portion of the judgment allowing interest only from December 1989.

In conclusion, we affirm the summary judgment order of 25 June 1991 dismissing Travelers' affirmative defenses, and we affirm the 17 February 1992 summary judgment order on all issues except the amount of interest awarded. On that issue we reverse and remand to the trial court for entry of judgment in accordance with this opinion.

Affirmed in part, reversed in part and remanded.

Judge EAGLES 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 reverses the trial court's decision to award interest from 28 December 1989 instead of from 28 March 1988. I believe the trial court was correct on the issue of interest, and I vote to affirm that portion of the judgment as well. For that reason, I respectfully dissent, in part.

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[111 N.C. App. 340 (1993)]

STATE OF NORTH CAROLINA v. COLIN GLENN WITHERS

No. 9227SC547

(Filed 3 August 1993)

1. Evidence and Witnesses § 1123 (NCI4th)— sufficiency of showing of conspiracy — conspirator's testimony about coconspirators' statements admissible

The State's evidence that five members of a rescue crew, working together on the night of a tornado, took items from a destroyed residence and put them in the rescue truck, went through various checkpoints set up by law enforcement officers without disclosing that they had the property, and each took some of the items with them when they went home after completing work was sufficient to show an implied understanding between the crew members to unlawfully possess property which had been taken from the residence; therefore, since the State made a *prima facie* showing of conspiracy, testimony by one conspirator with respect to the statements of coconspirators was properly admitted. N.C.G.S. § 8C-1, Rule 801(d)(E).

Am Jur 2d, Homicide §§ 345, 346.**2. Evidence and Witnesses § 1617 (NCI4th)— tape recording— exclusion based on improper foundation error— exclusion based on misleading jury, causing undue delay proper**

In a prosecution of defendant for felonious larceny and possession of stolen property allegedly taken by rescue squad members who were called to the scene of a tornado, the trial court erred by excluding a tape recording of the State's witness based on improper foundation, since the witness's mother had sufficient personal knowledge of the witness's voice to properly identify her voice from a prior relationship, and the State and defendant stipulated to the date of the tape recording; however, the trial court properly excluded the tape because it posed a danger of misleading the jury, causing undue delay and being cumulative since the tape contained extreme profanity, did not tend to prove or disprove any of the essential elements of either crime charged, and contained threats directed to one other than defendant. N.C.G.S. § 8C-1, Rules 901, 403.

Am Jur 2d, Evidence § 436.

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3. Larceny § 154 (NCI4th)— felonious possession of stolen firearm—dishonest purpose—sufficiency of evidence

There was no merit to defendant's contention that the charge of felonious possession of a stolen firearm should have been dismissed because the State failed to prove that defendant possessed any weapon with a dishonest purpose, since several factors, supported by uncontradicted evidence, indicated a dishonest purpose, including the fact that defendant found a pistol at a home destroyed by a tornado and then hid it under the seat of his rescue truck; he passed several roadblocks where he could have turned the pistol over to law enforcement authorities; defendant exercised dominion over the pistol by cleaning it, keeping it for four months, and then giving it to his uncle; he contacted police several times to check on the status of the pistol to see if it had been reported stolen or missing; he participated in transporting other firearms taken from the residence and told other members of the rescue squad that they could keep the weapons; and, when contacted by the investigating officers, defendant initially denied having any knowledge of the missing items.

Am Jur 2d, Larceny § 155.

4. Larceny § 200 (NCI4th)— not guilty of larceny—guilty of felonious possession—verdicts not inconsistent

The jury's verdicts of not guilty of felonious larceny of a firearm and guilty of felonious possession of a stolen firearm were not inconsistent as a matter of law.

Am Jur 2d, Larceny §§ 176, 177.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 ALR3d 866.

Appeal by defendant from judgment entered 5 December 1991 by Judge Julia V. Jones in Lincoln County Superior Court. Heard in the Court of Appeals 28 April 1993.

Defendant was charged in a bill of indictment with felonious larceny of several weapons and assorted jewelry in violation of G.S. § 14-70, and with felonious possession of stolen property in violation of G.S. § 14-72(a). He entered pleas of not guilty. At trial, the State presented evidence tending to show the following:

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On the evening of 6 May 1989, a tornado struck western Lincoln County destroying many homes including that of the State's witness, Clara Pizzoli. Defendant Colin Withers and four other members of the Stanley County Rescue Squad responded to the tornado site at the request of Lincoln County emergency management authorities. At this time, defendant was the captain of the Stanley Rescue Squad.

The squad was dispatched to retrieve a body near Ms. Pizzoli's residence. After removing the body, the crew went to the Pizzoli home which was left in ruins by the tornado. The crew was initially requested to search for injured or deceased occupants of the house, but remained at the residence after it was determined that the occupants were already at the hospital.

The crew continued to look about and found four guns and some jewelry. Defendant admitted finding a Browning 9mm pistol in a field during the search. He put the pistol under the seat of the crash truck. Rita Jones, a rescue squad member and State's witness, testified that defendant told the others to be quiet about the items found and said that insurance would reimburse the property owner for the loss. Upon returning to the rescue squad building in Stanley, defendant distributed the guns, including a .22 caliber rifle, a 12 gauge shotgun, and a .45 caliber revolver, to members of the squad. Other members, including Ms. Jones, divided up the jewelry.

Defendant took the 9mm pistol, cleaned it and kept it for four months. During this four month period, he contacted the police to inquire about the status of the pistol. He also spoke to a neighbor, Gaston County Police Officer Daniel Hawley, to determine if the gun had been reported stolen. Officer Hawley, however, did not recall being told that defendant had found the pistol in Lincoln County. In September 1989, defendant gave the pistol to his uncle, who sold it.

Following the tornado, Ms. Pizzoli discovered her jewelry box among the ruins of her home, but she did not find any jewelry in the box. Ms. Pizzoli also found the zipper pouch for the Browning 9mm pistol on which she had written the serial number of the pistol. She contacted the Lincoln County Sheriff's Department about the missing items. No report was filed because she was told by the police that after a tornado, it is difficult to distinguish between property that is stolen or simply missing.

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The Lincoln County Sheriff's Department began to investigate after Rita Jones reported to Crimestoppers of Gaston County on 28 August 1989 that two rifles, two handguns and some jewelry had been stolen from Lincoln County by rescue squad members. Lincoln County Sheriff's Department investigators spoke with defendant on 6 September 1989 about the missing items. Defendant denied having any knowledge of the missing items. On 20 September 1989, defendant contacted Deputy Bruce Rice of the Lincoln County Sheriff's Department to report that he had found two rifles in a closet at the Stanley Rescue Squad. Deputy Rice recovered these rifles, and Lincoln County investigators asked defendant to come to the Lincoln County Sheriff's Department. Defendant advised the deputies that he could obtain the Browning 9mm pistol. Upon returning with the pistol, defendant was arrested on 28 September 1989.

At the close of all the evidence, the trial court dismissed the charges relating to the jewelry and submitted to the jury only the issues of defendant's guilt of felonious larceny of a firearm and felonious possession of a stolen firearm. The jury found defendant not guilty of felonious larceny of a firearm, but guilty of felonious possession of a stolen firearm. The trial court entered judgment sentencing defendant to imprisonment for three years. This sentence was suspended, however, and defendant was placed on supervised probation for three years. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Don Wright, for the State.

James R. Carpenter and David A. Phillips for defendant-appellant.

MARTIN, Judge.

Defendant contends that the trial court erred by (1) admitting hearsay testimony by the State's witness, Rita Jones; (2) excluding a tape recording offered by defendant to impeach Ms. Jones' testimony; (3) denying defendant's motion to dismiss the charges of the possession of stolen weapons at the close of all the evidence, and (4) denying defendant's motion to set aside the verdict. For the reasons stated below, we find no prejudicial error.

[1] By his first assignment of error, defendant contends that the trial court committed prejudicial error by allowing State's witness,

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Rita Jones, to testify to hearsay statements made by other members of the rescue crew during the evening of 6 May 1989, and then refusing to strike the testimony when the State failed to make out a *prima facie* case of conspiracy. We disagree.

Rule 801(d) of the North Carolina Rules of Evidence provides that “[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.” N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (1992). *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977). Statements of coconspirators are admissible against other members of the conspiracy so long as a *prima facie* case of conspiracy is established independently of the statements sought to be admitted. *Id.*, at 138, 232 S.E.2d at 438; *See also State v. Brewington*, 80 N.C. App. 42, 341 S.E.2d 82, *disc. review denied*, 317 N.C. 708, 347 S.E.2d 449 (1986). A coconspirator’s statement may be admitted before the establishment of a *prima facie* case of conspiracy conditioned upon a subsequent showing of conspiracy before the close of the State’s evidence. *Tilley*, at 138-39, 232 S.E.2d at 438-39; *Brewington*, at 49, 341 S.E.2d at 86-87. In order to use a coconspirator’s statement against other coconspirators, the State must show that “(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.” *Tilley*, at 138, 232 S.E.2d at 438.

A conspiracy is “an express agreement or mutual implied understanding between defendant and others to do an unlawful act or a lawful act by unlawful means.” *State v. Lyons*, 102 N.C. App. 174, 183, 401 S.E.2d 776, 781, *affirmed*, 330 N.C. 298, 412 S.E.2d 308 (1991). It may be shown by direct or circumstantial evidence. *State v. Collins*, 81 N.C. App. 346, 344 S.E.2d 310, *appeal dismissed*, 318 N.C. 418, 349 S.E.2d 601 (1986). A conspiracy “‘may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, . . . point unerringly’” to its existence. *State v. Fink*, 92 N.C. App. 523, 530, 375 S.E.2d 303, 307 (1989), *quoting State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E.2d 893, 901, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). In determining the sufficiency of the evidence to establish a conspiracy, the evidence is considered in the light most favorable to the State. *Collins, supra*.

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At trial, the State sought to introduce, through the testimony of Rita Jones, statements made by members of the crew other than defendant with respect to the jewelry and guns. She testified, over objection, that she had asked her husband, Tony Jones, what he was going to do with the jewelry and that his response was “[k]eep it of course.” She also testified that one of the other crew members, Richard Mills, agreed with defendant that everyone should keep quiet about the property and that “[t]he insurance will pay for it.” After defendant and Richard Mills left the building, Ms. Jones testified that the following exchange took place between herself, her husband Tony Jones, and Arthur Greene:

A. Tony and Arthur waited 'til everybody else had left the building and they proceeded to put the jewelry on the table, looking through it, asked me if I wanted any, and I said, “No not really” because you don’t—I told them, I said, “You don’t know if the woman’s dead or alive. How can you take her jewelry?”

Q. Did they say anything in response to that?

A. He just said—repeated what was said before, ‘The insurance will pay for it, don’t worry about it’.

In order for Ms. Jones’ testimony to be admissible pursuant to Rule 801(d)(E), the burden was upon the prosecution to establish a *prima facie* case of conspiracy through evidence independent of these statements before the close of the State’s evidence. We hold that the State produced sufficient evidence to carry its burden. Through other testimony by Ms. Jones, the State showed that five members of the rescue crew, working together on the night in question, had taken items from the Pizzoli residence and put them in the rescue truck, that they had gone through various checkpoints set up by law enforcement officers without disclosing that they had the property, and that when they went home after they had completed their work, each of them had taken some of the items with them. In our view, these acts, considered in the light most favorable to the State, are sufficient to show an implied understanding between the crew members to unlawfully possess property which had been taken from the Pizzoli residence. Since the State made a *prima facie* showing of conspiracy, Ms. Jones’ testimony with respect to the coconspirator statements was properly admitted. Defendant’s first assignment of error is overruled.

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[2] Defendant contends in his second assignment of error that the trial court erred by denying defendant the opportunity to play before the jury a tape recording of a telephone call by the State's witness, Rita Jones. We find no error in the exclusion of the tape.

In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), our Supreme Court held that instead of the seven-step test applied in *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1976), only Rule 901 of the North Carolina Rules of Evidence has to be satisfied for admission into evidence of a tape recording. *Stager* and Rule 901 only require personal knowledge for authentication. *Id.*; See also N.C. Gen. Stat. § 8C-1, Rule 901(b) (1992). Rule 901 provides in pertinent part:

(a) *General Provision.*—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.*—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness with Knowledge.*—Testimony that a matter is what it is claimed to be.

. . .

(5) *Voice Identification.*—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

Once authenticated, the tape recording is admissible if legally obtained and contains competent evidence. *Stager*, at 316-17, 406 S.E.2d at 898.

In the case at bar, defendant attempted to introduce a tape recording to impeach the testimony of Rita Jones and to show her motive to testify against him. On direct examination, Ms. Jones testified that she did not threaten her husband or anyone at the Stanley Rescue Squad. Defendant, however, offered a telephone answering machine tape recording in which Ms. Jones profanely threatened to go to the authorities in Lincolnton and report her husband, who had been present when the property had been taken

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and when it had been divided. Ms. Jones' former mother-in-law testified, based on her personal knowledge, that the voice on the tape was that of Ms. Jones. The witness could not pinpoint the date of the tape, but said it had been made in early August 1989. The State and defendant later stipulated to the date of the tape recording. The trial court, however, refused to admit the tape recording holding that defendant had not provided a proper foundation.

Applying *Stager* and Rule 901(b), we conclude that the trial court erred by excluding this tape recording based on improper foundation. The witness had sufficient personal knowledge of Ms. Jones' voice to properly identify her voice from a prior relationship, and the State and defendant stipulated to the date of the tape recording. We hold, however, that the tape was properly excluded for other reasons.

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Evidence offered to show a defect in the witness' truthfulness or veracity is relevant for impeachment. *1 Brandis on North Carolina Evidence*, § 38 at 192 (3d ed. 1988). Generally, relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1992).

"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." N.C. Gen. Stat. § 8C-1, Rule 403 (1992) (emphasis added). The decision to allow or exclude evidence under this rule is a matter within the sound discretion of the trial judge and may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

In the present case, the State suggests that the potential for prejudice outweighed the usefulness of defendant's tape because Ms. Jones' recorded statement was heavily laden with the emotion of a recently terminated marriage, and because she was intoxicated at the time that the tape was made. Ms. Jones' recorded message,

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directed to her husband, not defendant, was: “[d]rinking or whatever you want to call it. I might be f---ed up, but I know about all your g-----n lies. I’m going to Lincolnton and I’m going to put your f---ing ass under the f---ing jail.” While the tape in question directly contradicts Ms. Jones’ earlier testimony denying making threats to “get back” at her husband, the tape does not tend to prove or disprove any of the essential elements of either crime charged. Furthermore, the threats made on the tape are not directed at defendant. On direct examination, defendant’s witness, Joyce Jones, testified to the threat which Ms. Jones made, so that the impeaching evidence was disclosed to the jury. Considering these factors and the extreme profanity contained on the tape, we believe the tape posed a danger of misleading the jury, causing undue delay and being cumulative. *Id.* Therefore, we hold that the trial judge did not abuse her discretion in excluding the tape.

[3] Defendant contends in his third assignment of error that the trial court erred in denying defendant’s motion to dismiss the charge of felonious possession of a stolen firearm at the close of all the evidence because the State failed to prove that defendant possessed any weapon with a dishonest purpose. We disagree.

In ruling on a motion to dismiss in a criminal action, the trial judge must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Brown*, 81 N.C. App. 622, 344 S.E.2d 817, *disc. review denied*, 318 N.C. 509, 349 S.E.2d 867 (1986). Conflicts in the evidence are for the jury to decide. *Id.* The trial court decides if there is substantial evidence of each element of the crime charged. *Id.* Substantial evidence is that which a reasonable mind would accept as sufficient to support a conclusion. *Id.*

From our review of the record, we find there is substantial evidence that defendant possessed the firearm with a dishonest purpose. Dishonest purpose is an essential element of possession of stolen goods. *See generally State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). Dishonest purpose is equivalent to felonious intent. *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986). Intent can be proven by direct or circumstantial evidence. *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974). There is no need to show that defendant intended to personally gain from his action. *Parker, supra.*

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In the light most favorable to the State, several factors, supported by uncontradicted evidence, indicate a dishonest purpose on the part of defendant. After defendant found the Browning 9mm pistol at the Pizzoli home, he hid it under the seat of the rescue truck. He passed several roadblocks where he could have turned the pistol over to law enforcement authorities. Defendant exercised dominion over the pistol by cleaning the pistol, keeping the pistol for four months, and then giving the pistol to his uncle. He contacted the police several times to check on the status of the pistol to see if the pistol had been reported stolen or missing. He also participated in transporting the other firearms taken from the Pizzoli residence and told other members of the crew that they could keep these weapons. When contacted by the investigating officers, defendant initially denied having any knowledge of the missing items. These factors, taken together, support a reasonable inference of dishonest purpose. The trial court was correct in not allowing the motion to dismiss because this question was for resolution by the jury. This assignment of error is overruled.

[4] The defendant's final assignment of error is that the trial court committed reversible error in denying defendant's motion to set aside the verdict upon the grounds that the jury's verdicts were inconsistent as a matter of law. We disagree.

By enacting the possession of stolen goods statute, the Legislature intended to "plug a loophole in the law as it then existed when one was found in possession of stolen goods and the State was unable to prove either larceny or receiving." *Perry*, at 236, 287 S.E.2d at 817. The State does not have to prove who committed the larceny, nor is a larceny conviction a prerequisite to a jury finding a defendant guilty of felonious possession of stolen goods. *Id.* at 235, 287 S.E.2d at 816. In fact, the State may indict and try a defendant for larceny and possession of the same property, but a defendant may only be convicted of one of these offenses. *Id.*; *State v. Williams*, 65 N.C. App. 373, 309 S.E.2d 266 (1983), *disc. review denied*, 310 N.C. 480, 312 S.E.2d 890 (1984).

Applying the foregoing principles to the present case, the jury's verdicts of not guilty of felonious larceny of a firearm and guilty of felonious possession of a stolen firearm are not inconsistent as a matter of law. This assignment of error has no merit.

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No error.

Judges EAGLES and JOHN concur.

WAYNE HALES, ADMINISTRATOR OF THE ESTATE OF DONALD WAYNE HALES,
DECEASED v. ALTON RAY THOMPSON

No. 927SC910

(Filed 3 August 1993)

1. Automobiles and Other Vehicles § 716 (NCI4th)— last clear chance—sufficiency of evidence

There was substantial evidence to require submission of last clear chance to the jury, and it was error for the trial court to fail to so instruct, where the evidence tended to show that defendant observed deceased's vehicle approximately two hundred feet ahead of him; defendant braked and left tire impressions for 193 feet before the point of impact; defendant traveled those feet in deceased's lane rather than his own; defendant had the time and means, by staying in his own lane of travel, to avoid the accident; and defendant's failure to stay in his own lane was a failure to use every reasonable means to avoid the injury to deceased.

Am Jur 2d, Automobiles and Highway Traffic § 1118.**2. Evidence and Witnesses § 239 (NCI4th)— damages in auto accident case—deceased's leukemia—effect on relationship with parents—evidence relevant—admissibility discretionary with judge**

In a wrongful death action arising from an automobile accident, evidence pertaining to deceased's leukemia and the effect it had on his relationship with his parents was admissible because it had a tendency to prove the extent of damages which were in controversy in the case, and it was therefore relevant; however, whether the evidence should be excluded on retrial because its probative value is substantially outweighed by the danger of unfair prejudice is a question addressed to the sound discretion of the trial judge. N.C.G.S. § 8C-1, Rules 401, 403.

Am Jur 2d, Damages §§ 923 et seq.

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Appeal by plaintiff from judgment entered 18 November 1991 and order entered 28 January 1992 in Wilson County Superior Court by Judge W. Russell Duke, Jr. Heard in the Court of Appeals 7 July 1993.

Mast, Morris, Schulz & Mast, P.A., by Bradley N. Schulz and George B. Mast, and Battle, Winslow, Scott & Wiley, P.A., by Samuel S. Woodley, Jr., for plaintiff-appellant.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr. and Lyn K. Broom, for defendant-appellee.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for Nationwide Mutual Insurance Company.

GREENE, Judge.

Wayne Hales (plaintiff), administrator of the estate of his deceased son Donald Wayne Hales (Donald), appeals from a judgment that he recover nothing in a wrongful death action against Alton Ray Thompson (defendant), and from the trial court's denial of his Rule 59 motion for a new trial.

Donald and defendant were involved in an automobile accident on 9 December 1988, which resulted in Donald's death and serious injuries to defendant. On 8 February 1989, plaintiff, duly qualified as administrator of Donald's estate, filed a complaint against defendant on behalf of Donald's estate. Donald died intestate. The complaint alleged that defendant had negligently driven his vehicle into the eastbound lane of Highway 42 and struck the vehicle operated by Donald, thereby proximately causing his death. The complaint further alleged that defendant was negligent in that he failed to maintain proper control of his vehicle and a proper lookout, was operating his vehicle at a greater than reasonable speed, failed to decrease speed to avoid the collision, and failed to travel on the right side of the highway. Defendant answered, denying negligence and asserting the affirmative defenses of contributory negligence, sudden emergency and assumption of the risk. Defendant also counterclaimed to recover for his own injuries, alleging that Donald was negligent in that he failed to yield the right-of-way, operated his vehicle without proper control, did not maintain a proper lookout, and turned into the path of defendant's vehicle without ascertaining that the movement could be made in safety.

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Plaintiff filed a reply in which he alleged that, should it be determined that Donald was contributorially negligent, defendant still had the last clear chance to avoid the collision and that the conduct of defendant constituted willful and wanton negligence. Thereafter, defendant filed a motion in limine to exclude from evidence at the trial any reference to Donald's medical condition prior to the accident on the grounds that Donald's health at the time of his death was not in issue, and thus such information would be irrelevant, and that, if relevant, would be unfairly prejudicial to defendant. Specifically, defendant moved to exclude any reference to the fact that Donald had suffered from leukemia for a prolonged period of time prior to his death and had only recovered shortly before his death. Plaintiff opposed the motion on grounds that the information about Donald's battle with leukemia was relevant to show the relationship between Donald and his family and would not be unfairly prejudicial to defendant. The motion was granted. Plaintiff later made an offer of proof, in which Donald's mother testified on voir dire as to the illness and its effect on the family.

The case came to trial on 4 November 1991. The undisputed evidence shows that the accident occurred near the intersection of Radio Tower Road and Highway 42 in Wilson County at approximately 6:05 a.m. on 9 December 1988. Defendant was travelling west on Highway 42 and Donald was travelling on Radio Tower Road and approaching the stop sign at the intersection of Radio Tower Road and Highway 42. Donald attempted to make a left turn onto Highway 42, in front of the vehicle driven by defendant. Defendant's car struck Donald's car, killing Donald and injuring defendant.

Plaintiff's evidence tends to show that at the time of the accident, defendant was travelling at a high rate of speed. Donald attempted to make a left turn from the stop sign on Radio Tower Road into the eastbound lane of Highway 42. Defendant, upon seeing Donald enter the roadway, braked and swerved to the left, crossing over the center line of Highway 42 into the eastbound lane, and striking Donald's vehicle. Dr. Charles Manning (Dr. Manning), an accident reconstruction specialist, testified that in his opinion the defendant's vehicle was travelling at least eighty-one miles per hour prior to braking, and that at the point of impact with Donald's vehicle was travelling at fifty-seven to sixty miles an hour. Dr. Manning further testified that Donald was able to complete his turn, that his vehicle was safely in the eastbound

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lane of Highway 42, and that the point of impact was in the eastbound lane of Highway 42. In Dr. Manning's opinion, if defendant had not been travelling at an excessive speed, Donald would have had time to make the turn safely. Dr. Manning also gave his opinion that had defendant not turned his vehicle to the left but rather had stayed in his own lane of travel, no collision would have taken place. Trooper J.A. Branch of the North Carolina Highway Patrol also testified that the point of impact between the two vehicles was in the eastbound lane. Further, he testified that the "tire impressions" made by defendant's vehicle prior to impact measured 193 feet.

Donald's mother, father, and sister, other family members and friends testified as to the closeness of the family and the impact on the family of Donald's death. Numerous photographs of Donald with his family, holiday cards, report cards, and other items were introduced to illustrate this testimony. Two of these items, a poem written by Donald's mother after his death and a photograph of Donald and his mother in which the physical effects of the leukemia on Donald are apparent, were objected to by defendant. The trial court sustained defendant's objections. At the close of plaintiff's evidence, defendant moved for a directed verdict, which was denied. In addition, plaintiff made a motion that the testimony of defendant's expert witness in accident reconstruction, Dr. Roland F. Barrett (Dr. Barrett), be excluded pursuant to Rule 26(e) of the North Carolina Rules of Civil Procedure, because plaintiff was prevented from adequately preparing to cross-examine Dr. Barrett by defendant's delay in identifying Dr. Barrett as an expert witness and defendant's failure to supplement Dr. Barrett's deposition answers. Plaintiff's motion was denied.

Defendant's evidence tended to show that he was travelling within the fifty-five mile per hour speed limit prior to the collision. Defendant saw Donald's car as he approached the intersection. Defendant believed when he saw Donald's car slow down as it approached the stop sign that Donald was going to stop, but he did not. Donald pulled out in front of defendant, and defendant immediately applied the brakes and swerved to the left in an attempt to avoid Donald's car, which was entering the intersection from defendant's right. Upon impact, defendant lost consciousness. Dr. Barrett testified that in his opinion defendant's vehicle was travelling at a maximum speed of 54.7 miles per hour when defendant applied the brakes.

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At the charge conference, plaintiff requested an instruction on last clear chance, which the trial court declined to give. A verdict sheet was given to the jury and the jury retired for deliberation. Upon reaching a verdict, the jury returned the verdict, which read in pertinent part as follows:

1. Was the death of . . . Donald Wayne Hales, proximately caused by the negligence of the defendant . . . ?

Answer: YES

. . . .

2. If so, did . . . Donald Wayne Hales, by his own negligence, contribute to his death?

Answer: YES

. . . .

3. Was the death of . . . Donald Wayne Hales, caused by the willful or wanton conduct of the defendant . . . ?

Answer: No

. . . .

4. What amount of damages, if any is . . . the Estate of Donald Wayne Hales, deceased, entitled to recover by the reason of the negligence of [defendant]?

Answer: \$16,000.00

Defendant made a motion to strike the jury's answer to issue number four as being inconsistent with the jury's answers to issues one, two, and three, which the trial court granted, and signed a judgment on 18 November 1991, that plaintiff recover nothing of defendant and defendant recover nothing on his counterclaim. Plaintiff then made a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, giving as grounds, among others, the trial court's failure to exclude the testimony of Dr. Barrett, denial of plaintiff's request that the issue of last clear chance be submitted to the jury, exclusion of two of plaintiff's exhibits, and the fact that the jury made a clerical error in writing down the answer to the third issue, which should have been "yes" instead of "no." The motion was supported by nearly identical affidavits from all twelve jurors, which stated that the jurors did

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not understand the significance of their answer to issue number three, that "the third Issue should have been answered 'Yes,' and must have been written down incorrectly," and that the jury intended that the estate recover \$16,000.00. The trial court denied the motion.

The determinative issues presented are whether (I) the trial court committed reversible error in failing to submit to the jury the issue of last clear chance; and (II) evidence concerning Donald's leukemia and its effect on his relationship with his parents was relevant.

I

[1] Plaintiff argues that the evidence supported the submission of last clear chance to the jury. We agree.

The doctrine of last clear chance would allow plaintiff to recover despite any contributory negligence by Donald if defendant, in the exercise of reasonable care and prudence, had the last clear chance to avoid the collision and failed to do so. *Williams v. Odell*, 90 N.C. App. 699, 703, 370 S.E.2d 62, 65, *disc. rev. denied*, 323 N.C. 370, 373 S.E.2d 557 (1988). In order to require the submission of last clear chance to the jury, plaintiff must carry the burden of providing substantial evidence which, "when viewed in the light most favorable to [plaintiff], will support a reasonable inference" that each of the five essential elements of last clear chance is present. *Watson v. White*, 60 N.C. App. 106, 109, 298 S.E.2d 174, 176 (1982); *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 245, 423 S.E.2d 504, 507 (1992), *disc. rev. denied*, 333 N.C. 574, 429 S.E.2d 567 (1993) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Accordingly, plaintiff must present substantial evidence that

(1) [Donald], by [his] own negligence, placed [himself] in a position of helpless peril . . . ; (2) defendant saw, or by the exercise of reasonable care should have seen, and understood [Donald's] perilous position; (3) defendant had the time and the means to avoid the accident had defendant seen or discovered [Donald's] perilous condition; (4) defendant failed . . . to use every reasonable means at his command to avoid the impending injury; and (5) [Donald] was injured as a result of defendant's failure . . . to avoid [the] impending injury.

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Williams, 90 N.C. App. at 703, 370 S.E.2d at 65 (emphasis omitted). Failure to submit the issue of last clear chance when supported by substantial evidence is error and requires a new trial. See *McMahan v. Stogner*, 95 N.C. App. 764, 767, 384 S.E.2d 60, 62 (1989), *disc. rev. denied*, 326 N.C. 49, 389 S.E.2d 91 (1990).

The parties do not dispute, and we therefore assume, that elements one, four, and five are shown by the evidence. The parties dispute only the presence of elements three and four. We must, therefore, determine, based on the evidence before the trial court taken in the light most favorable to the plaintiff, first, whether there is substantial evidence that defendant had the time and means to avoid the accident, and, second, whether there is substantial evidence that he failed to use every reasonable means to do so.

The answers of defendant in a deposition taken prior to trial were read into evidence. Defendant testified in that deposition that he was "probably . . . two hundred feet" from Donald's car when he realized that it was not going to stop. Defendant then steered his car into the left lane, the lane into which Donald was attempting to turn. Evidence from Trooper Branch revealed that he measured "tire impressions" from defendant's vehicle beginning at 193 feet before the point of impact. Based on this figure, Dr. Manning testified that it was his opinion that defendant began braking at 193 feet from the point of impact. Dr. Manning further testified that the position of the 193 feet of impressions indicated that defendant's vehicle crossed the center line to the left and travelled the 193 feet in the lane into which Donald was attempting to make his turn, and that the point of impact was in that lane. Based on this information, Dr. Manning gave his opinion, without regard to whether the defendant was travelling at fifty-five miles per hour as he testified or at the eighty-one miles per hour that Dr. Manning estimated, that when defendant applied the brakes 193 feet before impact, "if [defendant] would have [braked] and not turned the car, the car would not have gone over into the other lane and struck [Donald's] vehicle." Dr. Manning also gave his opinion, based on information found in the North Carolina Driver's Handbook, that the proper procedure when faced with a situation like that faced by defendant is to "turn to your right or . . . turn sharply into a field to get off the road."

The above evidence supports a reasonable inference that defendant had the time and means, by staying in his own lane of

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travel, to avoid the accident. It also supports the reasonable inference that defendant's failure to stay in his own lane was a failure to use every reasonable means to avoid the injury to Donald. There is thus substantial evidence to require submission of last clear chance to the jury, and it was therefore error to fail to so instruct. Accordingly, the case must be remanded for a new trial.

II

[2] Plaintiff also argues that the trial court committed reversible error by granting defendant's motion in limine excluding evidence of Donald's leukemia and the effect on the closeness of the family which resulted from their attempts to cope with his illness. Defendant argued at trial that the evidence should be excluded on two grounds: first, that it was not relevant pursuant to Rule 401; and second, that even if relevant, its probative value was substantially outweighed by its prejudicial effect pursuant to Rule 403. While the grant of a new trial on the issue of last clear chance makes it unnecessary that we address this issue, in our discretion, because the issue may be pertinent at the new trial, we address only the issue of whether the evidence of Donald's illness was relevant.

Evidence is relevant, and therefore admissible, pursuant to Rule 401 of the North Carolina Rules of Evidence, "if it has *any* logical tendency to prove any fact that is of consequence" in the action. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *and cert. denied*, --- U.S. ---, 121 L. Ed. 2d 241 (1992). A ruling on whether proffered evidence is relevant is not discretionary on the part of the trial judge, but will nevertheless be given great deference on appeal. *Id.*

Our State's wrongful death statute, N.C.G.S. § 28A-18-2, provides in pertinent part

[a]ll evidence which reasonably tends to establish any of the elements of damages . . . or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

N.C.G.S. § 28A-18-2(c) (Supp. 1992). The statute further provides that damages for wrongful death include the value of the "[s]ociety,

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companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered." N.C.G.S. § 28A-18-2(b)(4)(c) (Supp. 1992).

Any recovery in a wrongful death action is distributed to the same persons as it would be had the decedent died intestate. *Williford v. Williford*, 288 N.C. 506, 510, 219 S.E.2d 220, 223 (1975). The record reveals that at the time of his death, Donald was unmarried and had no children. Under the intestate laws of this state, those entitled to any damages recovered in this action would be Donald's parents. N.C.G.S. § 29-15(3) (1984). The testimony of Donald's mother during plaintiff's offer of proof as to the evidence concerning Donald's leukemia tends to establish that Donald's battle with leukemia drew Donald and his parents closer together, caused them to spend more time together, and increased their emotional ties beyond those of the average family. Such closeness has a direct bearing on the value to his parents of Donald's "[s]ociety, companionship, [and] comfort." Accordingly, the evidence pertaining to Donald's disease and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which are in controversy in this case. The evidence was therefore relevant and should not have been excluded on that ground.

Whether the evidence should be excluded on retrial pursuant to Rule 403 of the North Carolina Rules of Evidence because "its probative value is substantially outweighed by the danger of unfair prejudice" is a question addressed to the sound discretion of the trial judge at the retrial. N.C.G.S. § 8C-1, Rule 403 (1992); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

New trial.

Judges EAGLES and LEWIS concur.

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STATE OF NORTH CAROLINA v. CHARLES MARVIN PARKER

No. 9227SC30

(Filed 3 August 1993)

1. Evidence and Witnesses § 2333 (NCI4th)— rape and incest case—doctor qualified as expert in detection of child abuse and trauma—no error

The trial court did not err in qualifying a doctor as an expert “in the field of pediatrics and in the area of the detection of child abuse and trauma,” where the witness was a board certified pediatrician who had served as a child medical examiner for the State for a dozen years, had examined over 400 abused and neglected children, and had testified in the North Carolina courts on the subject of child abuse and neglect on numerous occasions.

Am Jur 2d, Evidence § 5.**2. Evidence and Witnesses § 2331 (NCI4th)— expert medical witness—opinion that victim had been sexually abused—admission error**

In a prosecution of defendant for rape, first-degree sexual offense, and incest where credibility was the central issue, the trial court committed prejudicial error in allowing an expert medical witness to testify over defendant’s objection that in his opinion the victim had been sexually abused, since the witness based his opinion only on his interview with the victim in which she related a history of sexual abuse and the fact that her hymenal ring was not intact, and there was thus nothing in the record to support a conclusion that the witness was in a better position than the jury to determine whether the victim was sexually abused.

Am Jur 2d, Expert and Opinion Evidence § 244.

Appeal by defendant from judgments entered 2 August 1991 by Judge Zoro Guice, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 11 February 1993.

On 6 November 1989, defendant was indicted for one count of rape and one count of sexual offense, and on 8 April 1991, defendant was indicted for one count of first degree sexual offense,

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one count of rape, and two counts of incest. These cases were joined for trial. On 2 August 1991, a jury found defendant guilty of all charges. Judge Zoro Guice, Jr. entered judgments and sentenced defendant to two life terms. From these judgments, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Melissa L. Trippe, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

ORR, Judge.

This case arises out of acts that allegedly occurred between defendant and his minor daughter, (whom we shall refer to as T.P. due to her young age). At trial, T.P. testified to four incidents of sexual acts which occurred between her and defendant. T.P. testified that on 9 February 1985, she went with defendant to the hospital to visit defendant's wife (T.P.'s stepmother), Kelly Parker. At this time, according to the evidence, T.P. was ten years old. T.P. testified further that after visiting Kelly Parker she and defendant walked back to the car where defendant asked her if she would take off her pants. T.P. asked defendant why, and he said, "Are you going to give me a little bit." T.P. pulled down her pants, and defendant told her to bend over. Defendant then engaged in anal intercourse with her.

T.P. also testified that on 4 July 1987 when, according to the evidence, T.P. was twelve years old, defendant and Kelly Parker got into an argument while driving in defendant's truck. T.P. and three other children were also riding in the truck. When defendant stopped the truck, Kelly Parker got out and took two of the children out of the truck before defendant drove off with T.P. and one of T.P.'s stepsisters. When they got home, defendant told T.P. to take her clothes off and get into the bed with him. After T.P. took off her clothes and got into bed with defendant, defendant fondled her breasts and had vaginal intercourse with her.

Further, T.P. testified that on 9 March 1989 when, according to the evidence, T.P. was fourteen years old, she and defendant were alone on the couch in the living room when defendant pulled out his penis and told her to play with it. After T.P. touched

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defendant's penis, he told her to perform oral sex, which T.P. did. Then on 18 March 1989, when T.P.'s stepmother was absent from the home, defendant had vaginal intercourse with her in one of the bedrooms. T.P. also testified that the first time she told anyone of these incidents was on 2 April 1989 when she told her boyfriend's stepmother and Kelly Parker while they were at the Carolina Speedway.

Defendant testified, however, that he has never been sexual with T.P. More specifically, defendant testified that he has never had oral, anal, or vaginal sexual relations with T.P. Defendant also testified to the specific allegations T.P. made against him. Defendant testified that in February 1985, Kelly Parker was in the hospital and that he did visit her, but that as far as he could recall, T.P. never accompanied him on those visits. Defendant denied having sexual relations with T.P. on 9 February 1985 in the parking lot of the hospital.

Further, defendant testified that on 4 July 1987, he and Kelly Parker got into a fight while they were out at the Moose Lodge. After they left the Moose Lodge in defendant's truck, they continued to fight until Kelly Parker told defendant to let her out of the truck. Defendant stopped the truck, and Kelly Parker got out, taking two of the four children with her. Defendant then drove to Mary and Mitchell Hilton's house where defendant told the Hiltons about the fight. The Hiltons asked defendant if he wanted them to follow him to his house, and defendant said he did because he was "liable to get locked up" and he wanted someone to watch the kids. The Hiltons arrived at defendant's home, and Mary Hilton stayed with defendant until the next morning to look after the kids. Defendant denied having sexual relations with T.P. and testified that the only thing he did with regard to T.P. that night was to tell her to put her younger sister to bed. Additionally, defendant denied that any sexual relations occurred between him and T.P. on 9 March 1989 or on 18 March 1989.

Defendant also presented evidence that questioned the credibility of T.P. and Kelly Parker. T.P. was dating Chad Hawkins in 1989, and defendant testified that Kelly Parker was dating Chad's brother, Buddy. Kelly Parker also testified that she dated Buddy. The evidence shows that both T.P. and Kelly were friends with the stepmother of Chad and Buddy, Mary Hawkins. Defendant testified that on 1 April 1989, the day before T.P. first told anyone

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about these sexual acts, he told T.P. that she could not see Chad Hawkins anymore. He also testified that he told T.P. that he did not want her to have a relationship with anyone in the Hawkins family, nor did he want anyone in the Hawkins family in his home. After these statements to T.P., defendant testified that Kelly Parker, Bud Hawkins (Buddy's father), and Mary Hawkins told him that they would get even with him. Further, according to defendant, after he told T.P. that she could not see Chad Hawkins, T.P. did not want to speak to him or even be near him. On 3 April 1989, defendant spoke to Kelly Parker's mother who accused him of sexually molesting T.P.

Defendant's parents also testified at trial that before defendant's marriage to Kelly Parker, his relationship with T.P. seemed to be that of a normal father-daughter relationship, but that after defendant and Kelly Parker married, T.P.'s demeanor changed. T.P. began drinking some and cursing and, according to defendant's father, lying. Further, defendant testified that after his marriage to Kelly Parker, he was unable to talk to T.P. because of Kelly. He testified that Kelly told him that he was "a lot older than" her and that he would "be in a wheelchair or probably a rocking chair pretty soon" and that she and T.P. would "get out" and "have a good time." Defendant's sister also testified that before Christmas, 1988, Kelly Parker told her that she had a plan to fix defendant so that she could leave him and he could not see his children again.

On 21 April 1989, Dr. Carlos Fisher examined T.P. after T.P. told Kelly Parker that defendant had sexually abused her. The trial court qualified Dr. Fisher as an expert witness "in the field of pediatrics and in the area of the detection of child abuse and trauma." At trial, Dr. Fisher testified over defendant's objection, that in his opinion, T.P. "had been sexually abused over a long period of time based on [his] exam."

Based on all of the evidence, the jury found defendant guilty of all of the acts charged against him. From these judgments, defendant appeals.

I.

[1] First, defendant contends the trial court erred in qualifying Dr. Fisher as an expert in the "detection of child abuse and trauma." We disagree.

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At the outset, the State argues that defendant has waived his right to object to the qualification of Dr. Fisher as an expert in the "detection of child abuse and trauma" by failing to object at trial.

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

State v. Hunt, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982). Due to the serious crime involved and the substantial penalty imposed, however, we have elected in our discretion to consider the merit of defendant's contention. *See, id.* at 244, 287 S.E.2d at 822 (where our Supreme Court elected to hear the merits of defendant's contention that an expert witness invaded the province of the jury when defendant failed to object to the testimony at trial and the defendant was found guilty of first degree murder and sentenced to life in prison).

Before the trial court qualified Dr. Fisher as an expert "in the field of pediatrics and in the area of the detection of child abuse and trauma", he testified to his extensive work in the field of pediatrics. Dr. Fisher testified that he graduated from the University of North Carolina School of Medicine in Chapel Hill in 1969 and completed his four-year pediatric training and program of internship at North Carolina Memorial Hospital. He was a member of the Child Evaluation Program on the Maltreatment Committee at Memorial Hospital for two years during his training. He is practiced and licensed and also board certified in pediatrics. Further, he has served as a child medical examiner for the State of North Carolina since 1977. He also serves on a committee in Gastonia similar to the Maltreatment Committee he served on at Memorial Hospital, and he has examined over four hundred children who have been abused and neglected. Finally, Dr. Fisher has testified in North Carolina superior and district courts on the subject of child abuse and neglect on numerous occasions.

"Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641

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(1987). Further, “[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it.” *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989) (citation omitted).

Applying these standards to the testimony of Dr. Fisher’s credentials as an expert, we conclude that the trial court did not err in qualifying Dr. Fisher as an expert “in the field of pediatrics and in the area of the detection of child abuse and trauma.”

II.

[2] Next, defendant contends that the trial court erred in allowing Dr. Fisher to testify, over defendant’s objection, that in his opinion T.P. had been sexually abused. Based on the holding in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), we agree.

In *Trent*, the defendant was convicted of first degree rape and taking indecent liberties with a minor. At trial, the minor victim testified to specific instances of sexual abuse which occurred between her and defendant. Defendant testified on his own behalf and denied the allegations. The State also introduced the testimony of Dr. Markello as an expert in the field of medicine with a specialty in pediatrics. Dr. Markello had examined the victim and interviewed her specifically with regard to her allegations of sexual abuse.

Dr. Markello testified that the victim told him that

her father had treated her for a rash on her thigh when she was about ten years old, that he had at that time begun to touch her private parts and breasts and continued to do so even after the rash disappeared, and that he had had sexual intercourse with her. Dr. Markello said that the victim also told him about moving back to Virginia to live with her grandmother in the summer of 1981 and returning to Greenville in September of 1984, when, according to the victim, the touching, but not the sexual intercourse, began again. The victim told Dr. Markello that she attempted to commit suicide in July of 1985 but was not treated for the attempt.

Id. at 613, 359 S.E.2d at 465. Further, Dr. Markello testified that another physician conducted a pelvic exam of the victim and found that the victim’s hymen was not intact. The exam did not, however, show any lesions, tears, abrasions, bleeding or otherwise abnormal conditions.

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The prosecuting attorney then asked Dr. Markello if he had a diagnosis based on his interview of the victim and the physical exam. Over defendant's objection, Dr. Markello replied, "The diagnosis was that of sexual abuse." *Id.* On appeal, defendant assigned as error the admission of this testimony.

Our Supreme Court recited the applicable law for admitting expert testimony. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." *Id.* at 614, 359 S.E.2d at 465; N.C.R. Evid. 702. Further,

in determining whether expert medical opinion is to be admitted into evidence the inquiry should be . . . whether the opinion expressed is really one based on the special expertise of the expert, that is, *whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.*

Trent, supra (emphasis added).

The Court stated that its review of the record showed that Dr. Markello based his opinion solely on the results of the pelvic exam and the history of sexual abuse given to him by the victim. Further, the Court stated that the pelvic exam was conducted four years after the date of the offenses and only revealed that the victim's hymen was not intact. The Court stated, "Given the limited basis recited by Dr. Markello for his diagnosis, there is nothing in the record to support a conclusion that he was in a better position than the jury to determine whether the victim was sexually abused". *Id.* at 614, 359 S.E.2d at 466. Based on this conclusion, the Court held that this testimony was not admissible under Rule 702 and that its admission constituted prejudicial error to defendant.

In the present case, Dr. Fisher read his notes into evidence which relayed an interview he conducted with T.P. about the alleged sexual acts defendant committed against her. Dr. Fisher also testified about the physical exam of T.P. which was conducted. He stated, "The findings on examination revealed there was a vaginal discharge, a creamy sort of discharge, from the vagina. The hymenal ring was not intact." As to the vaginal discharge,

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Dr. Fisher testified that it is a common complaint that adolescents have and that it can occur for non-sexual reasons.

Dr. Fisher also testified that he conducted a rectal exam of T.P. and found no lesions with sores or other evidence of disease present. He conducted tests for sexually transmitted diseases and found none. He also found no tears or scar tissue.

The prosecuting attorney then asked:

Q. Dr. Fisher, based on your interview with [T.P.] and your subsequent examination of her person, did you thereafter make a conclusion or reach a conclusion as to whether or not she had been the victim of sexual or abusive neglect?

The defendant objected to Dr. Fisher answering this question, which objection the trial court overruled. Dr. Fisher answered, "It was my opinion that she had been sexually abused over a long period of time based on my exam."

Thus, like the expert in *Trent*, Dr. Fisher based his opinion only on his interview with T.P. in which she related a history of sexual abuse and the fact that her hymenal ring was not intact. Given the limited bases for Dr. Fisher's opinion, there is nothing in the record to support a conclusion that he was in a better position than the jury to determine whether the victim was sexually abused. We hold, therefore, that it was error to admit this testimony into evidence.

We also hold that in the present case the error was prejudicial. "Defendant is entitled to a new trial if there is a 'reasonable possibility that, had the error . . . not been committed, a different result would have been reached'" *Trent*, 320 N.C. at 615, 359 S.E.2d at 466; N.C. Gen. Stat. § 15A-1443(a). The central contest in the present case is one of credibility. The record contains considerable evidence of conflict in the family arising out of defendant's second marriage to Kelly Parker and the relationship between Kelly Parker, T.P., and the Hawkins family. Further, the record contains evidence that prior to his marriage to Kelly Parker, defendant had a normal father-daughter relationship with T.P. We cannot say that, under the facts of this case, there was no reasonable possibility of a different result had the error not occurred, and defendant is, therefore, entitled to a new trial.

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Based on this holding, we decline to address defendant's remaining assignments of error.

New trial.

Judges WELLS and MARTIN concur.

RC ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF v.
REGENCY VENTURES, INC., HARRIS B. GUPTON AND SAMIE E.
GUPTON, DEFENDANTS

No. 9218SC836

(Filed 3 August 1993)

1. Damages § 51 (NCI4th)— breach of lease—effort to mitigate damages—genuine issue of material fact

In an action for breach of a lease agreement, the trial court erred in entering summary judgment for plaintiff because a genuine issue of material fact existed as to whether plaintiff made a reasonable attempt to mitigate damages as required by the parties' lease agreement and by law.

Am Jur 2d, Damages § 909.

2. Attorneys at Law § 55 (NCI4th)— breach of lease—award of attorney's fees—determination of reasonableness not required—statute applicable

There was no merit to defendant's contention that the trial court in an action for breach of a lease agreement erred in awarding excessive attorney's fees to plaintiff without considering whether the amount allowed was reasonable, since the lease agreement provided for the payment of "reasonable attorney's fees" should the landlord need to employ an attorney to collect rent or enforce its other rights and remedies under the lease, but it did not refer to any specific percentage, and N.C.G.S. § 6-21.2(2) therefore applied so that the amount of attorney's fees should be 15% of the outstanding balance owing on said evidence of indebtedness.

Am Jur 2d, Attorneys at Law § 277.

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Amount of attorneys' compensation in matters involving real estate. 58 ALR3d 201.

3. Guaranty § 13 (NCI4th)— defendant as guarantor of lease agreement—responsibility for attorney's fees—award proper

The trial court did not err in awarding attorney's fees against the individual defendant because he was a guarantor of a lease and not a party to it, since the guaranty contract provided that defendant "unconditionally guarantees the full and punctual payment of the rent and other charges provided for in this lease . . ."; the lease provided for reasonable attorney's fees if necessary to collect rent; and the language in the guaranty contract was sufficient to put a guarantor on notice that he would be liable for attorney's fees.

Am Jur 2d, Guaranty §§ 26 et seq.

4. Rules of Civil Procedure § 55.1 (NCI3d)— failure of defendants to file answer—motion to set aside entry of default properly denied

The denial of defendants' motion to set aside entry of default was not in error where defendants never filed an answer and made no attempt to defend their case after their attorney withdrew until two months later when they filed their responsive pleading to plaintiff's motion for default judgment or, alternatively, for summary judgment. N.C.G.S. § 1A-1, Rule 55(d).

Am Jur 2d, Judgments § 1169.

Appeal by defendants from order and judgment entered 18 May 1992 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 17 June 1993.

Plaintiff, RC Associates, is a North Carolina general partnership formed in 1990 upon execution of a joint venture agreement by several individuals, including defendants Harris B. Gupton and Samie E. Gupton, who are general partners. Mr. and Mrs. Gupton purchased some real property upon which they constructed a car wash. They sold the real property, with improvements, to plaintiff. Mr. Gupton's company, defendant Regency Ventures, Inc., leased the property and car wash from plaintiff. Defendant Harris B. Gupton guaranteed defendant Regency Ventures' obligations under the lease agreement. Defendant Regency Ventures defaulted on the lease payments, and defendant Harris B. Gupton defaulted on the guaran-

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ty. Mr. and Mrs. Gupton also defaulted on payments due under the joint venture agreement.

Plaintiff's complaint, filed 13 June 1991, claimed relief against defendant Regency Ventures, Inc. for breach of a lease agreement, against defendant Harris Gupton for breach of a guaranty relating to that lease agreement and against the defendants Harris Gupton and Samie Gupton for the breach of a joint venture agreement. Plaintiff sought recovery of sums owed and attorney's fees. On 8 January 1992, plaintiff filed an amendment to the complaint claiming defendants Harris B. Gupton and Samie E. Gupton had failed to make additional capital contributions to plaintiff since the filing of the original complaint. Pursuant to the court's order, an answer was due from defendants on or before 23 January 1992.

A responsive pleading was not filed by defendants, and the clerk of court entered an entry of default on 3 February 1992. On the same day, the court allowed the attorney of record for the defendants to withdraw from the case. On 2 March 1992, plaintiff filed a motion for default judgment or, alternatively, for summary judgment. On 3 April 1992, the defendants filed a response to that motion and a motion to set aside entry of default.

At a hearing on 8 May 1992, the trial court rendered a decision allowing the plaintiff's motions and denying the defendants' motion. The attorney for plaintiff drafted the order and judgment, which the trial court entered on 18 May 1992. In the judgment, the trial court granted judgment by default with respect to plaintiff's claim on the joint venture agreement and summary judgment with respect to the claims on the lease and guaranty agreements.

From this order and judgment, defendants appeal.

Carruthers & Roth, P.A., by Kenneth L. Jones, for plaintiff-appellee.

David B. Hough for defendant-appellants.

ORR, Judge.

Defendants appeal the entry of summary judgment, the award of attorney's fees, the denial of defendants' motion to set aside entry of default, and the failure of the trial court to hold defendant Regency Ventures, Inc. and defendant Harris B. Gupton jointly and severally liable for the recovery awarded for breach of the

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lease agreement. Plaintiff concedes that it is entitled to but one recovery of the principal amount of the judgment and the award of attorney's fees with respect to the claims on the lease agreement. Thus, defendant Regency Ventures, Inc. and defendant Harris B. Gupton are jointly and severally liable for that part of the judgment granting recovery on the lease and guaranty agreements.

I.

[1] Defendants allege that the trial court erred in entering summary judgment against them because a genuine issue of material fact existed as to whether plaintiff made a reasonable attempt to mitigate damages as required by the lease agreement and by law. We agree.

N.C. Rule of Civil Procedure 56(c) calls for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The record only contains the pleadings and submitted affidavits.

A party moving for summary judgment may prevail if it meets the burden of proving an essential element of the opposing party's claim is nonexistent or not supported by evidence. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979). If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E.2d 363 (1982).

The Supplemental Affidavit of James W. Hall contains facts tending to show that Hall, as a general partner of the plaintiff, made a reasonable attempt to mitigate the damages of plaintiff by advertising that the property was available for lease or sale. Defendants offer paragraph 7 of the affidavit of Harris B. Gupton to show that a genuine issue of the reasonableness of plaintiff's attempts at mitigation exists. Paragraph 7 states:

After the alleged default on the rent by Defendant Regency Ventures, Inc., James W. Hall, on behalf of the Plaintiff took control of the premises of the Regency Car Wash. While the said Premises was under the control of James W. Hall, the Plaintiff failed and refused to perform the following functions

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which would have greatly served to mitigate the Plaintiff's alleged damages:

a) James W. Hall failed an [sic] refused to continue the business as an operating and functioning car wash and thereby diminished its appeal to prospective buyers of the property. Prospective buyers who did express an interest in purchasing the property were prohibited by the Plaintiff to view the car wash in full operation.

b) James W. Hall failed and refused to permit prospective buyers to adequately examine the premises or the business equipment.

c) James W. Hall failed and refused to properly place the business on the market for sale even though several entities expressed an interest in purchasing the property for use as a commercial car wash.

d) James W. Hall failed and refused to make the property available for examination and inspection by prospective lessors.

e) James W. Hall, on information and belief, refused to entertain offers to purchase or lease by prospective purchasers or lessors.

Plaintiff argues that these allegations are not sufficient to overcome summary judgment because they are not based on Mr. Gupton's personal knowledge and do not show affirmatively that Mr. Gupton is competent to testify to the allegations, as required by N.C. Rule of Civil Procedure 56(e). Whether the affidavit meets the requirements of Rule 56(e) is immaterial in light of the fact that plaintiff failed to make a timely objection to the form of the affidavit. *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992). The record discloses no objection to the affidavit on Rule 56(e) grounds prior to appeal. Thus, plaintiff has waived any objection regarding these matters.

Plaintiff also challenges the affidavit by saying that the allegations are untrue. This argument serves to support defendants' contention that the affidavit presents a genuine issue of material fact. A genuine issue of material fact is one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved

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may not prevail. A genuine issue is one which can be maintained by substantial evidence. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983). Whether the creditor of a lease agreement has used diligence to mitigate damages is a genuine issue of material fact so as to challenge summary judgment. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, *appeal dismissed*, 301 N.C. 92 (1980).

Summary judgment is a drastic measure and should be used with caution. *Williams v. Carolina Power and Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). The allegations in the defendants' affidavit, when taken as true, do constitute a legal defense that could reduce the amount of the judgment.

We hold that defendants' affidavit presents a genuine issue of material fact as to the adequacy of plaintiff's attempted mitigation of damages. Therefore, the trial court incorrectly granted summary judgment on the issue of damages.

II.

[2] Defendants next challenge the award of attorney's fees. They first contend that the trial court erred in awarding excessive attorney's fees to the plaintiff without considering whether the amount allowed was reasonable. We disagree.

N.C. Gen. Stat. § 6-21.2 authorizes the awarding of attorney's fees in actions to enforce obligations owed under an evidence of indebtedness (a lease) that provides for the payment of attorney's fees. The lease agreement in this case provides for the payment of "reasonable attorney's fees" should the landlord need to employ an attorney to collect rent or enforce its other rights and remedies under the lease. Because the lease provides for reasonable attorney's fees and does not refer to any specific percentage, N.C.G.S. § 6-21.2(2) applies, which says that if the contract "provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said . . . evidence of indebtedness."

The defendants' reliance on *West End III Limited Partners v. Lamb*, 102 N.C. App. 458, 402 S.E.2d 472, *disc. review denied*,

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329 N.C. 506, 407 S.E.2d 857 (1991) is misplaced. The case at bar should be distinguished from *West End III*, as well as from *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 319 S.E.2d 650, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984). In those cases, the relevant contract provisions called for an award of attorney's fees in reference to a specific percentage of the amount owing. Thus, these awards fell under N.C.G.S. § 6-21.2(1) which requires the trial court to determine a reasonable percentage within the specified range. This determination necessarily requires some evidence of what percentage will be reasonable in each case, as *West End III* and *Coastal Production* so state. However, subdivision (2) has predetermined that 15% is a reasonable amount in our case.

[3] Defendants also oppose the award of attorney's fees against defendant Harris B. Gupton because he was guarantor of the lease and not a party to the lease. We hold that the guaranty contract provided for the award of attorney's fees, and the trial court correctly held the guarantor liable for that award.

In this State, the obligation of a guarantor of payment is separate and distinct from that of the debtor. *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972). N.C.G.S. § 6-21.2 does not authorize collection of attorney's fees unless the guaranty contract sued upon so provides. *Id.*

In *Wilson*, the guaranty contract provided that the guarantor would be liable for "the payment when due of any and all notes, accounts receivable, conditional sales contracts, chattel mortgages, indebtedness and liability . . ." at any time made or carried by the debtor. Plaintiff argues that the guaranty contract provides for payment of attorney's fees in the clause stating that defendant Harris B. Gupton "unconditionally guarantees the full and punctual payment of the rent and other charges provided for in this lease. . . ." The lease provides for reasonable attorney's fees if necessary to collect rent.

This Court must decide if the language in the guaranty is sufficient to require an award of attorney's fees. There is judicial public policy against the award of attorney's fees. *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980). Also, the requirement that the guaranty itself provide for the payment of attorney's fees insures that the guarantor is put on notice of the additional liability. One purpose of N.C.G.S.

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§ 6-21.2 is to allow the debtor a last chance to pay the outstanding balance to avoid litigation and the award of attorney's fees. *Coastal*, 70 N.C. App. at 224, 319 S.E.2d at 656. However, the statute should be construed liberally, *Stillwell Enterprises*; narrow constructions are to be avoided, *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973), and the plain, unambiguous meaning of the clause is that Mr. Gupton guarantees all charges in the lease, one of which is attorney's fees.

The language in the guaranty contract is sufficient to put a guarantor on notice that he will be liable for attorney's fees if he fails to make the guaranteed payment before the creditor finds it necessary to employ an attorney to collect the debt. We hold that the trial court did not err in awarding attorney's fees on the guaranty contract, and the defendant Harris B. Gupton is jointly and severally liable for the award of attorney's fees, along with defendant Regency Ventures, Inc. On remand, the amount of the fees to be awarded should be redetermined on the basis of the eventual recovery.

III.

[4] Defendants' final argument alleges that the trial court erred in denying their motion to set aside entry of default. We disagree.

N.C. Rule of Civil Procedure 55(d) provides that the court may set aside an entry of default for good cause shown. Defendant correctly argues that the showing required to set aside an entry of default is less stringent than that required to set aside a default judgment. *Peebles v. Moore*, 48 N.C. App. 497, 269 S.E.2d 694 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981). However, the determination of good cause to set aside an entry of default is in the trial court's discretion and will not be disturbed absent an abuse of discretion. *Byrd v. Mortenson*, 60 N.C. App. 85, 298 S.E.2d 170, *modified and aff'd*, 308 N.C. 536, 302 S.E.2d 809 (1982). Defendant has the burden of establishing good cause to set aside entry of default. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663, *cert. denied*, 328 N.C. 93, 402 S.E.2d 418 (1990). A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980).

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The record shows that plaintiff filed the amended complaint on 8 January 1992, and a response pleading was due on 23 January 1992. The filing of plaintiff's motion for entry of default and the entry of default occurred on 3 February 1992, the same day defendants' attorney officially withdrew from the case. Plaintiff's motion for default judgment was served directly to defendants, certificate dated 2 March 1992. Defendants argue that the fact that they assumed their attorney had filed a response pleading constitutes good cause requiring the entry of default be set aside. But defendants never filed an answer and did not file a motion to set aside the entry of default until 3 April 1992, when they filed a response to plaintiff's motion.

In *Bailey v. Gooding*, 60 N.C. App. 459, 299 S.E.2d 267, *disc. rev. denied*, 308 N.C. 675, 304 S.E.2d 753 (1983), this Court held that the trial court did not abuse its discretion in failing to find good cause to set aside entry of default where defendants' answer was filed four months after expiration of the time allowed and more than one month after default was entered, and where there was nothing in the record to indicate what actions defendants took in the meantime to defend the case other than to deliver the suit papers to the insurance carrier. According to the record in the case *sub judice*, defendants never filed an answer and made no attempt to defend their case after their attorney withdrew until filing their responsive pleading to plaintiff's motion for default judgment or, alternatively, for summary judgment.

The evidence in the record does not compel this Court to find an abuse of discretion by the trial court. We hold that the denial of the defendants' motion to set aside entry of default was not in error.

Affirmed in part; reversed and remanded in part.

Judges WELLS and McCRODDEN concur.

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[111 N.C. App. 376 (1993)]

THE TOWN OF NEWTON GROVE, PLAINTIFF v. MCCOY SUTTON, BLONDIE J. SUTTON, AND BECKY BARFIELD, DEFENDANTS

No. 914SC1039

(Filed 3 August 1993)

1. Municipal Corporations §§ 30.12, 30.19 (NCI3d)— zoning ordinances — mobile home not allowed in central business district

The trial court did not err in finding that plaintiff's ordinances prohibited defendants from placing a mobile home for their mentally ill daughter on their property, which was zoned C-1, central business district, where defendants' house was a nonconforming use; the ordinance prohibited enlargement or extension of nonconforming uses; placing the mobile home on defendants' property would extend their nonconforming residential use; and the mobile home was not a "customary accessory" structure to their residence. Furthermore, there was no merit to defendants' contention that plaintiff's Board of Adjustment should have granted them a variance to place the mobile home on their property based on the Board's authority to authorize variances on appeal in certain cases in order to "strike a fair balance between the City and the rights of the property owner," since, in order for the Board to grant a variance, the property owner must first file an appeal with plaintiff's zoning administrator, and defendants failed to file such an appeal.

Am Jur 2d, Mobile Homes, Trailer Parks, and Tourist Camps §§ 13, 14.

Use of trailer or similar structure for residence purposes as within limitation of restrictive covenant, zoning provision, or building regulation. 96 ALR2d 232.

2. Handicapped Persons § 5 (NCI4th) — Fair Housing Act — practice not discriminatory "because of" handicapping condition — Act inapplicable

In this proceeding for an injunction prohibiting defendants from locating a mobile home for their mentally ill daughter on their property which was zoned central business district, the North Carolina Fair Housing Act did not apply, since defendants failed to meet one of the threshold requirements of the Act—that the discriminatory housing practice discrim-

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inated "because of" the daughter's "handicapping condition" – as plaintiff prohibited defendants from placing the mobile home on the property in order to enforce its ordinances and to maintain the nonresidential, business scheme of the C-1 district, not "because of" the daughter's physical or mental condition. N.C.G.S. §§ 41A-4(a), 41A-5.

Am Jur 2d, Mobile Homes, Trailer Parks, and Tourist Camps §§ 13, 14.

Use of trailer or similar structure for residence purposes as within limitation of restrictive covenant, zoning provision, or building regulation. 96 ALR2d 232.

Appeal by defendants from order signed 12 June 1991 and filed 14 June 1991 by Judge Henry L. Stevens, III in Sampson County Superior Court. Heard in the Court of Appeals 15 October 1992.

In 1988, defendants requested plaintiff's permission to locate a mobile home behind defendants McCoy and Blondie Sutton's (the "Suttons") residence on the Sutton's property located in the area zoned C-1, Central Business District in the Town of Newton Grove. This mobile home is owned by defendants McCoy Sutton and his daughter, Becky Barfield. Defendants wanted to place this mobile home on their property as Barfield's residence because Barfield has a severe mental illness. After a public hearing, plaintiff's Town Council voted to deny defendants' request.

Subsequently, in a letter dated 13 October 1989, defendants wrote plaintiff's mayor and informed him of their belief that the newly enacted 1989 Federal Fair Housing Act would apply to their situation so that the zoning requirements could be set aside to allow them to place a mobile home on their property. Additionally, they informed plaintiff of their intention to locate a mobile home on their lot on 30 October 1989 if they did not hear from plaintiff.

On 28 October 1989, plaintiff Town of Newton Grove filed a complaint and motion for injunction against defendants alleging that plaintiff's zoning ordinances do not permit mobile homes in the district zoned C-1 and that defendants had violated these ordinances by placing a mobile home on their property located in the C-1 district. Based on these allegations, plaintiff asked the court to issue a temporary and permanent injunction prohibiting

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and enjoining the defendants from locating the mobile home, or any mobile home on their property.

On 29 December 1989, defendants filed an answer to this complaint and a counterclaim. In their answer, defendants neither admitted nor denied plaintiff's allegation that plaintiff's zoning ordinances do not permit mobile homes in the C-1 district and neither admitted nor denied the allegation that their mobile home violates the zoning ordinances because of this prohibition. Instead, defendants pointed out that plaintiff had prohibited them from placing the mobile home on their property before the enactment of state and federal laws "protecting the rights of persons with disabilities to have reasonable accommodations made to policies to meet their individual needs and afford them the opportunity to reside in their communities."

In their counterclaim, defendants alleged that defendant Barfield is protected by the Federal Fair Housing Amendments of 1988 and the North Carolina Fair Housing Amendments enacted in 1989 as a person with severe and persistent mental illness and essentially that defendants should be allowed to place the mobile home on their property as Barfield's residence because Barfield is protected under these laws. Additionally, defendants alleged that the continued refusal of plaintiff to allow defendants to place a mobile home on their property in which Barfield could reside is based upon prejudices of citizens of the Town of Newton Grove against persons with mental illnesses. Based on these allegations, defendants asked the court to deny plaintiff's motion for an injunction and to order plaintiff to issue a permit to locate the mobile home on their property.

On 20 February 1991, plaintiff and defendants agreed to and filed stipulations in this action. On 12 June 1991, Judge Henry L. Stevens, III signed an order based on these stipulations prohibiting and enjoining defendants from locating a mobile home on their property. From this order, defendants appeal.

Robert S. Griffith II for plaintiff-appellee.

Governor's Advocacy Council for Persons With Disabilities, by Judy J. Burke and Augustus B. Elkins, II, for defendant-appellants.

Amicus Curiae Brief filed by Daniel D. Addison for the North Carolina Human Relations Commission.

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ORR, Judge.

The parties have stipulated that the Suttons own property in the Town of Newton Grove zoned as C-1 Central Business District under the applicable zoning ordinances which plaintiff properly enacted on or about March 1977. Additionally, the parties stipulated that before the enactment of these ordinances, the Suttons used their property for residential purposes, such being the use of the property at that time. After the zoning ordinances were enacted, the district where the Sutton residence was located was zoned as C-1, for business use. It is undisputed that the Sutton residence that was on the property prior to the enactment of the ordinances is now permitted in the C-1 district as a "nonconforming use" under the ordinances.

Additionally, the parties have stipulated that defendants have previously requested permission from plaintiff to locate a mobile home on the Sutton property and that plaintiff denied this request. Further, the parties stipulated that defendant Barfield has been classified as disabled by the Department of Health and Human Services, Social Security Administration and is receiving Social Security Disability benefits.

Based on these stipulations, the trial court found as fact that "the zoning ordinances of the Plaintiff do not permit the location of a mobile home within an area zoned C-1" and the additional findings of fact:

1. That the placement of a mobile home upon the property of the Defendants is not a real estate transaction as defined by NCGS 41A-4 et seq.
2. That even if the Defendant, Becky Barfield, is a member of the class sought to be protected by NCGS 41A-4 et seq., such statutes do not require that the Plaintiff not enforce its zoning ordinances with respect to such an individual.

Based on these findings of fact, the trial court enjoined defendants from placing their mobile home or any mobile home on their property.

On appeal, defendants bring forward three assignments of error: (1) that the trial court erred in finding that plaintiff's ordinance does not permit mobile homes in the C-1 zoned district, (2) that the trial court erred in concluding that the placement of the mobile home on their property was not a "real estate transaction" under

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N.C. Gen. Stat. § 41A-4 et seq., and (3) that the trial court erred in concluding that even if Becky Barfield is in the protected class of G.S. § 41A-4 et seq., “such statutes do not require that the Plaintiff not enforce its zoning ordinances with respect to such an individual.” For the reasons stated below, we find no error, and accordingly, we affirm the order of the trial court.

I.

[1] First, defendants argue that the trial court erred in finding that plaintiff’s ordinances prohibit defendants from placing the mobile home on the Sutton property. We find no error.

The parties have stipulated that the Sutton property was subject to plaintiff’s zoning ordinances at all times relevant to this action and that this property is zoned C-1, Central Business District. Under this section of the ordinances, the stated intent of this zoned area is “to accommodate those retail and office uses which are characteristic of the major business centers of town”, and accordingly, the “Permitted Uses” and “Conditional Uses” allowed under this section are all related to business establishments. The parties do not dispute that the Sutton residence is allowed in the C-1 district as a “nonconforming use”.

Article V of the ordinances defines “nonconforming uses”:

After the effective date of this ordinance, pre-existing lots or structures, or uses of lots or structures which are prohibited under the regulations for the district [in] which [the lot, structure, or use is] located, shall be considered as nonconforming. Nonconforming lots, structures or uses may be continued, provided they conform to the following provisions.

One of the provisions under Article V states, “[n]onconforming portions of structures and nonconforming uses of structures or land shall not be enlarged or extended.”

Defendants do not dispute that placing their mobile home on their property would be an extension of the nonconforming use; instead, they argue that they are entitled to place this mobile home on their property because it is a “customary accessory” use or structure under Article VI, Section 6.4. We disagree.

Under Article VI, Section 6.4(b), the “Permitted Uses” section of the C-1 district, “Customary accessory uses and structures” are

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allowed. Subsequently, defendants argue that since their residence is allowed as a nonconforming use under Article V of the ordinance, the mobile home is allowed under Article VI, Section 6.4 as an accessory structure to their residence.

Defendants' residence is permitted under Article V as a nonconforming use, and Article V plainly prohibits defendants from extending or enlarging this nonconforming use. Placing the mobile home on the Sutton property would extend their nonconforming residential use. We decline to apply Article VI, Section 6.4 to defendants' situation to allow them to place their mobile home on the Sutton property as an accessory structure. To do so would directly contradict the article that specifically applies to defendants' residence, Article V. Additionally, in light of the intent of Article VI, Section 6.4, to "accommodate those retail and office uses which are characteristic of the major business centers of the town", we do not think that Article VI, Section 6.4 overrides Article V to allow defendants to extend the nonconforming *residential* use of their property.

Defendants also argue, however, that plaintiff's Board of Adjustment should have granted them a variance to place the mobile home on their property based on the Board's authority to authorize variances on appeal in certain cases in order to "strike a fair balance between the City and the rights of the property owner." Under Article XI, Section 11.1 of the zoning ordinances, plaintiff's Board of Adjustment has the power to authorize on appeal "such variances from the terms of the Ordinance as will not be contrary to the public interest" upon a finding after a public hearing that certain conditions exist. In order for the Board to grant a variance, however, the property owner must first file an appeal with plaintiff's Zoning Administrator. Article XI, Section 11.2 of the zoning ordinances states, "Appeals from the enforcement and interpretation of this Ordinance and requests for variances, shall be filed with the Zoning Administrator specifying the grounds thereof. The Zoning Administrator shall transmit to the Board of Adjustment all applications and records pertaining to such appeals and variances."

The record before us is void of any evidence that defendants filed an appeal or a request for a variance with the Zoning Administrator; thus, this section of the ordinances is not applicable to the present case, and defendants' first assignment of error is without merit.

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II.

[2] Defendants' next two assignments of error deal with arguments under the North Carolina Fair Housing Act. Before we can address defendants' specific assignments of error, we must determine whether the Act is applicable to the facts of this case.

N.C. Gen. Stat. § 41A-4(a) (1990) of the North Carolina Fair Housing Act states:

It is an unlawful discriminatory housing practice for any person in a *real estate transaction*, because of race, color, religion, sex, national origin, handicapping condition, or familial status to:

. . .

(2b) Refuse to make reasonable accommodations in rules, policies, practices, or services, when these accommodations may be necessary to a handicapped person's equal use and enjoyment of a dwelling;

. . .

(8) Otherwise make unavailable or deny housing.

(Emphasis added.)

Thus, in order for the Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in the statute, in this case "because of" Barfield's "handicapping condition". We conclude that defendants have failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the Sutton property "because of" Barfield's handicapping condition.

There is uncontroverted evidence in the record that plaintiff prohibited defendants from placing their mobile home on the Sutton property in order to enforce its ordinances and to maintain the nonresidential, business scheme of the C-1 district. Prohibiting mobile homes for residential purposes in the C-1 district is in keeping with the intent of the zoning ordinances for this district to "accommodate those retail and office uses which are characteristic of the major business centers of the town." The C-1 district is not a residentially zoned area, and there is no evidence that other persons in this district have been permitted to place mobile homes on their property. Plaintiff's ordinances do provide specifically for

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mobile homes in the residentially zoned area under the R-A Residential-Agricultural District.

Even though we recognize that a person can prove that an act is discriminatory under the State Fair Housing Act, regardless of intent, by showing the act had a discriminatory effect under N.C. Gen. Stat. § 41A-5, defendants have also failed to prove the existence of a discriminatory effect in this case. Plaintiff's enforcement of its ordinances prohibiting mobile homes applies to all of the property owners located in the area zoned C-1. The effect of this enforcement is that no persons in this area have mobile homes on their property, no matter if they have a handicapping condition or not.

Thus, the evidence in the record before us shows that plaintiff prohibited defendants from placing a mobile home on the Sutton property in order to maintain the spirit and purpose behind the zoning ordinances and not "because of" Barfield's handicapping condition. The effect of this act was to maintain the business nature of the area zoned C-1, and plaintiff refused to allow Barfield to place a mobile home on the property based on a classification of housing type and not on Barfield's physical or mental condition.

Thus, defendants have failed to meet one of the threshold requirements of the State Fair Housing Act, and the Act is not, therefore, applicable to this case. Because we have held that the Act does not apply, we need not address defendants' specific assignments of error and related arguments that concern certain provisions of the Act.

Accordingly, we affirm the order of the trial court enjoining defendants from placing a mobile home on their property in the C-1 district.

Affirmed.

Judges EAGLES and JOHN concur.

IN RE HAYES

[111 N.C. App. 384 (1993)]

IN THE MATTER OF: MICHAEL CHARLES HAYES

No. 9210SC792

(Filed 3 August 1993)

1. Appeal and Error § 168 (NCI4th) — insanity acquittee — changed rules for recommitment hearing — statute subsequently changed — new hearing — due process and equal protection issues from first hearing moot

Defendant's contention that the 1991 amendment to N.C.G.S. §§ 122C-268.1(i) and 122C-276.1(c), which required an insanity acquittee to prove that he was no longer dangerous and mentally ill, violated due process and equal protection is moot, since North Carolina amended the provision in question in response to the U. S. Supreme Court decision of *Foucha v. Louisiana*, 504 U.S. ---, to require an insanity acquittee to prove that he is no longer mentally ill or is no longer dangerous to others, and defendant has since had an opportunity to be heard under the amended statute.

Am Jur 2d, Appeal and Error §§ 760 et seq.

2. Hospitals and Medical Facilities or Institutions § 60 (NCI4th) — insanity acquittee — commitment rehearing — trial court division and open hearings — equal protection

An insanity acquittee's equal protection rights are not violated because commitment rehearings take place in the trial division in which the criminal trial was held and the rehearings are open to the public while hearings involving other involuntarily committed persons are closed and confidential, since the insanity acquittee is entitled to fewer constitutional protections than one who is civilly committed and surviving families, victims and the public have a right to know if and when an insanity acquittee will be released back into the public.

Am Jur 2d, Incompetent Persons §§ 39-43.

3. Constitutional Law § 165 (NCI4th); Hospitals and Medical Facilities or Institutions § 60 (NCI4th) — insanity acquittee — recommitment hearing — shift of burden of proof — open hearing — no ex post facto violation

Application of the statutory amendments shifting the burden of proof in a recommitment hearing for an insanity

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acquittee and opening the hearing to the public after respondent was acquitted by reason of insanity and was involuntarily committed did not violate the Ex Post Facto Clause since the amendments did not make an innocent act criminal, alter the nature of the offense, or increase the punishment for a criminal act, and they are procedural changes that do not violate substantive rights or protections, though they may disadvantage the respondent.

Am Jur 2d, Constitutional Law §§ 634 et seq.

Appeal by respondent from order entered 21 February 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 1993.

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

Karl E. Knudsen for respondent-appellant.

ARNOLD, Chief Judge.

On 5 December 1988, respondent, Michael Charles Hayes, was indicted on four counts of first degree murder, five counts of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault with a deadly weapon on a law enforcement officer, and one count of assault with a deadly weapon on medical personnel. These widely-publicized crimes all occurred on 17 July 1988 in Forsyth County. On 14 April 1989, a Forsyth County jury tried respondent on all charges and found respondent not guilty by reason of insanity. The superior court thereafter had respondent involuntarily committed to the John Umstead State Mental Health Facility in Butner for temporary custody, examination and treatment pending a district court hearing. On 20 April 1989, the district court held an involuntary commitment proceeding pursuant to N.C. Gen. Stat. § 122C (1989) and committed respondent on the bases that respondent was mentally ill and dangerous to himself and others.

After his initial commitment, respondent was moved to Dorothea Dix Hospital. Thereafter, prior to 1991, respondent had several rehearings regarding his involuntary commitment under former G.S. § 122C. Under the former procedure, recommitment of an involuntary acquittee was based upon the State's proof of continu-

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ing mental illness and dangerousness of the acquittee. The district court, at each rehearing under former G.S. § 122C, found by clear, cogent, and convincing evidence that respondent was mentally ill and dangerous to others and ordered his continued hospitalization.

In April 1991, however, the North Carolina legislature amended the General Statutes relating to the involuntary commitment of persons who had been found not guilty by reason of insanity, which amendments took immediate effect. Senate Bill 43 enacted as Chapter 37 of the 1991 Session Laws was codified as N.C. Gen. Stat. § 122C-276.1, which provided the following:

The respondent shall bear the burden to prove by a preponderance of the evidence that he is no longer dangerous to others. If the court is so satisfied, then the respondent shall bear the burden to prove by a preponderance of the evidence (i) that he does not have a mental illness, or (ii) that confinement is not necessary to ensure his own survival or safety and that confinement is not necessary to alleviate or cure his illness. If the court is so satisfied, then the court shall order the respondent discharged and released. If the court finds that the respondent has not met his burden of proof, then the court shall order inpatient commitment be continued

N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) (Cum. Supp. 1991). Whereas prior to the 1991 amendment respondent was entitled to release when no longer dangerous or mentally ill, the effect of the revised statutory provision relating to the standards for recommitment hearings was to shift the burden of proof from the State to the respondent and require the respondent to show both lack of dangerousness and lack of mental illness requiring confinement.

On 21 February 1992, respondent was subject to a rehearing under the amended provision of G.S. § 122C. After respondent and the State presented evidence on the issues of respondent's dangerousness and mental illness, the superior court made findings of fact and concluded that respondent failed to meet his burden of proof that he meets the criteria for release under G.S. § 122C-276.1. The court further concluded that the evidence showed that respondent was at the time presently dangerous to others and that he suffered from multiple mental illnesses which required his continued confinement. The court ordered, therefore, continued com-

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mitment of respondent for a period of one year. Respondent appealed the court's order.

The basis of the appeal before this Court concerns the constitutionality of the 1991 amendment to G.S. § 122C, Senate Bill 43. Respondent contends that by requiring an insanity acquittee to prove that he is no longer dangerous and that he is no longer mentally ill, Senate Bill 43 violates the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as Article I, Section 19 of the North Carolina Constitution. Respondent also asserts that Senate Bill 43 violates the *ex post facto* clauses of the Federal Constitution and North Carolina Constitution. We disagree with both assignments of error.

DUE PROCESS

[1] Respondent contends that G.S. §§ 122C-268.1(i) and -276.1(c) (Supp. 1991) violate the due process clauses of our state and federal constitutions. Respondent relies on the United States Supreme Court's recent decision in *Foucha v. Louisiana*, 504 U.S. ---, 118 L.Ed.2d 437 (1992). In *Foucha*, the Court held that a Louisiana statute violated the Due Process Clause of the Fourteenth Amendment because it allowed an insanity acquittee to be committed to a mental institution until he is able to prove that he is not dangerous to himself and others, regardless of whether he suffers from any mental illness. *Id.* at ---, 118 L.Ed.2d at 447. "[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* at ---, 118 L.Ed.2d at 446. In light of *Foucha*, respondent likens the statutory scheme in North Carolina to that of Louisiana by requiring the insanity acquittee to prove that he is not dangerous. Only if he satisfies the court as to his lack of dangerousness will the issue of mental illness arise. Failure to prove lack of dangerousness will result in continued confinement. Thus, like the Louisiana statute, the statute at issue disregards the issue of mental illness unless the acquittee first proves he is not dangerous.

We agree with respondent that under *Foucha* the scheme under which the February 1992 rehearing took place was unconstitutional. However, since *Foucha*, the North Carolina General Assembly has amended the provision at issue and respondent has had an opportunity to be heard under the amended statute. Therefore, respondent's assignment of error regarding this issue is moot.

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In response to the Supreme Court's decision in *Foucha*, the legislature enacted Session Laws c. 1034, House Bill 379 effective 24 July 1992 which provides:

The respondent shall bear the burden to prove by a preponderance of the evidence that he (i) no longer has a mental illness as defined in G.S. 122C-3(21), or (ii) is no longer dangerous to others as defined in G.S. 122C-3(11)b.

N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) (Cum. Supp. 1992) (emphasis added). Although respondent questions the rehearing in February 1992 where he was recommitted for an additional year, he has since had the opportunity to be heard under the amended statute. Pursuant to G.S. § 122C-276.1(d), fifteen days before the end of any commitment period, an automatic rehearing is calendared and the parties are notified. In February 1993, fifteen days before the end of his commitment period, a rehearing was calendared and notice was given to respondent. At this time the amended statute was in effect thereby affording respondent the constitutional rights which he now complains he was deprived of in February 1992. Therefore this assignment of error, as respondent's counsel has conceded in oral argument, is moot.

EQUAL PROTECTION

Respondent also contends that G.S. §§ 122C-268.1(i) and -276.1(c) violate the equal protection clauses of the federal and state constitutions because (1) the burden of proof is now on the respondent to show by a preponderance of the evidence that he is no longer dangerous or mentally ill, (2) the commitment hearings take place in the trial division where respondent's criminal trial was held, and (3) the hearings are open to the public. Respondent argues that he should be afforded the same benefits as a civil committee who is attempting to gain release from the hospital. We disagree.

First we note that respondent's first contention regarding his burden of proving lack of dangerousness and mental illness is moot since respondent has had the opportunity for a rehearing under the newly amended statute in response to *Foucha*. Moreover, respondent's complaint that he should not bear the burden of proof because he is no different from a civil committee ignores his special status as an insanity acquittee. The Supreme Court has recognized crucial differences between civil committees and insanity acquittees that justify different standards of proof. *Jones v. United States*,

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463 U.S. 354, 77 L.Ed.2d 694 (1983). Indeed, numerous decisions exist supporting the shift in burden of proof to respondent at a release hearing due to his distinct status. *See, e.g., United States v. Wallace*, 845 F.2d 1471 (8th Cir.), *cert. denied*, 488 U.S. 845, 102 L.Ed.2d 94 (1988); *Benham v. Ledbetter*, 785 F.2d 1480 (11th Cir. 1986); *Dorsey v. Solomon*, 604 F.2d 271 (4th Cir. 1979).

[2] Respondent's second and third contentions under the equal protection argument are also without merit, especially in light of respondent's special status. N.C. Gen. Stat. § 122C-268.1(g) provides that an insanity acquittee's hearing shall take place in the trial division in which the original trial was held and that it shall be open to the public. In contrast, hearings involving other involuntarily committed persons are closed and confidential. N.C. Gen. Stat. § 122C-52 (1989). As we have stated above, the insanity acquittee is entitled to fewer constitutional protections than an individual who is civilly committed. The acquittee makes the tactical decision to rely on the insanity defense, therefore, the public has a right to know when and if such an individual is discharged into the community. Particularly in a case such as the one at bar, we believe that the surviving families and victims have a right to know if and when respondent will be released back into the community.

EX POST FACTO

[3] Respondent's second assignment of error is that application of Senate Bill 43 to respondent's recommitment hearing when the amendment was enacted after respondent committed the acts charged, after respondent was acquitted by reason of insanity, and after respondent was involuntarily committed, violates the *ex post facto* provisions of the United States Constitution and the North Carolina Constitution. We disagree.

Both our state and federal constitutions contain provisions which may prohibit retrospective application of newly enacted laws. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. An *ex post facto* law has been defined by the United States Supreme Court as one which

punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

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Beazell v. Ohio, 269 U.S. 167, 169-170, 70 L.Ed.2d 216, 217 (1925). Two critical elements must be present for a law to be considered *ex post facto*: it must apply to events occurring before its enactment and it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981).

Respondent contends that he has been disadvantaged by retroactive application of Senate Bill 43 because he now has the burden of proof to show that he is no longer dangerous or mentally ill and because his hearing is open to the public. Respondent argues that the changes found in G.S. §§ 122C-268.1 and -276.1 are “fundamental, substantial, and their effects on respondent are profoundly to his detriment.” A similar contention was made by the respondent in *Collins v. Youngblood*, 497 U.S. 37, 111 L.Ed.2d 30 (1990). In *Youngblood*, the respondent contested the retroactive application of a Texas statute allowing the reformation of an improper jury verdict in respondent’s case. While conceding that the statute does not fall within the *Beazell* definition of *ex post facto* law, respondent maintained that even a *procedural* change which deprived a defendant of “substantial protections” may constitute an *ex post facto* violation. *Id.* at 45, 111 L.Ed.2d at 40. Retroactive procedural changes of law in criminal cases generally have not been recognized as violations of the Ex Post Facto Clause. *Id.*; see, *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed.2d 344 (1977); *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983). The respondent in *Youngblood* correctly noted, however, as does the respondent in this case, that a procedural change may constitute an *ex post facto* violation if it deprives defendant of or infringes upon defendant’s “substantial personal rights.” *Beazell*, 269 U.S. at 171, 70 L.Ed.2d at 218; *Malloy v. South Carolina*, 247 U.S. 180, 183, 59 L.Ed.2d 905, 906 (1915). Although the *Youngblood* Court noted that a law labeled as procedural will not necessarily immunize it from *ex post facto* scrutiny, the Court held that for purposes of the Ex Post Facto Clause, it is logical to presume that a change in procedure by which a criminal case is adjudicated, as opposed to substantive changes in the law, will not violate the Clause even though the change may work to the accused’s disadvantage. *Youngblood*, 497 U.S. at 49-50, 111 L.Ed.2d at 43-44. In other words, only a procedural change that alters the definition of an offense or increases the punishment, thereby expanding the scope of a criminal prohibition after the act is done, violates the Ex Post Facto Clause. *Id.*

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In the instant case, neither of the statutory amendments makes an innocent act criminal, alters the nature of the offense, or increases the punishment for a criminal act. Shifting the burden of proof to respondent and opening the hearing to the public are procedural changes that do not violate substantive rights or protections, though they may disadvantage respondent. *See In the Matter of Rogers*, 63 N.C. App. 705, 306 S.E.2d 510, *disc. rev. denied, appeal dismissed*, 309 N.C. 633, 308 S.E.2d 716 (1983), *appeal dismissed*, 465 U.S. 1095, 80 L.Ed.2d 117 (1984) (statute requiring hearing for insanity acquittees before release from mental institution not *ex post facto* law under federal or state constitutions because procedures do not compromise punishment for crime); *United States v. Mest*, 789 F.2d 1069 (4th Cir.), *cert. denied*, 479 U.S. 846, 93 L.Ed.2d 102 (1986) (procedural change, although retroactive in application, not violative of Ex Post Facto Clause if it does not increase punishment, change ingredients of offense, or ultimate facts necessary to establish guilt). Thus, respondent's second assignment of error is without merit.

Affirmed.

Judges ORR and MARTIN concur.

UNCC PROPERTIES, INC. v. ROBERT D. GREEN AND JAMES E. GREEN

No. 9225SC457

(Filed 3 August 1993)

1. Evidence and Witnesses § 1099 (NCI4th)— answer in prior hearing—no admission in subsequent hearing

Defendants' answer in a condemnation proceeding admitting that plaintiff had an easement in their property, which was incorporated in their answer in a subsequent action, did not constitute an admission that was conclusive in the subsequent action, since the incorporation of the prior answer was an evidential admission and was merely evidence of the existence of an easement.

· Am Jur 2d, Evidence §§ 480, 687.

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Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed. 63 ALR2d 412.

2. Easements § 9 (NCI4th) — agreement not under seal — easement not created

An agreement not under seal cannot create an easement, since an easement is an interest in land, and a seal is absolutely essential to the validity of an instrument to convey legal title to interests in land in North Carolina.

Am Jur 2d, Easements and Licenses § 22.

3. Easements § 9 (NCI4th) — agreement not under seal — contract to convey easement — validity

The parties' agreement which was not under seal was nevertheless effective as a contract to convey an easement.

Am Jur 2d, Easements and Licenses § 22.

4. Contracts § 82 (NCI4th) — contract to convey easement — property condemned — impossibility of performance

Even if the parties' agreement constituted a contract to convey an easement, the undisputed facts of the case established that it was impossible for defendants to perform the contract, since defendants agreed only that plaintiff should have access to and parking on the tract of land sold; defendants did not assume the risk of subsequent governmental interference; there was no evidence that either party was aware that the county planned to condemn the subject property; it was not reasonably foreseeable to either party that the county would exercise its power of eminent domain over the property; and the filing of notice of condemnation effected a transfer of title which made it impossible for defendants to convey an easement to the subject property, thus discharging the contract to convey.

Am Jur 2d, Contracts §§ 355 et seq., 673.

Modern status of the rules regarding impossibility of performance as defense in action for breach of contract. 84 ALR2d 12.

Appeal by defendants from order of partial summary judgment entered 22 November 1991, by Judge Chase B. Saunders in Catawba

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County Superior Court and from judgment entered 6 March 1992, by Judge Forrest A. Ferrell in Catawba County Superior Court. Heard in the Court of Appeals 13 April 1993.

On 7 September 1990, plaintiff instituted this action alleging that defendants had breached their contractual agreement with plaintiff by failing to convey or provide certain easements to plaintiff. In their answer, defendants denied the existence of an easement, asserted that any contractual duties were discharged by the doctrine of impossibility, and argued that plaintiff was estopped from recovering from them. They incorporated by reference the appellee's motion to quash and their motion in the cause made in the condemnation action.

After extensive discovery, both parties moved for summary judgment. The trial court granted plaintiff's motion for partial summary judgment as to the issue of liability and denied defendants' motion.

The issue of damages was then tried before a jury which awarded damages to plaintiff in the amount of \$70,000.00. Defendants appeal.

Martin & Monroe Pannell, P.A., by Martin Pannell, for plaintiff.

Byrd, Byrd, Ervin, Whisnant, McMahan & Ervin, P.A., by Robert C. Ervin, and Rayburn, Moon & Smith, P.A., by Matthew R. Joyner, for defendants.

MCCRODDEN, Judge.

Defendants assign error both to the denial of their motion for summary judgment and to the entry of partial summary judgment for appellee. Upon a motion for summary judgment, the trial court must decide whether there is any issue of material fact and whether any party is entitled to judgment as a matter of law. *Brenner v. School House, Ltd.*, 302 N.C. 207, 216, 274 S.E.2d 206, 212 (1981); N.C. Gen. Stat. § 1A-1, Rule 52(c) (1991). Since the material facts of this case are not in dispute, our review focuses on whether the trial court erred in its conclusion concerning who was entitled to judgment as a matter of law. That, in turn, requires that we consider four issues: (I) whether defendant's answer in a condemnation hearing, when incorporated in a subsequent action, constitutes an admission that is conclusive in the subsequent action; (II) whether an agreement not under seal can create an easement; (III) if II

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is answered in the negative, whether an agreement not under seal is effective as a contract to convey an easement; and (IV) if so, whether impossibility of performance is a valid defense.

The facts in this case are as follows. On 13 April 1987, defendants entered into an offer to purchase and contract with plaintiff, according to which plaintiff was to sell a 7.6 acre tract of land between Highways 29 and 49 in Mecklenburg County for \$700,000.00. On 20 July 1987, defendants and plaintiff entered into another contract, whereby defendants were to sell 6.5 acres of the original 7.6 acre tract back to plaintiff for \$825,000.00.

Under the terms of the second contract defendants were to retain a portion of the tract that fronted on Highway 29 and adjoined the portion to be sold to plaintiff. The agreement recited that plaintiff was aware that defendants planned to erect a Burger King restaurant on the site they retained. Further, the contract provided that plaintiff would allow defendants to put a sign on that portion of plaintiff's property that faced Highway 49. In addition, the contract provided that "Purchaser (plaintiff) and Seller (defendants) agree that both parties shall have access and parking throughout the entire development."

At the closing on 9 September 1987, the parties executed a deed containing the following provision:

The Grantors, for themselves and their assigns, hereby reserve a right of ingress and egress from property owned by the Grantors joining Grantee at the northwestern portion of the property to Highway 49 (University City Boulevard).

The deed included no other provisions relating to access. It was subsequently recorded in the office of the Register of Deeds in Mecklenburg County.

In addition to the deed, defendants signed an untitled agreement (the Agreement) that stated:

The undersigned agree that UNCC Properties, Inc., its successors and assigns, shall have the non-exclusive right of access and parking upon the property of the undersigned located at the northwest corner of the property conveyed to UNCC Properties, Inc., this ninth day of September, 1987.

On 29 March 1989, Mecklenburg County issued a Notice of Intent to Institute Condemnation to defendants and on 2 May 1989,

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commenced a condemnation action against the defendants in relation to the property defendants retained on Highway 29. Defendants filed an answer to the action in which they asserted, *inter alia*, that "UNCC Properties, Inc. has an access and parking easement to the tract." Subsequently, however, defendants made a motion in the cause in which they asserted that, on information and belief, plaintiff, which held an unrecorded easement, would not be affected by a settlement in the action because the easement was null and void as against Mecklenburg County. Plaintiff, responding to a motion by defendants, filed a motion to quash in the case, asserting that it was not a proper party to the action. In an order filed 27 June 1990, Judge Samuel Wilson found that the Agreement between plaintiff and defendants had not been recorded at the time Mecklenburg County instituted its condemnation proceeding. On this basis, he concluded that the agreement was a nullity as between defendants and Mecklenburg County.

Defendants and Mecklenburg County eventually settled the condemnation proceeding for \$400,000.

I.

[1] The first question we address is whether defendants' answer, which admitted that plaintiff had an easement in the condemnation proceeding and which was incorporated in their answer in this action, constitutes an admission that is conclusive in the action before us. We hold that it is not, and we reverse the trial court's grant of partial summary judgment for the plaintiff.

There are two kinds of admissions which appear in pleadings. The first kind is a judicial admission, which is an admission made in the final pleadings and which serves to define the issues for trial. 2 H. Brandis, *Brandis on North Carolina Evidence* § 177 (1982). Judicial admissions are conclusive, and the trial court may not accept evidence to refute them. *Id.* § 166.

The second type of admissions in pleadings is evidential admissions. Evidential admissions, "while not defining issues in the case being litigated, nevertheless reflect something which a party has once said . . ." *Id.* § 177. Evidential admissions include "pleadings in another case offered against the pleader as a party in the case being litigated." *Id.* However, they are not conclusive, but may be controverted or may be explained on the ground of inadvertence or mistake of counsel or otherwise. *Id.*

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We believe that the admission in the condemnation action is of the second type. The denial of the existence of the easement as the first defense in the answer in this case is the pleading that serves to define the issue at trial. The incorporation of the answer from the prior proceeding appears only in the appellants' third defense, that of estoppel. We find that the incorporation of the prior answer was an evidential admission and was merely evidence of the existence of an easement.

Similarly, appellee's motion to quash in the condemnation case is an evidential admission that appellee did not have an interest in the property. The trial court could review evidence of the admissions of both parties to determine whether there was an easement.

II.

[2] Defendants' next contention is that the trial court should have granted summary judgment in their favor because the Agreement, which was not under seal, did not create an easement. We agree that the Agreement did not create an easement.

An easement is an interest in land. A seal is absolutely essential to the validity of an instrument to convey legal title to interests in land in North Carolina. *Williams v. Board of Education*, 284 N.C. 588, 594, 201 S.E.2d 889, 893 (1974). See also James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* §§ 197, 311, 344 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed. 1988). To hold, as plaintiff urges, that an agreement not under seal may be interpreted as conveying an easement if that were the parties' intention, would totally vitiate the ancient requirement of a seal.

III.

[3] Under principles enunciated in *Dunn v. Dunn*, 242 N.C. 234, 87 S.E.2d 308 (1955), however, we conclude that the Agreement in this case may be interpreted as a *contract* to convey an interest in land. In *Dunn*, upon the death of the grandmother of one of the defendants, a tract of land passed to him and other descendants as tenants in common. Because defendant had cared for the grandmother in the later years of her life, the tenants in common executed a deed for the property to him. The deed, however, was not under seal. When former tenants in common sued to have the deed declared void, the defendants asserted that even though the instrument was not under seal, it was a contract to convey,

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enforceable by specific performance. The Supreme Court, finding that there appeared to be consideration for the transfer, agreed and reversed the trial court's striking of this defense.

We follow *Dunn* and hold that, in the instant case, the Agreement was a contract to convey an easement.

IV.

[4] Plaintiff, however, cannot prevail on the basis that the Agreement constituted a contract to convey an easement, because the undisputed facts of this case establish that it was impossible for the defendants to perform the contract. For nonperformance of an executory contract to be excused under the doctrine of impossibility, a party must show that his "performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing whether impossible or not Moreover, in most cases it must be shown that the event was not reasonably foreseeable." *Messer v. Laurel Hill Associates*, 102 N.C. App. 307, 311-12, 401 S.E.2d 843, 846 (1991) (citations omitted). Government actions, such as condemnation, may be a basis for a finding of legal impossibility. Restatement (Second) of Contracts, § 264, Illustration A (1981).

We reject plaintiff's argument that defendants made an unqualified promise and assumed the risk of governmental interference. *Helms v. Investment Co.*, 19 N.C. App. 5, 198 S.E.2d 79 (1973), cited by plaintiff, is inapposite. In that case, the defendants sold the plaintiffs a tract of land and made "an unqualified guaranty" that they would extend water and sewer lines to the property within six months. When the county denied them permission to extend the lines and plaintiff sued for breach, defendants asserted the defense of impossibility. The Court stated that the "terms of a contract may be such that, expressly or by construction, one of the parties assumes the risk of subsequent governmental interference preventing his performance of his undertaking." *Id.* at 8, 198 S.E.2d at 81 (citation omitted). The Court found that the defendants had assumed the risk of subsequent governmental interference when they signed the guaranty and were liable for damages.

This case is easily distinguishable from *Helms* and other cases in which it has been found that the defendant assumed the risk of the frustrating event. In each of the other cases, there were

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provisions in the contract clearly showing that the parties had anticipated a possible frustrating event and had allocated the risk. *Messer*, 102 N.C. App. at 312, 401 S.E.2d at 846; *Fraver v. N.C. Farm Bureau Ins. Co.*, 69 N.C. App. 733, 738, 318 S.E.2d 340, 343, *disc. review denied*, 312 N.C. 492, 322 S.E.2d 555 (1984); *Brenner*, 302 N.C. at 212, 274 S.E.2d at 210. In the instant situation, there was no such express assumption of the risk. Defendants agreed only that plaintiff should have access to and parking on the tract of land sold. In this case, we find that defendants did not assume the risk of subsequent governmental interference.

There is no evidence that either party was aware that Mecklenburg County planned to condemn the subject property, and it was not reasonably foreseeable to either party that the county would exercise its power of eminent domain over this property. Under N.C. Gen. Stat. § 40A-42(a) (1984), the filing of notice of condemnation on 2 May 1989, effected a transfer of title of the property to Mecklenburg County. At this time, therefore, it became impossible for defendants to convey an easement to the subject property and the contract to convey was discharged. Restatement (Second) of Contracts, §§ 261, 264 (1981).

Based upon the foregoing, we vacate the partial summary judgment in favor of plaintiff and the subsequent judgment entered by the jury and remand for entry of summary judgment in favor of defendants.

Judges JOHNSON and ORR concur.

RUTH E. MASHBURN v. FIRST INVESTORS CORPORATION AND DORCAS ANN BROOKS

No. 9230SC641

(Filed 3 August 1993)

Corporations § 16.1 (NCI3d) — fraud by securities broker — rescission offer by brokerage firm — claim by investor barred

Defendant securities brokerage firm made a valid rescission offer to plaintiff investor for fraud by its broker pursuant to N.C.G.S. § 78A-56(g)(1), and plaintiff is thus precluded by

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her acceptance of the amount offered from maintaining an action against the brokerage firm, where the firm offered plaintiff an amount equal to the total amount invested by plaintiff less (1) systematic monthly payments made to plaintiff which were misrepresented by the broker to be interest but which were actually a return of capital, (2) payments made to plaintiff by the broker which were misrepresented as investment returns but which were from unknown and possibly illegal sources, and (3) the total amount of legitimate interest and dividends received by plaintiff, plus interest at 8%. The systematic and broker payments compensated plaintiff for her out of pocket loss and should be considered as income within the meaning of N.C.G.S. § 78A-56(g)(1), and plaintiff has received a return of her investment plus interest.

Am Jur 2d, Corporations § 710.

Appeal by plaintiff from judgment signed and entered 27 April 1992 by Judge Julia V. Jones in Cherokee County Superior Court. Heard in the Court of Appeals 14 May 1993.

Zeyland G. McKinney, Jr., for plaintiff-appellant.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for defendant-appellee.

LEWIS, Judge.

The issues presented by this appeal arise from the greed of Dorcas Ann Brooks ("Brooks") and her plans for ill-gotten gain at the expense of her unknowing victim, Ruth E. Mashburn ("Mashburn"). Between 1985 and 1987, Brooks operated an unregistered office for the sale of securities in Andrews, North Carolina on behalf of First Investors Corporation ("First Investors"). During the relevant time period one of Brooks' customers was Mashburn, the plaintiff in this action. Upon seeing an ad for the sale of securities in a local newspaper, Mashburn contacted Brooks and was persuaded to invest in various securities through First Investors. It is uncontroverted that Brooks made several fraudulent and material misrepresentations to Mashburn in persuading her to invest. Included were misrepresentations that Mashburn's principal investment would remain the same, that the securities in which she was investing were backed by and insured by the United States Government and that the annual yield would be 14.42%.

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On 25 October 1985, relying on Brooks' representations, Mashburn gave Brooks a check in the amount of \$38,000 to be invested with First Investors in its Government Fund. At the time Mashburn made her initial investment she also signed an account authorization form. Unbeknownst to Mashburn, the effect of the account authorization form returned \$470 a month to her of her initial capital investment. Brooks misrepresented these monthly payments to Mashburn as interest payments instead of return of capital. After her initial investment Mashburn purchased additional securities from Brooks bringing her total investment with First Investors to \$67,000. All of this money was received and recorded on the books of First Investors.

In May of 1987, Mashburn became concerned when the checks she was receiving were being drawn on different banks and had different account numbers. Brooks then suggested that Mashburn liquidate her previous investments and combine all of her investments into one account. Thereafter, under the pretext of liquidating Mashburn's accounts, Brooks gave Mashburn a check in the amount of \$70,000. Of the \$70,000, Mashburn kept \$1,000 and then reinvested the remaining \$69,000 with Brooks. In fact, however, Mashburn's reinvestment of \$69,000 was never received by First Investors. As it turned out, most of the monthly payments which Mashburn had been receiving from the various banks had been from Brooks herself and were from unknown sources. (These payments will be referred to hereafter as "the Brooks payments.")

It was not until July of 1987 when Brooks was investigated for securities fraud that Mashburn became aware of the misrepresentations. Upon learning of Brooks' fraudulent activities First Investors made a rescission offer on 20 January 1988 to Mashburn pursuant to N.C.G.S. § 78A-56 in the amount of \$26,737.77. Mashburn, in a letter to First Investors dated 6 March 1988, conditionally accepted First Investors' rescission offer, but reserved her right to sue First Investors for breach of contract, fraud and punitive damages. Thereafter, First Investors mailed a cashier's check to Mashburn in the amount of \$26,560.12, which Mashburn accepted and cashed. First Investors arrived at the amount of the rescission offer by taking the total amount invested by Mashburn (\$136,000), and deducting the amount of the Brooks payments (\$92,072), the amount of the systematic withdrawals (\$13,160), and the total amount of legitimate interest and dividends received by Mashburn (\$12,047.56). On this amount, First Investors calculated 8% interest

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and arrived at the rescission offer amount of \$26,560.12. The difference between the original rescission offer and the amount of the rescission check was explained by First Investors as a failure to credit itself with one of the Brooks payments.

This matter seemed concluded until 1 July 1988, when Mashburn filed an action against First Investors seeking damages for breach of contract, fraud and negligence. First Investors filed its answer on 19 September 1988 asserting its rescission offer as a bar to Mashburn's claims. After having journeyed through this Court once before, this matter was remanded for a new trial. On remand First Investors made a Motion to Dismiss pursuant to Rule 41(b). Judge Jones granted First Investors' motion and held that Mashburn was barred from pursuing any further claims against First Investors due to its rescission offer. Mashburn appealed.

The essence of Mashburn's appeal is that First Investors has failed to make a valid rescission offer under the terms of N.C.G.S. § 78A-56(g)(1) and that she is therefore not precluded from maintaining her present action. In particular Mashburn claims that First Investors' rescission offer is invalid due to the fact that First Investors included both the systematic payments as well as the Brooks payments in calculating the rescission offer. N.C.G.S. § 78A-56(g)(1) (Cum. Supp. 1992) provides in pertinent part:

No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate as provided by G.S. 24-1 from the date of payment, *less the amount of any income received on the security* or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

(Emphasis added). The crux of the parties' dispute centers on the language "less the amount of any income received on the security," because nowhere in the statute is the term "income" defined. Never-

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theless Mashburn contends that the systematic withdrawals and the Brooks payments are not income within the meaning of section 78A-56(g)(1). We disagree.

Though this is a case of first impression, N.C.G.S. § 78A-56(g)(1) is modeled after the Uniform National Securities Act and we have found cases in other jurisdictions which have interpreted similar statutes. One was handed down by the Fourth Circuit in *Brockman Industries, Inc. v. Carolina Securities Corp.*, 861 F.2d 798 (4th Cir. 1988), in which the court interpreted a South Carolina statute. In *Brockman*, Carolina Securities made a rescission offer to its investors on the basis that one of its agents was not registered. After conditionally accepting the rescission offer, Brockman Industries instituted a separate action for the recovery of attorneys' fees. The Fourth Circuit held that the "completion of a valid offer, either by acceptance or by failure to accept within the 30-day period . . ., brings the dispute to a close." *Id.* at 801. Given that the South Carolina statute concerning rescission offers is virtually identical to N.C.G.S. § 78A-56(g)(1) and since all of the states in the Fourth Circuit have adopted the Uniform National Securities Act, we find the *Brockman* opinion persuasive. If First Investors has made a valid rescission offer, Mashburn's subsequent suit will be barred.

In determining whether First Investors has made a valid rescission offer we must consider not only the language of N.C.G.S. § 78A-56(g)(1), but also its purposes. At oral argument, the parties seemed to agree that one purpose of section 78A-56(g)(1) is to restore the status quo. We agree. In *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 542 (1967), our Supreme Court stated "[r]escission is not merely a termination of contractual obligations. It is abrogation or undoing of it from the beginning." (Citation omitted). "[A] rescission of the contract entitles each party to be placed *in statu quo ante fuit.*" *Id.* at 75, 155 S.E.2d at 542 (emphasis in original). It has also been said that a rescission offer allows the parties to avoid litigation and quickly settle their differences. See *Brockman*, 861 F.2d at 801. We believe that by allowing Mashburn to continue her suit against First Investors both of these purposes would be frustrated.

Though the parties have agreed that one of the purposes of a valid rescission offer is to restore the status quo, they disagree as to what it will take to achieve that goal. Mashburn contends

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that it was her expectation that she would have a principal investment of \$69,000 at all times and that the systematic payments should not be considered in restoring her to the status quo. Essentially Mashburn makes a "benefit of the bargain" argument and seeks to be placed in the same position she would have been if her investments had gone as planned. This does not restore the status quo. In fact, this approach would allow for a windfall in favor of Mashburn, in that she would be able to retain the systematic withdrawals with no offset and she would still get her entire \$69,000 investment back.

It is undeniable that Mashburn is not in the financial position in which she had hoped to be. Instead, the \$69,000 investment has decreased by the amount of the monthly withdrawals. Since these withdrawals were actually authorized by Mashburn and were in fact a return of her capital, we cannot allow Mashburn to recover twice. As one court stated, statutes such as N.C.G.S. § 78A-56(g)(1) seek to reimburse the purchaser for his actual out-of-pocket loss and not for the "benefit of the bargain." *Garretson v. Red-Co, Inc.*, 516 P.2d 1039, 1042 (Wash. App. 1973). We hold that First Investors' rescission offer has in fact reimbursed Mashburn for her out of pocket loss at least in respect to the systematic withdrawals and that the systematic payments were properly characterized as income.

Since the rescission offer specifically informed Mashburn that she would be barred from bringing further claims for liability with the possible exception of the Brooks payments, we will consider how the Brooks payments should be characterized. Similar to the systematic payments, we find that the Brooks payments compensated Mashburn for her out of pocket loss and should be considered as income. Even though these payments were from unknown and possibly illegal sources, the Brooks payments represented money which Mashburn had the use of for close to two years. To exclude these payments as income in figuring the rescission offer would have also amounted to a windfall in favor of Mashburn. We therefore hold that First Investors made a valid rescission offer to Mashburn and that interest was properly calculated on the offer.

The last question we must address is whether or not Mashburn's suit is barred by the rescission offer. As stated in a recent law review article, "the primary effect of the [rescission] offer will be to eradicate civil liability, at least with respect to certain state

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securities law violations which, if sued upon, would have resulted in a judgment equal to the amount received by the offeree." Michele Rowe, *Rescission Offers Under Federal and State Securities Law*, 12 J. Corp. L. 383, 424 (1987). After reviewing Mashburn's complaint we find that the remedies she seeks are nothing more than a return of her investment plus interest. This is exactly what the rescission offer has already returned to her. As a result we find that Mashburn's action is barred by First Investors' valid rescission offer.

Mashburn has also raised as an issue the failure of the trial court to find facts specially as required by Rule 52 of the North Carolina Rules of Civil Procedure. Mashburn claims that the trial court did not make any findings as to why the Brooks payments and the systematic payments constituted income. The requirement that facts be specially found is merely to provide a basis for appellate review. *In re Jones*, 62 N.C. App. 103, 302 S.E.2d 259 (1983). As was the case in this matter, it is possible for findings of fact to be established by stipulation. See *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 368 S.E.2d 413 (1988). We have reviewed the trial court's findings of fact, which were adopted from the parties' stipulations, and conclude that they support the trial court's conclusions of law. As a result Mashburn's assignment of error is overruled and the judgment of the trial court is hereby,

Affirmed.

Judges EAGLES and MCCRODDEN concur.

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L. J. BEST FURNITURE DISTRIBUTORS, INC., PLAINTIFF v. CAPITAL DELIVERY SERVICE, INC. & DUNCAN TRANSPORTATION INC., DEFENDANTS

No. 9118DC1055

(Filed 3 August 1993)

Corporations § 208 (NCI4th)— breach of contract and bailment duties—one corporation as continuation of another—genuine issues of material fact—summary judgment improper

In an action to recover for damages to goods during delivery based on breach of contract, breach of bailment duties, and negligence, the trial court erred in granting plaintiff customer's motion for summary judgment where there were genuine issues of material fact as to whether an existing corporation purchased defendant carrier for grossly inadequate consideration, whether the carrier fraudulently conveyed its assets to the existing corporation, and whether, depending on the determination of these issues, the existing corporation's actions constituted an unfair and deceptive trade practice.

Am Jur 2d, Corporations § 2712; Fraudulent Conveyances § 65.

Appeal by defendant Duncan Transportation, Inc. from order entered 31 July 1991 by Judge Donald L. Boone in Guilford County Superior Court. Heard in the Court of Appeals 18 November 1992.

On 30 May 1989, plaintiff filed a complaint against Capital Delivery Service ("Capital") and Jerry Duncan and Joe Peace, Jr., individually and as general partners of Capital, alleging that Capital damaged furniture it undertook to deliver for plaintiff, a furniture retailer. In its complaint, plaintiff alleged breach of contract, breach of bailment duties, and negligence and sought \$1,986.00 in damages. Subsequently, plaintiff voluntarily dismissed its complaint against Jerry Duncan and Joe Peace, Jr. and moved to amend its complaint to add defendant Duncan Transportation, Inc. ("Duncan, Inc."). On 21 December 1989, the trial court filed an order granting plaintiff's motion to amend its complaint.

On 11 January 1990, plaintiff filed its amended complaint alleging that Capital, its officers, directors, and agents fraudulently conveyed its assets to Duncan, Inc. with the intention of avoiding

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Capital's financial obligations by leaving Capital to exist as a valueless corporation while they continued to conduct Capital's business under the name of Duncan Transportation, Inc. Based on these allegations, plaintiff sought to recover damages from Duncan, Inc., including treble damages based on an unfair and deceptive trade practice claim. On 2 February 1990, Duncan, Inc. filed its answer denying these allegations and asking the trial court to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6).

In June 1991, plaintiff and defendant Duncan, Inc. each filed a motion for summary judgment. On 31 July 1991, Judge Donald L. Boone signed an order entering default judgment against defendant Capital, denying defendant Duncan, Inc.'s motion for summary judgment, granting plaintiff's motion for summary judgment against Duncan, Inc. and ordering Duncan, Inc. to pay plaintiff \$1,986.00 plus interest. From this order, defendant Duncan, Inc. appeals.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Daniel M. Sroka, for plaintiff-appellee.

Scott, Hill, Hovis & Lutz, by Frederick S. Lutz, for defendant-appellant.

ORR, Judge.

The undisputed facts show that in 1982 or 1983, Jerry Duncan and Joe Peace, Jr. formed Capital Delivery Service, Inc., a trucking company, in which Joe Peace, Jr. and Jerry Duncan were the only officers and the only shareholders, each owning fifty percent of Capital's stock. Jerry Duncan's wife, Jo Anne Duncan, leased trucks to Capital which she had owned prior to Capital's creation. Additionally, Jo Anne Duncan worked for Capital as an office manager, buying supplies and keeping the road tax paid. Jo Anne and Jerry Duncan's son, Edgar Duncan, and nephew, Ken Underwood, also worked for Capital as a warehouse manager and a general manager.

In July or August, 1988, Capital ceased to operate because it ran out of money. On 15 September 1988, Jo Anne Duncan filed Articles of Incorporation for Duncan Transportation, Inc., as a trucking company, and Jo Anne Duncan, Ken Underwood, and Edgar Duncan each became one-third shareholders in the new corporation. Additionally, Jo Anne Duncan became the secretary and treasurer; Ken Underwood became the president, and Edgar Duncan became

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the vice president of Duncan, Inc. Duncan, Inc. then leased the same trucks from Jo Anne Duncan as Capital had leased.

The present action involves damages arising out of a contract for delivery between plaintiff and Capital before Capital ceased to operate. Plaintiff alleges that before it could recover damages from Capital, Capital transferred all of its assets to Duncan, Inc. for little or no consideration, that Duncan, Inc. is in effect a continuation of Capital and that Capital is, therefore, liable for this action. Both Duncan, Inc. and plaintiff filed motions for summary judgment in this action, alleging that no genuine issue of material fact exists, and the trial court granted plaintiff's motion and denied Duncan Inc.'s motion. The issue now on appeal is whether the trial court erred in granting plaintiff's motion for summary judgment against Duncan, Inc. and in denying Duncan Inc.'s motion for summary judgment.

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).

"The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment. It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . ."

Kessing v. National Mortgage Corp., 278 N.C. 523, 534-35, 180 S.E.2d 823, 830 (1971).

Additionally, "[a] party may show that there is no genuine issue as to any material facts by showing that no facts are in

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dispute." *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979). However, "if different material conclusions can be drawn from the evidence, summary judgment should be denied even though the evidence is uncontradicted." *Durham v. Vine*, 40 N.C. App. 564, 569, 253 S.E.2d 316, 320 (1979). "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).

In the present case, the trial court stated in its order that it is undisputed that substantially all of the assets of Capital Delivery, including intangible assets, were purchased by Duncan Transportation for grossly inadequate consideration and that Capital Delivery has no remaining assets. Additionally, the trial court stated that it is also undisputed that the most substantial asset of Capital which is now an asset of Duncan, Inc. is the right to lease certain tractor trailer trucks from Jo Anne Duncan.

In North Carolina, "[a] corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities." *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988). The purchasing corporation may become liable, however, for the old corporation's debts where the transfer of assets was done for the purpose of defrauding the corporation's creditors or where the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. *Id.* In determining whether the purchasing corporation is a "mere continuation" of the old corporation, factors such as inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value may be considered. *Id.*

Thus, if Duncan, Inc. is a "mere continuation" of Capital or if Duncan, Inc. purchased Capital's assets in order to defraud Capital's creditors then, it would be liable for Capital's debt to plaintiff. In order for Duncan, Inc. to fit into one of these exceptions for successor corporate liability, the evidence must show that Duncan, Inc. was the "purchaser" of Capital. Even if there was no evidence of a formal purchase of Capital, the evidence must show Duncan, Inc. has acquired Capital's assets without sufficient consideration and is thus a mere continuation of Capital. Because this fact is determinative of Duncan, Inc.'s liability, it is material to this action.

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See, Kessing, supra. Further, if the fact that Duncan, Inc. purchased Capital or was merely a continuation of Capital is also genuinely disputed, then summary judgment is not appropriate for either party in this case.

On appeal, Duncan, Inc. argues that insufficient evidence exists to support the fact that Duncan, Inc. purchased Capital. In support of this argument, Duncan, Inc. contends that no evidence exists to show that Duncan, Inc. received Capital's leasehold rights to Jo Anne Duncan's trucks or that this asset was the most valuable one to both Capital and Duncan, Inc. Further, Duncan, Inc. argues that the trial court ignored the evidence that Capital leased trucks from another individual, from whom Duncan, Inc. does not lease trucks. Duncan, Inc. also argues that insufficient evidence exists to show that Duncan, Inc. received the good will of Capital. Additionally, Duncan, Inc. argues that there is evidence that the property used by Capital employees such as computers, desks, and filing cabinets, was owned by the individual employees of Capital and not the corporation so that Capital could not have sold this property to Duncan, Inc., even though employees of Duncan, Inc. now use this property. Also, no officer or shareholder of Capital is now an officer or shareholder of Duncan, Inc.

On the other hand, the evidence before the trial court in support of the fact that Duncan, Inc. purchased all of Capital's assets for grossly inadequate consideration is that no evidence exists to show Duncan, Inc. ever paid Capital anything, yet after Capital ceased to operate, Duncan, Inc. started leasing Jo Anne Duncan's trucks which had previously been leased to Capital. The Capital logos on the trucks were immediately replaced by Duncan, Inc. logos. Additionally, Duncan, Inc. serves at least one, and maybe several of the same customers that Capital had previously serviced, suggesting that Duncan, Inc. may have acquired the good will of Capital. The evidence also shows that plaintiff received a freight bill from Capital with a return address for "Duncan Transportation", and the same employees who worked for Capital previously are now either employees of, or officers and shareholders of, Duncan, Inc.

Based upon our review of the record, we find that there is a question as to the weight of the evidence that was before the trial court to show Duncan, Inc. was a "mere continuation" of Capital or that Duncan, Inc. "purchased" Capital to defraud Capital's

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creditors. Although Duncan, Inc. argues on appeal that it is entitled to summary judgment, we disagree. There is sufficient evidence in the record to create a genuine issue as to the material fact of whether Duncan, Inc. purchased Capital for grossly inadequate consideration, whether Capital fraudulently conveyed its assets to Duncan, Inc., and whether, depending on the determination of these issues, Duncan, Inc.'s actions constituted an unfair and deceptive trade practice. We cannot, therefore, say that either party is entitled to judgment as a matter of law. Accordingly, we vacate the order of the trial court granting plaintiff's motion for summary judgment and remand this case for trial.

Vacated and Remanded.

Chief Judge ARNOLD and Judge JOHNSON concur.

BERNICE WATSON, PETITIONER-APPELLANT v. EMPLOYMENT SECURITY
COMMISSION OF NORTH CAROLINA AND THE PLASTIC FORMER COM-
PANY, RESPONDENTS-APPELLEES

No. 9226SC826

(Filed 3 August 1993)

**Labor and Employment § 152 (NCI4th) — unemployment benefits —
plant moved by employer — no transportation for employee —
leaving job for cause attributable to employer**

The Employment Security Commission erred in disqualifying petitioner from receiving unemployment benefits where petitioner left her job after her employer moved its plant from Charlotte to Mooresville because she had no reliable means of transportation to work every day of the week, even though she had attempted to make a series of arrangements to get to work; when petitioner became aware that her employer was moving its plant, she expressed reservations about her ability to maintain reliable transportation to work, but, due to her supervisor's encouragement, she continued to work for a period of time even after the plant moved; and petitioner should not be penalized merely because she attempted to

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continue working after her employer moved the plant to another city.

Am Jur 2d, Unemployment Compensation § 105.

Appeal by petitioner from judgment entered 19 May 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 June 1993.

Petitioner terminated her employment with The Plastic Former Company on 19 September 1991 and filed a claim for unemployment insurance benefits. Her claim was denied by a claims adjudicator, an appeals referee, and by the Employment Security Commission, on the grounds that the petitioner had left work without good cause attributable to the employer. Upon appeal by the petitioner to the Superior Court of Mecklenburg County, the decision of the Employment Security Commission was affirmed. Petitioner appeals to this Court.

Legal Services of Southern Piedmont, Inc., by Linda S. Johnson, for petitioner-appellant.

T. S. Whitaker, Chief Counsel, and James A. Haney, Staff Attorney for defendant-appellee Employment Security Commission of North Carolina.

MARTIN, Judge.

The sole question for determination is whether petitioner is disqualified from receiving unemployment benefits on the ground that she left work without good cause attributable to her employer. We conclude that she is not and reverse the denial of her claim for benefits.

In its Decision denying petitioner's claim, The Employment Security Commission found the following pertinent facts:

2. The claimant last worked for The Plastic Former Company on September 19, 1991. The claimant was employed as a packer and had been employed since March 21, 1989.

3. The claimant left this job. When the claimant left the job, continuing work was available for the claimant with the employer.

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4. The claimant left this job because she did not have a reliable means of transportation to work.

5. The employer moved from its [sic] location on Wilkinson Boulevard in Charlotte to Mooresville around November or December, 1990.

6. Before the move, the claimant had expressed reservations about her ability to maintain reliable transportation to and from work. Due to Mr. Haywood's [petitioner's supervisor] encouragement, she decided that she would continue working.

7. Mr. Haywood was available to take the claimant to work on Monday and Tuesday. The claimant worked Monday through Thursday, and he had taken her to work on past occasions.

8. The claimant's car broke down after the employer moved its plant. She made a series of different arrangements to get to work. Immediately prior to leaving her job, she was riding to work in a truck owned by a co-worker. On September 19, 1991, the truck was in disrepair, causing the claimant and the co-worker to arrive at work at approximately 8:15 a.m., fifteen minutes after the scheduled beginning of the shift. Both the claimant and the co-worker were sent home as a penalty for arriving late. The claimant had been tardy several times before, and was aware of this penalty as it had been waived twice before.

9. Believing the co-worker's truck to be beyond immediate repair, and having no other foreseeable means of transportation to work every day of the week, the claimant announced she was quitting. The co-worker was out of work ten days, but returned to work when his vehicle was repaired.

Petitioner did not except to the Commission's findings; they are therefore presumed to be supported by the evidence and are binding on appeal. *Beaver v. Paint Co.*, 240 N.C. 328, 330, 82 S.E.2d 113, 114 (1954). Based on its findings, the Commission concluded "that the claimant's leaving was without good cause attributable to the employer." The Commission's conclusions of law are fully reviewable. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E.2d 372 (1984), *affirmed*, 312 N.C. 618, 324 S.E.2d 223 (1985).

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In enacting Chapter 96 of the North Carolina General Statutes, the "Employment Security Law," our General Assembly declared as the public policy of this State:

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require . . . the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

N.C. Gen. Stat. § 96-2. Because the Act was designed to provide protection against economic insecurity due to unemployment, it should be liberally construed in favor of applicants. *Eason, supra*.

G.S. § 96-14(1) (1991) provides in pertinent part that:

An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

"Good cause" connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. *Sellers v. National Spinning Co.*, 64 N.C. App. 567, 307 S.E.2d 774 (1983), *disc. review denied*, 310 N.C. 153, 311 S.E.2d 293 (1984); *In re Clark*, 47 N.C. App. 163, 266 S.E.2d 854 (1980). A cause "attributable to the employer" is one which is produced, caused, created or as a result of actions by the employer and also includes inaction by the employer. *Ray v. Broghill Furniture Industries*, 81 N.C. App. 586, 344 S.E.2d 798 (1986).

In *Barnes v. The Singer Co.*, 324 N.C. 213, 376 S.E.2d 756 (1989), a case involving facts similar to those in the present case, our Supreme Court reversed the Commission's denial of benefits to the claimant. In that case, the claimant, an employee of Singer Company, commuted to the employer's plant, a forty-four mile round trip, with her brother-in-law, who worked for another company

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in the same town. The claimant was not licensed to operate a car, nor did she own one. When Singer moved its plant to another location eleven miles further from plaintiff's home, plaintiff no longer had transportation to work, because her brother-in-law was unable to drive her the additional distance. She was unable to secure other transportation to the new plant and quit her job with Singer.

At the time the plaintiff in *Barnes* applied for benefits, G.S. 96-14(1) disqualified claimants from receiving benefits for having left work "voluntarily without good cause attributable to the employer." The test for disqualification from unemployment benefits consisted of two prongs: was the termination by the employee voluntary, and if so, was it without good cause attributable to the employer. *Barnes, supra*. The Court found that an employee does not leave work voluntarily when termination is caused by events beyond the employee's control or when the acts of the employer caused the termination. *Id.* Specifically, the Court held that:

Singer, by moving its plant, caused plaintiff's commuting distance to be increased fifty percent and in effect destroyed plaintiff's ability to go from her home to the job site. The moving of the plant was beyond the plaintiff's control. Her leaving work was in response to the removal of the plant by Singer and not an act of her own free will. Thus, the external motivating factor causing the termination of plaintiff's employment was not of her own doing but done by Singer for its own benefit. All the evidence was to the effect that plaintiff wanted to continue to work for Singer but, despite her best efforts, could not physically or economically do so.

Id., at 216, 376 S.E.2d at 758-59. Because the Court decided the case based upon the "voluntariness" prong of the two pronged test, it found it unnecessary to discuss the second prong, i.e., the "good cause attributable to employer" issue.

Effective 5 July 1989, G.S. § 96-14(1) was amended to delete the "voluntary" prong of the disqualification test (except in those instances where the employee quits after being notified by the employer of a termination at some future date). 1989 N.C. Sess. Laws, ch. 583, § 7. The test for disqualification is now simply whether the employee left work without good cause attributable to the employer. We believe, however, that the rationale of *Barnes* and the similarity of its facts are sufficiently broad to support a conclusion that respondent employer's moving of its plant in

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this case is "good cause attributable to the employer" for petitioner's leaving. The Commission found that petitioner left her job after her employer moved its plant from Charlotte to Mooresville because she had no reliable means of transportation to work every day of the week even though she had attempted to make a series of arrangements to get to work. The Commission also found that when petitioner became aware that her employer was moving its plant, she expressed reservations about her ability to maintain reliable transportation to work, but that due to her supervisor's encouragement, she continued work for a period of time even after the plant moved.

All of the Commission's findings of fact make clear that petitioner desired, and attempted, to continue to work for respondent employer. The relocation of the plant was an act of the employer, done for its benefit, and was an event over which petitioner had no control. Her leaving work was solely the result thereof. Thus her separation from employment was unquestionably "attributable to the employer." Under the interpretation which our courts have given to "good cause," a reasonable person would clearly view petitioner's reason for quitting her job as a valid one which does not indicate an unwillingness to work on her part, nor did the Commission find that she was unwilling to work. Although an employee's transportation to and from work is not ordinarily the employer's responsibility, petitioner's inability to get to work is the direct result of her employer's actions in moving its plant, thereby significantly changing the circumstances of her employment. The result which we reach comports fully with the policy established by our General Assembly in G.S. § 96-2 that one who becomes unemployed through no fault of their own should receive unemployment benefits.

Respondents argue, however, that petitioner in this case, unlike the claimant in *Barnes*, "chose to accept the transfer and worked for many months . . ." after the plant relocation occurred. We find this distinction inconsequential. Petitioner should not be penalized merely because she attempted to continue working after defendant chose to move the plant to another city. To the contrary, petitioner's efforts should be commended and are in line with our state's policy that unemployment benefits should go only to those who are not at fault in their unemployment. We note that courts in other jurisdictions have similarly approved the award of unemployment benefits to persons who left employment due to workplace

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relocation even when the claimant had attempted to work at the new location. *See Guillory v. Office of Employment Sec.*, 525 So.2d 1197 (La.App. 1988) (employee who initially tried to make additional fifty mile round trip after employer relocated plant had “good and legal” cause for leaving work after she became nervous and emotionally upset by the drive); *Ross v. Rutledge*, 338 S.E.2d 178 (W.Va. 1985) (employer’s removal of work site an additional 19.8 miles was a substantial unilateral change in the conditions of employment furnishing good cause for leaving work for ten employees who quit their jobs at the time of the move or shortly thereafter due to the added time and expense of travel).

For the foregoing reasons, we hold that the Commission erred in disqualifying petitioner from receiving benefits. The judgment of the Superior Court is reversed and this case is remanded to that court for remand to the Employment Security Commission for entry of an award of benefits in accordance with this opinion.

Reversed and remanded.

Chief Judge ARNOLD and Judge COZORT concur.

STATE OF NORTH CAROLINA v. TIMOTHY ALLAN ALSTON

No. 9225SC989

(Filed 3 August 1993)

1. Narcotics, Controlled Substances, and Paraphernalia § 120 (NCI4th) — sale of controlled substance on school property — sufficiency of evidence

In a prosecution of defendant for felonious sale of crack cocaine on or within the legal boundaries of school property, evidence was sufficient to show that the drug sale took place within 300 feet of a middle school boundary in violation of N.C.G.S. § 90-95(e)(8).

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

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2. Criminal Law § 400 (NCI4th)— trial interrupted to introduce district attorney—no expression of opinion by court

The trial judge's interruption of the trial to introduce the district attorney to the jury and the colloquy between the judge and the district attorney did not constitute an expression of opinion on any fact to be proved in the case and therefore did not constitute a violation of N.C.G.S. § 15A-1222.

Am Jur 2d, Trial § 94.

3. Narcotics, Controlled Substances, and Paraphernalia § 207 (NCI4th)— one sale of cocaine—conviction for sale and sale on school property—error

Defendant could not be convicted of sale of cocaine and sale of cocaine on school property, since there was only one sale made, and the sale on school property constituted an aggravated sale pursuant to N.C.G.S. § 90-95(e)(8).

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 48 et seq.

Appeal by defendant from judgments entered 10 April 1992 in Caldwell County Superior Court by Judge Zoro J. Guice, Jr. Heard in the Court of Appeals 6 July 1993.

On 14 October 1991, defendant was indicted on one count of felonious possession of a controlled substance in violation of G.S. § 90-95(a)(3), one count of felonious possession of a controlled substance with intent to sell or deliver in violation of G.S. § 90-95(a)(1), felonious sale or delivery of a controlled substance in violation of G.S. § 90-95(a)(1), and felonious sale of a controlled substance on or within the legal boundaries of school property in violation of G.S. § 90-95(e)(8). At trial, the State presented evidence which tended to show the following:

On 7 June 1991, State Bureau of Investigations (SBI) Special Agent Kelli Carleton was conducting an undercover narcotics investigation for the City of Lenoir. On that particular morning, Agent Carleton, along with Detective Sergeant Eddie Taylor and Lieutenant D.A. Brown of the Lenoir Police Department, had set up their undercover investigation at the Morning Star Baptist Church in order to target the Finley Avenue area of Lenoir. At approximately 2:00 p.m., Agent Carleton and a confidential informant were driving down Finley Avenue for the purpose of making undercover purchases of crack cocaine. While heading slowly down Finley Avenue

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toward Highway 321 and Morning Star Baptist Church, the agent and informant were approached by a black male. He had been standing by a cement wall on a sidewalk with several other males when he waved to Agent Carleton and the informant to stop.

When Agent Carleton and the informant stopped the car, the man, Agent Carleton later identified as the defendant, got into the back seat of the car. The informant was driving the car at the time and Agent Carleton sat in the passenger seat. After the defendant got in the car, he asked what Agent Carleton wanted. Agent Carleton then turned around in her seat to face the defendant and replied that she was looking for a "\$40.00 piece, a \$40.00 rock," which are commonly accepted terms referring to crack cocaine.

While Agent Carleton spoke with the defendant, the informant continued driving the car without Agent Carleton instructing him where to go. The informant stopped the car to make a turn at the intersection of Finley Avenue and Arlington Street. This intersection was located one street away from the entrance to the William Lenoir Middle School. At the time of the drug sale, Agent Carleton and the informant were approximately 100 feet from the brick middle school sign at the entrance of the school.

After Agent Carleton indicated the amount of cocaine she wanted, the defendant took a Tylenol bottle, unscrewed the lid, shook out a piece of rock identified as crack cocaine into his hand, and handed it to Agent Carleton. Agent Carleton gave the defendant \$40.00 and the defendant left the car.

Immediately after the transaction, Agent Carleton took notes about the undercover purchase and the defendant's description. She was able to independently identify the defendant in court as the person from whom she purchased the drugs, and she also identified him at the Lenoir Police Department on 21 November 1991. Agent Carleton further testified that she noticed the person from whom she purchased the cocaine had a "bad" left eye. She relayed this information immediately after the drug purchase to Detective Taylor, although she had not included this descriptive feature in her notes.

The defendant testified that he had been convicted of two DWI's, careless and reckless driving, and two assault charges. He also testified that he had a drinking problem, but he denied ever consuming any controlled substances. He also testified that he knew

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the location of the middle school in relation to the location of the area where he often "hung out." He further testified that he could have been in the vicinity of Finley Avenue and Arlington Street on 7 June 1991, during the time the State alleges he was selling cocaine to Agent Carleton but denied having sold any cocaine to Agent Carleton on that day. Defendant has a noticeably drooping eye lid; however, he testified that an acquaintance of his, who often "hung out" in the area, had the same drooping eye lid.

At some point during the trial, the court paused to recognize the District Attorney of the Twenty-Fifth District, Mr. Robert Thomas, and introduced him to the jury.

The jury found the defendant guilty on all four counts. The trial court then arrested judgment for felony possession of cocaine. Defendant's remaining three convictions were consolidated for purposes of judgment. After finding one aggravating factor and no mitigating factors, the trial court sentenced the defendant to an active prison term of thirty years, a sentence in excess of the cumulative presumptive sentence for the three convictions. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman, for the State.

Beach, Correll and Beach, P.A., by J. Michael Correll, for defendant-appellant.

WELLS, Judge.

We note initially that defendant sets forth five generalized assignments of error for our review, taking issue with the trial court's rulings on its admission of evidence, its comments, acts and statements, its rulings on defendant's motions, its determination of defendant's sentence, and the overall conduct of the proceedings, which defendant asserts, violated his constitutional rights.

By his first assignment of error, defendant lists six sub-arguments, excepting to certain of the trial court's findings and admissions of evidence. Defendant cites no authority for his first, second, fourth and fifth arguments; therefore, they are deemed abandoned. N.C.R. App. P. 28(a).

[1] Defendant's sixth argument challenges the sufficiency of certain evidence locating the boundaries of the school property in

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relation to the place the State alleges defendant sold the drugs to Agent Carleton. Specifically, defendant argues that because there was only verbal evidence in the form of testimony from Earl Bradshaw and no maps or plats were introduced to locate the distance of the school from the drug sale, such evidence was nothing more than conjecture and was insufficient to prove an essential element of a crime. We disagree.

Defendant's argument goes to the weight of the evidence admitted. While it is true that evidence which merely raises a suspicion or conjecture as to an element of an offense warrants dismissal, such is not the case here. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Here, Mr. Bradshaw testified that he had worked for the Caldwell County Board of Education for approximately 23 years and that, as a part of his job, he was required to be familiar with the property owned by the school system. Mr. Bradshaw clearly testified as to the location of the school and about the experience upon which his knowledge was based. His testimony was also corroborated by the testimony of Agent Carleton, who used a diagram to specifically illustrate that the drug sale occurred 100 feet from the school boundary. We hold that there was plenary evidence that the drug sale, for which defendant was charged, took place within 300 feet of the school boundary in violation of G.S. § 90-95(e)(8). Defendant's contention is without merit.

[2] Although he couches his third sub-argument in terms of error based upon the erroneous admission of evidence, defendant is more precisely challenging the trial court's conduct in interrupting the trial to introduce District Attorney Thomas to the jury. Defendant contends that the trial court's remarks deprived defendant of a fair trial in violation of G.S. § 15A-1222. We disagree.

During the course of the trial, the district attorney apparently entered the courtroom. Judge Guice interrupted the trial, and the following exchange took place:

THE COURT: Pardon me. Mr. Thomas, you need to come down you may do so. We'll be glad to—ladies and gentlemen, the District Attorney for the District, Mr. Thomas.

MR. THOMAS: Just wanted to see how it was going.

THE COURT: We're working.

MR. THOMAS: I can see that. Thank you, Your Honor.

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THE COURT: Yes, sir.

MR. JENNINGS: Judge, tell him I need a pay raise while you're here.

THE COURT: He just went out the door. A little bit late for that.

G.S. § 15A-1222 prohibits a judge from expressing "during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Not every improper comment by a judge, however, warrants a new trial. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984). The defendant must prove he was prejudiced by the trial judge's remarks in order to show a violation of G.S. § 15A-1222 and reversible error. *Id.*

In this case, the colloquy between the trial judge and the district attorney did not constitute an expression of opinion on any fact to be proved in the case and therefore did not constitute a violation of G.S. § 15A-1222. Our appellate courts have repeatedly stated, however, that every criminal defendant is entitled to a trial before an impartial court. *See, e.g. State v. Staley*, 292 N.C. 160, 232 S.E.2d 680 (1977). While we view Judge Guice's conduct as showing some degree of partiality toward the State's attorney, and therefore may have arguably conveyed to the jury a degree of partiality towards the State's case, in light of the strong evidence of defendant's guilt, we cannot agree that Judge Guice's arguably inappropriate conduct was sufficiently prejudicial to require a new trial. This assignment is overruled.

After carefully reviewing defendant's remaining assignments of error, we find them to be without merit and therefore do not address them.

[3] Although not raised by defendant, we have discovered an error which appears on the face of the record. Defendant was charged in separate indictments for the sale of cocaine on school property (91CRS7640); felonious possession of cocaine (91CRS7641, Count I); possession of cocaine with intent to sell and deliver (91CRS7641, Count II); and sale of cocaine (91CRS7641, Count III). The trial court submitted separate verdicts for sale of cocaine and sale of cocaine within 300 feet of school property. This was error. The sale on school property constituted an aggravated sale pursuant to G.S. § 90-95(e)(8). Since that was the only sale made, defendant could be punished for but one sale. Accordingly, the conviction for the sale of cocaine appearing in the judgment is arrested.

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No error in the trial.

Judgment arrested in 91CRS7641 for sale of cocaine.

Judges ORR and MCCRODDEN concur.

NATHAN MOBLEY AND DEBRA SEKONA, PLAINTIFFS v. THE ESTATE OF
RAYMOND JOHNSON, DEFENDANT

No. 9212SC364

(Filed 3 August 1993)

**Automobiles and Other Vehicles § 536 (NCI4th)— automobile
accident—foreseeable medical emergency—genuine issues of
material fact—summary judgment improper**

In an action to recover for injuries arising out of an automobile accident, the trial court erred in granting defendant's motion for summary judgment where a genuine issue of material fact existed as to whether defendant suffered a sudden medical emergency (a stroke) at or immediately prior to the accident and whether this emergency was foreseeable to defendant.

Am Jur 2d, Automobiles and Highway Traffic § 773.

Appeal by plaintiffs from order signed on 9 December 1991 and filed 13 December 1991 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 10 March 1993.

On 13 November 1990, plaintiffs filed this action against defendant for injuries arising out of an automobile accident with Raymond Johnson, who is now deceased. In his complaint, plaintiff Nathan Mobley alleged that Johnson injured him through his negligent act of driving left of the center line and into the opposing lane of traffic on the wrong side of the road thus hitting the car Mobley was driving and causing him physical injuries. In her complaint, plaintiff Debra Sekona, Mobley's wife, alleged that Johnson's negligent acts while driving damaged her in that these acts damaged her vehicle and injured her husband. In addition, these complaints alleged that Johnson was driving while intoxicated, driving

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in a careless and reckless manner, that Johnson had an open liquor bottle in the car he was driving, and that he failed to keep proper control of his car or to look to see that he could make the movement he made safely.

On 11 January 1991, defendant filed answers to these complaints denying the allegations of negligence and asserting the defense that Johnson suffered a sudden medical emergency at or immediately prior to the accident and that this emergency was unforeseeable and unknown to Johnson such that plaintiffs are not entitled to recover from defendant. On 3 June 1992, a consent order consolidating these cases was filed. On 19 November 1991, the defendant filed a motion for summary judgment, and on 9 December 1991, Judge E. Lynn Johnson signed an order granting defendant's motion. From this order, plaintiffs appeal.

Bruce Allen for plaintiff-appellants.

Sanford W. Thompson, IV and Rudolph G. Singleton, Jr. for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment. For the reasons stated below, we find that the trial court did err and accordingly reverse the order.

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). Upon a motion for summary judgment by the defending party, the claimant is not required to present any evidence to support his claim for relief until the defending party has established his right to judgment as a matter of law. *Miller v. Triangle Volkswagen, Inc.*, 55 N.C. App. 593, 598, 286 S.E.2d 608, 611 (1982).

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"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). Further, "[s]ummary judgment is rarely appropriate in a negligence action." *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 332, 399 S.E.2d 411, 413, *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991).

I.

In the present case, plaintiffs contend that the trial court erred in granting defendant's motion for summary judgment based on the contention that a genuine issue of material fact exists as to defendant's negligence. On its motion for summary judgment, defendant has the burden of showing that no genuine issue of material fact exists. *See, Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986). Defendant could prevail on its motion if its evidence shows that defendant has an affirmative defense which would bar the claims made by the plaintiffs. *See, Dickens, supra*. Accordingly, in support of its motion for summary judgment, defendant has attempted to prove that the defense of sudden medical emergency or incapacitation is a bar to the claims of Mobley and Sekona.

This Court has recognized the defense of sudden incapacitation in negligence cases involving automobile accidents. *See, Wallace v. Johnson*, 11 N.C. App. 703, 182 S.E.2d 193, *cert. denied*, 279 N.C. 397, 183 S.E.2d 247 (1971); *Smith v. Garrett*, 32 N.C. App. 108, 230 S.E.2d 775 (1977). "By the great weight of authority the operator of a motor vehicle who becomes *suddenly stricken by a fainting spell or other sudden and unforeseeable incapacitation*, and is, *by reason of such unforeseen disability, unable to control the vehicle*, is not chargeable with negligence." *Wallace*, 279 N.C. at 705, 183 S.E.2d at 194 (emphasis added). " 'But one who relies upon such a sudden unconsciousness to relieve him from liability must show that the accident was *caused by reason of this sudden incapacity*.' " *Id.* (emphasis added) (citation omitted). "In North Carolina the burden is on the party asserting sudden incapacitation to prove the defense by the greater weight of the evidence." *Smith*, 32 N.C. App. at 110-11, 230 S.E.2d at 777.

Thus, in order to prevail on its summary judgment motion based on the defense of sudden incapacitation, defendant's evidence in the present case must show that there is no genuine issue of

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material fact (1) that Johnson was stricken by a fainting spell or other sudden incapacitation, (2) that this incapacitation was unforeseeable to Johnson, (3) that Johnson was unable to control his vehicle because of this incapacitation, and (4) that this sudden incapacitation caused the accident such that defendant is entitled to judgment as a matter of law.

Defendant asserts the defense of sudden incapacitation based on its argument that Johnson suffered from a stroke before the accident which caused him to swerve over the center line and hit plaintiffs' car. In their brief, plaintiffs do not dispute that Johnson suffered a stroke, but instead they contend that insufficient evidence exists to show that Johnson suffered a stroke before the accident which subsequently caused the accident. Additionally, plaintiffs have not conceded that the stroke was unforeseeable to Johnson.

The evidence produced by defendant which tends to show that the stroke occurred before the accident is as follows: One of the surgeons who operated on Johnson before he died stated in a written narrative summary, "Very few details are available [about the accident]; however, one person did note that the patient slumped over the steering wheel prior to the accident." Additionally, defendant submitted a deposition given by Dr. Arthur Davis in which Dr. Davis testified that in his opinion, Johnson suffered a spontaneous hemorrhage. When asked what he meant by spontaneous hemorrhage, Davis testified that Johnson suffered a stroke unrelated to trauma. When asked if by this description he meant that the automobile accident did not cause the stroke, Davis answered, "By the combination of various physical factors and the high blood pressure and the arteriolosclerosis, it was a normal course of events."

Further, Davis testified that he based this opinion on the fact that no trauma to the head was recorded by the autopsy protocol except for the term "'Blunt trauma' which was not substantiated by the description [following the term.]" Johnson's ex-wife, who was married to Johnson from 1955 to 1985, also testified in a deposition submitted to the trial court that Johnson did not have any heart problems which she was aware of and that he had never had any major health problems.

In addition to the evidence which defendant argues in support of its sudden incapacitation defense, our review of the evidence also shows that the autopsy report contains a summary of Johnson's

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injuries which includes a section entitled "Blunt trauma to head". Underneath this section is the following list describing the injuries Johnson sustained to his head: (a) subarachnoid hemorrhage of the cerebellum, (b) subarachnoid hemorrhage of the posterior cerebrum, and (c) no apparent skull fractures. In his deposition, Dr. Davis declined to give an opinion as to what the pathologist meant by "Blunt trauma to head". Further, Johnson's ex-wife, testified in her deposition that Johnson was taking medication for high blood pressure during their marriage, which testimony conflicted with her previous testimony that Johnson did not have any heart problems. There is no evidence contained in the autopsy report that shows the presence of blood pressure medicine. Further, Johnson's ex-wife testified that she does not remember anything about the last time he would have seen a doctor for his high blood pressure nor did she know any doctor whom Johnson was seeing for this condition.

Our review of the evidence shows that a genuine issue of material fact exists in the record and that defendant has not established that it is entitled to summary judgment as a matter of law. If a jury believes the evidence concerning Johnson's prior good health, such that a stroke would have been unforeseeable to him and the evidence tending to show Johnson's stroke occurred before the accident, thereby causing the accident, then the logical inference would be that Johnson suffered a sudden incapacitation. *See, Smith*, 32 N.C. App. at 111, 230 S.E.2d at 778. On the other hand, if a jury believes the evidence which tended to show that Johnson's stroke occurred at or just after the impact of the accident, as it could have been caused by some "Blunt trauma", then this evidence could lead to the equally plausible inference that the accident was caused by the negligence of the deceased and that the sudden trauma of the impact induced his stroke. *See, id.* Additionally, even if a jury believes the evidence that the stroke occurred before the accident but believes the evidence that Johnson should have foreseen this stroke, then this evidence could also lead to the inference that the accident was caused by Johnson's negligence.

The resolution of this question of fact was for the jury to determine. *See, id.* Accordingly, we reverse the decision of the trial court granting defendant's motion for summary judgment.

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[111 N.C. App. 427 (1993)]

II.

Next, plaintiffs contend that the trial court erred in admitting Dr. Davis' testimony as an expert witness based upon the argument that he based his opinion upon materials which could not reasonably be relied upon. Our review of plaintiffs' arguments and of the opinion of Dr. Davis find no support for plaintiffs' contention. Thus, this assignment of error is without merit.

Reversed and Remanded.

Judges WELLS and MARTIN concur.

PAUL CONSIDINE v. WEST POINT DAIRY PRODUCTS, INC.

No. 9216SC648

(Filed 3 August 1993)

Courts § 16 (NCI4th)— nonresident defendant—no in personam jurisdiction—stream of commerce theory inapplicable—insufficient minimum contacts

Defendant Nebraska company which sent a shipment of its butter to a North Carolina buyer could not be subject to personal jurisdiction in North Carolina since the "stream of commerce" theory applies only to products liability cases, but this was a personal injury action based on the alleged incident of negligence in loading butter onto a truck in Nebraska; there were insufficient contacts with North Carolina to permit personal jurisdiction in that plaintiff was not a resident of North Carolina; plaintiff's claim alleged a single incident of negligence which occurred in Nebraska; defendant was a nonresident corporation which neither owned nor rented any property in North Carolina; the company never solicited or sold any of its dairy products directly in North Carolina; and defendant's only connection with North Carolina was the sporadic resale of its product by an independent third party.

Am Jur 2d, Process § 305.

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[111 N.C. App. 427 (1993)]

Appeal by Plaintiff from Order entered 20 April 1992 by Judge William C. Gore, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 14 May 1993.

McLean, Stacy, Henry & McLean, P.A., by Robert C. Slaughter, III, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, P.A., by P. Scott Hedrick, for defendant-appellee.

LEWIS, Judge.

Plaintiff-appellant, Paul Considine, is a Florida resident who was employed as a truck driver trainer in June 1988. Plaintiff's trucking company was hired by a third party broker, Bert Lewis of Oakbrook, Illinois, to transport his bulk purchase of butter from defendant's Nebraska dairy to Lewis' subsequent buyers, the Campbell Soup Company in Maxton, North Carolina. Defendant-appellee, West Point Dairy Products, Inc., is a Nebraska corporation which neither owns nor rents any property in North Carolina. The only issue before us is whether or not defendant can be subject to personal jurisdiction in North Carolina.

On approximately 6 June 1988 plaintiff and a trainee drove to the West Point dairy to haul the load of butter from defendant's plant. A substantial number of boxes were loaded by the dairy employees onto the truck. After receiving the bill of lading from defendant, plaintiff and the trainee drove the truck with the loaded cargo to the North Carolina destination. Upon arrival at the Campbell Soup Company plant on 9 June 1988, Campbell Soup informed plaintiff that it would not accept the boxes unless they were secured with plastic wrap. Plaintiff was injured when several boxes fell on him during his attempt to restack the boxes in order to secure them.

Plaintiff commenced this action on 3 June 1991, alleging that the negligent loading of the truck by defendant's employees was the proximate cause of his injuries and damages. Defendant filed an answer and a motion to dismiss, asserting lack of personal jurisdiction over defendant pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. On 20 April 1992 the motion to dismiss was granted.

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[111 N.C. App. 427 (1993)]

In order to establish *in personam* jurisdiction over a nonresident defendant a two part test must be satisfied. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 513, 251 S.E.2d 610, 613 (1979). First, it must be determined whether a North Carolina statute allows the exercise of jurisdiction over the defendant. *Id.* The parties in the instant case have agreed that long arm jurisdiction under G.S. 1-75.4(4)(b) is applicable and is therefore not at issue. We will examine the second part of the inquiry, as to whether or not assertion of personal jurisdiction over the defendant is consistent with constitutional fairness and due process. *Id.* This analysis involves questions of minimum contacts, purposeful availment, and the stream of commerce.

The requirements for the exercise of personal jurisdiction over a nonresident defendant are set forth in the frequently cited United States Supreme Court case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), where the Court held:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316, 90 L. Ed. at 102. The satisfaction of minimum contacts depends on the facts of each case, and a court must "ascertain[] what is fair and reasonable and just in the circumstances." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 679, 231 S.E.2d 629, 632 (1977) (quoting *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963)). There is no mechanical formula employed to determine whether "minimum contacts" exist. *Id.* at 679, 231 S.E.2d at 632. However, the North Carolina Supreme Court has provided some guidance in cases involving nonresident plaintiffs. In *Dillon* the Court cited *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948, 30 L. Ed. 2d 265 (1971), for the proposition that:

wherein plaintiff was not a resident of the forum state and the claim for relief arose from activities not occurring in the forum state, defendant's contacts with the forum must be "fairly extensive."

Dillon, 291 N.C. at 677, 231 S.E.2d at 631 (citing *Ratliff*, 444 F.2d at 748).

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Furthermore, defendant must act to “purposely avail[] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). Without this purposeful activity in the State by the defendant, personal jurisdiction cannot be justified due to lack of sufficient contacts. See *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979).

Plaintiff contends that defendant may be subject to personal jurisdiction here because defendant entered its product into the “stream of commerce,” as set forth by the United States Supreme Court in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490 (1980). Plaintiff argues that this theory applies because defendant knew its product was going to North Carolina, evidenced by the fact that defendant filled out the bill of lading to North Carolina. Also, according to plaintiff, 21 other shipments of butter from defendant’s dairy had found their way to North Carolina.

We agree with the trial court that the “stream of commerce” analysis does not apply here. The cases which have applied the stream of commerce theory have been products liability cases, wherein a potentially defective and dangerous product has been injected into the stream of commerce. See, e.g., *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 411 S.E.2d 640, *disc. rev. denied and appeal dismissed*, 331 N.C. 116, 414 S.E.2d 752, *and cert. denied*, 113 S. Ct. 78 (1992) (assertion of personal jurisdiction over defendant English company which had manufactured defective water sprayer, then sold its product to distributors and eventually to the North Carolina plaintiff, who was injured when it exploded in his face). The case at hand is not a products liability case. Plaintiff does not allege that the butter itself was defective in any way. Instead, plaintiff’s claim is based on one alleged incident of negligence in loading the butter onto a truck in Nebraska.

Additional guidelines for determining fairness in personal jurisdiction are set forth in *Georgia Railroad Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 469, 265 S.E.2d 637, 640 (1980):

- (i) any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant;
- (ii) an estimate of the inconveniences to the defendant in being forced to defend a suit away from his home;

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(iii) the location of crucial witnesses and material evidence; and (iv) the existence of a contract which has a substantial connection with the forum state.

There are no facts indicating that North Carolina residents require protection from defendant. Plaintiff himself is a Florida resident. *Cf. ETR Corp. v. Wilson Welding Serv.*, 96 N.C. App. 666, 386 S.E.2d 766 (1990) (Court asserted personal jurisdiction over nonresident defendant in situation involving very minimal contacts, but plaintiff therein was a North Carolina corporation). There is no allegation that the defendant's products are defective or harmful. Moreover, most of the witnesses and other evidence is located outside North Carolina. Plaintiff's medical records are in Florida, where he sought treatment for his injuries. Plaintiff and defendant did not have a direct contractual relationship, and defendant is not a party to any contract having any direct connection with North Carolina. Therefore, the situation at hand would not support *in personam* jurisdiction under the *Georgia Railroad* criteria.

We conclude that the evidence does not support a finding of minimum contacts or purposeful availment. Plaintiff is not a resident of North Carolina. Plaintiff's claim alleges a single incident of negligence by defendant's employees which occurred in Nebraska. Defendant is a nonresident corporation which neither owns nor rents any property in North Carolina. The dairy company does not maintain any employees, offices, telephone listings, or mailing addresses in the state. Defendant contends that the company has never solicited or sold any of its dairy products directly in North Carolina. Furthermore, defendant's only connection with North Carolina is the sporadic resale of its product by an independent third party. We find nothing to justify the assertion of personal jurisdiction in this case.

The purpose of the due process clause is to promote fairness by protecting defendants like West Point Dairy from being subject to the binding judgments of a forum where no meaningful "contacts, ties, or relations" have been established. *International Shoe*, 326 U.S. at 319, 90 L. Ed. at 104. To require defense of this action in North Carolina would offend traditional notions of fairness to the nonresident defendant. Finally, we note that our decision does not result in prejudice to plaintiff since, as defendant pointed out in oral argument before this Court, plaintiff has already filed an

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action against defendant in United States District Court in Omaha, Nebraska. We hereby affirm the actions of the trial court.

Affirmed.

Judges Eagles and McCrodden concur.

RICHARDSON CORPORATION v. BARCLAYS AMERICAN/MORTGAGE CORPORATION, A. F. REAL ESTATE HOLDINGS, INC., AND PAUL M. DENNIS, JR., SUBSTITUTE TRUSTEE

No. 9218SC737

(Filed 3 August 1993)

**Mortgages and Deeds of Trust § 22 (NCI4th).— future advances—
priority of intervening lien**

Reading together a deed of trust, a loan agreement, and a letter of commitment, defendant was only obligated on the date the deed of trust was executed to make cumulative advances in the amount of \$14,950,000; therefore, any monies advanced in excess of that amount were not obligatory as of the date of the deed of trust, and the fact that they may have become obligatory at some later time did not extend to defendant the protection of N.C.G.S. § 45-70(a). Accordingly, because plaintiff gave actual notice to defendant that it had perfected a lien on the property, the future advances made by defendant to the borrower subsequent to the receipt of the notice and in excess of the cumulative amount of \$14,950,000 did not take priority over plaintiff's lien.

Am Jur 2d, Mortgages § 355.

Priority between mechanics' liens and advances made under previously executed mortgage. 80 ALR2d 179.

Appeal by plaintiff from judgment entered 27 April 1992 in Guilford County Superior Court by Judge William H. Freeman. Heard in the Court of Appeals 8 June 1993.

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[111 N.C. App. 432 (1993)]

Hunter, Wharton & Lynch, by John V. Hunter III, and Adams Kleemeier Hagan Hannah & Fouts, by M. Jay DeVaney and Amiel J. Rossabi, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr. and Andrew S. Chamberlin, for defendant-appellees.

GREENE, Judge.

Richardson Corporation (Richardson) appeals from the judgment entered on 27 April 1992 granting defendants' motion for summary judgment and denying Richardson's cross-motion for summary judgment.

In March, 1986, Richardson and Adams Farm Company (Adams Farm), a North Carolina partnership, agreed that Richardson would loan Adams Farm \$1,050,000 to assist in the purchase and development of a tract of land containing approximately 697 acres, to be known as the Adams Farm Development. Additionally, Adams Farm submitted to Barclays American/Mortgage Corporation (Barclays) a loan request to obtain additional funds for the purchase and development of the project. On 10 April 1986, Barclays issued a commitment letter approving "a loan which will provide cumulative advances of \$14,950,000, but with no more than \$8,000,000 outstanding at any one time" provided Barclays received a "valid first lien" on the 697 acres of land to be purchased by Adams Farm.

On 28 May 1986, consistent with the agreements between the parties, the following instruments were executed: a loan agreement between Barclays and Adams Farm, which incorporated the "terms and provisions" of the commitment letter, wherein Barclays agreed to provide a loan in the amount of \$14,950,000; a note, signed by Adams Farm payable to Barclays in the principal sum of \$14,950,000; and a deed of trust signed by Adams Farm securing the note of \$14,950,000; a note, signed by Adams Farm payable to Richardson in the principal amount of \$1,050,000; and a deed of trust signed by Adams Farm securing the note of \$1,050,000. The deed of trust to Barclays provided in part:

WHEREAS, and . . . [sic] is agreed: that this Deed of Trust is given, wholly or partly, to secure present and future obligations which may be incurred hereunder and pursuant to the Note and Loan Agreement; that the advances to be made under the Note are obligatory upon Lender up to the face

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amount of the Note; that the amount of obligations presently secured hereby is \$6,013,890.00, and the maximum amount of present and future obligations to be secured hereby shall not exceed at any one time the sum of \$14,950,000.00; and that all future obligations, if any, shall be incurred on or before ten years from the date hereof; . . . [emphasis added].

It was agreed by all the parties that the Barclays deed of trust would be a first lien on the properties and the Barclays deed of trust was recorded first in the register of deeds office. On this same date, 28 May 1986, Richardson delivered to Barclays a letter advising them, pursuant to "the provisions of G.S. 45-70(b)" that Richardson had "advanced a loan" to Adams Farm in the amount of \$1,050,000, which was secured by a deed of trust recorded in the Guilford County Register of Deeds Office.

After Barclays made cumulative advances totalling \$14,950,000, Barclays agreed, on 28 August 1987, to extend its loan commitment to provide additional advances of \$9,000,000. On 12 December 1988, Barclays further agreed to advance an additional \$8,000,000 to Adams Farm. The total amount advanced to Adams Farm by Barclays was approximately \$28,000,000. Adams Farm defaulted in the repayment of Barclays note, leaving a balance owed of some \$8,000,000, and in the repayment of the Richardson note, leaving a balance of \$1,419,632.34. Barclays and Richardson, on 1 November 1990, entered into an escrow agreement, wherein it was agreed that Barclays would deposit \$1,419,632.34 into an escrow account and that Richardson would release the property from its deed of trust. On 1 May 1991, the property was sold at foreclosure to Barclays for the sum of \$6,316,000.

Richardson initiated this action by a verified complaint seeking judgment declaring that the Richardson loan has priority over the advances made by Barclays above \$14,950,000 and that it therefore be declared the owner of the funds in escrow. On 8 January 1992, the defendants moved for summary judgment, and Richardson cross-moved for summary judgment on 21 February 1992. The trial court granted defendants' summary judgment motion, thus denying Richardson's claim of priority.

The dispositive issue is whether, pursuant to Chapter 45, Article 7 of the North Carolina General Statutes, the advances by

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Barclays to Adams Farm above \$14,950,000 have priority over Richardson's deed of trust.

As to priority of intervening liens in relation to future advances, N.C.G.S. § 45-70 states:

(a) Any security instrument which conforms to the requirements of this Article [see N.C.G.S. § 45-68 (1991)] and which on its face shows that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligatory future advances secured by it, as if all the advances had been made at the time of the executions of the instrument. An advance shall be deemed obligatory if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation.

(b) Any security instrument . . . which on its face does not show that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligations secured by it, as if all the advances had been made at the time of the execution of the instrument, except that when an intervening lienor or encumbrancer gives actual notice as hereinafter provided that an intervening lien or encumbrance has been perfected on the property covered by the security instrument, . . . any future advances made subsequent to the receipt of such notice shall not take priority over such intervening perfected lien or encumbrance. Such notice shall be in writing and shall be given to the secured creditor named in the security instrument

N.C.G.S. § 45-70(a), (b) (1984), *amended by* 1989 N.C. Sess. Laws, ch. 496, § 3, effective October 1, 1989.¹

Although Richardson argues otherwise, we assume, for the purposes of this opinion, that the Barclays' deed of trust complies with the requirements of N.C.G.S. § 45-68, that is, it shows (1) that it was given "to secure future obligations which may be in-

1. The amendment modifying subsection (a) and repealing subsection (b) was effective 1 October 1989, and applicable only to security instruments executed on or after that date.

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curred thereunder;" (2) the "amount of present obligations secured, and the maximum amount . . . which may be secured;" and (3) the "period within which such future obligations may be incurred, which period shall not extend more than 10 years beyond the date of the security instrument." N.C.G.S. § 45-68(1). The only question we address therefore is whether Barclays was obligated, "on [the] face" of the original note and deed of trust to make advances in excess of \$14,950,000. If so, Barclays' deed of trust maintained its superiority over the Richardson deed of trust to the extent of all advances made. If not obligatory, then Richardson's deed of trust was senior to the Barclays' deed of trust, to the extent of any advances in excess of the \$14,950,000.

The Barclays' deed of trust provided in pertinent part that advances were "obligatory upon Lender up to the face amount of the Note." The deed of trust incorporated the terms of the loan agreement, which incorporated the terms of the commitment letter. The commitment letter provided for advances in the "cumulative" sum of \$14,950,000, "with no more than \$8,000,000 outstanding at any one time." Reading these documents together, as the documents require, Barclays was only obligated, on 28 May 1986 (the date the deed of trust was executed), to make cumulative advances in the amount of \$14,950,000. Therefore, any monies advanced in excess of that amount were not obligatory as of 28 May 1986, and the fact that they may have become obligatory at some later time, does not extend to Barclays the protection of Section 45-70(a). Accordingly, because Richardson gave actual notice to Barclays that it had perfected a lien on the property, the future advances made by Barclays to Adams Farm subsequent to the receipt of the notice and in excess of the cumulative amount of \$14,950,000 did "not take priority over" the Richardson loan.

In so holding, we reject Barclays' argument that Section 45-69 requires a different result. We acknowledge the general rule that "if any obligation secured . . . [by a security agreement consistent with N.C.G.S. § 45-68] is paid or is reduced by partial payment, further obligation may be incurred . . . provided the unpaid balance of principal outstanding shall never exceed the maximum amount authorized," and that such obligations "shall be secured to the same extent" as the original obligation. N.C.G.S. § 45-69 (1991). If, however, the "security instrument provides to the contrary," this general rule is not applicable. *Id.* In this case, the deed of trust, which incorporates the commitment letter, provides to the

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contrary. It specifically provides that no obligation shall be incurred in excess of a cumulative total of \$14,950,000.

The summary judgment entered for defendants is reversed and this case is remanded for entry of summary judgment for Richardson.

Reversed and remanded.

Judges JOHNSON and WYNN concur.

IN THE MATTER OF: STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT
SECURITY COMMISSION OF NORTH CAROLINA, APPELLEE v. DAVID
R. HOPKINS, JR., APPELLANT

No. 9218SC368

(Filed 3 August 1993)

Labor and Employment § 137 (NCI4th) — seasonal alien agricultural workers — unemployment taxes required of employer

An employer must pay unemployment taxes on his alien farm workers who are Seasonal Agricultural Workers admitted to the United States under 8 U.S.C. § 1160 (Supp. 1993).

Am Jur 2d, Unemployment Compensation §§ 19 et seq.

Appeal by employer from judgment entered 27 December 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 11 March 1993.

T.S. Whitaker and C. Coleman Billingsley, Jr., for appellee.

Max D. Ballinger for appellant.

LEWIS, Judge.

David R. Hopkins, Jr., employs non-resident alien farm workers as well as several U.S. workers on his Guilford County tobacco farm. In 1988 Hopkins contacted the Employment Security Commission (hereafter "ESC") office in Greensboro and inquired as to whether or not he owed state unemployment taxes for those quarters of 1987 in which his payroll exceeded \$20,000. *See* N.C.G.S.

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§ 96-8(5)n. (1991). An ESC field auditor determined that he did owe unemployment taxes in 1987, and assessed his tax liability along with interest and penalties. Hopkins paid the tax and interest under protest, objecting to the payment of state unemployment taxes on that portion of the wages earned by alien farm workers. The ESC held hearings on the matter and affirmed Hopkins' tax liability. Hopkins now appeals from the Order of the Superior Court affirming the decision of the ESC.

This case involves two classifications of alien agricultural workers set forth in the Immigration and Nationality Act (INA): "H-2A" workers and "SAW" workers. The term "H-2A" refers to alien workers admitted under 8 U.S.C. § 1101(15)(H)(ii)(a), which provides:

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(H) an alien . . . (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature . . .

8 U.S.C. § 1101(15)(H)(ii)(a) (Supp. 1993). An employer must petition the Attorney General for permission to import an alien as a nonimmigrant under section 1101(a)(15)(H), according to 8 U.S.C. § 1184(c) (Supp. 1993). H-2A workers are not entitled to permanent resident status, and may remain in the U.S. only for the duration of their particular job. *See Wint v. Yeutter*, 902 F.2d 76, 78 (D.C. Cir. 1990).

The term "SAW" stands for Seasonal Agricultural Worker and refers to workers admitted under 8 U.S.C. § 1160 (Supp. 1993). A worker is eligible for SAW status if he applied within 18 months of 1 June 1987 and showed that he resided in the U.S. and performed seasonal agricultural work for at least 90 days between 1 May 1985 and 1 May 1986. A worker with SAW status is lawfully admitted for temporary residence until the expiration date listed, and may later seek permanent residence. According to Hopkins, the SAW program was enacted to supplement the H-2A program.

Each of the alien farm workers employed by Hopkins has been issued an Employment Authorization Card I-688A, which is valid for six months and issued to those seeking SAW status. 8 U.S.C.

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§§ 1160, 1324a. Some have also been issued a Temporary Residence Card I-688, which confers SAW status. None of Hopkins' workers were H-2A workers.

Hopkins argues he should not be required to pay state unemployment taxes on his SAW workers for several reasons. He argues that the Federal Unemployment Tax Act does not require contributions on sums paid to alien farm workers with SAW status, that the North Carolina provisions parallel the federal act, and that therefore the tax should not be owed in North Carolina. Also, he contends he should not owe such taxes for SAW workers, because they are not eligible to receive unemployment insurance benefits under North Carolina law. Additionally, Hopkins argues that his SAW workers are really the functional equivalent of H-2A workers, who are exempted from unemployment tax liability in North Carolina.

The North Carolina unemployment insurance provisions are found in Chapter 96 of the North Carolina General Statutes. It is undisputed that Hopkins meets the definition of "employer" for the purposes of Chapter 96, because he paid over \$20,000 in wages during several quarters in 1987. N.C.G.S. § 96-8(5)n. (1991). Also, the services provided by the alien workers in this case meet the statutory definition of "employment," because they provide agricultural labor and because their employer paid over \$20,000 in wages during a calendar quarter. § 96-8(5)n.(a).

The controversy in this case arises because Chapter 96 contains an exception from its unemployment insurance requirements for H-2A workers. Those workers are excluded from the definition of employment as follows:

Provided, such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

§ 96-8(6)g. There is no listed exception for alien workers with SAW status.

Although the North Carolina statute contains no exception for SAW workers, Hopkins contends that in adopting the federal provisions on unemployment taxation and insurance, our legislature intended the state act to be applied in exactly the same manner as the federal act. Notwithstanding the treatment of SAW workers

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under the federal act, we are governed by the provisions of the North Carolina act, which clearly provides an exception only for H-2A workers. We reject the argument that we must apply our act exactly as the federal act. See *Unemployment Compensation Comm'n v. National Life Ins. Co.*, 219 N.C. 576, 14 S.E.2d 689 (1941). If our legislature intends that SAW workers as well as H-2A workers be exempt from unemployment contributions, they must make that decision and enact the statutory change.

Hopkins also argues that he should not owe unemployment taxes for SAW workers because they are not eligible to receive unemployment insurance benefits. However, we note that such workers are eligible for benefits. Section 96-13(f), as it existed in 1987, provided that

[b]enefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law or was lawfully present for purposes of performing such services

§ 96-13(f) (1985) (amended 1991). According to this provision, an alien is eligible for benefits if he was: (1) lawfully admitted for permanent residence; (2) permanently residing in the U.S. under color of law; or (3) lawfully present for the purpose of performing such services. SAW workers satisfy the third requirement listed in the statute, and are therefore eligible to receive benefits.

Finally, Hopkins argues that his workers have attained de facto H-2A status and should therefore be excluded from the definition of employment in Chapter 96. Regardless of the fact that the SAW program supplements the H-2A program, the statute clearly exempts only H-2A workers.

We find no support for Hopkins' arguments, and therefore affirm the Superior Court. We hold that an employer must pay unemployment taxes on his alien farm workers with SAW status. Any changes or additions to section 96-8(6) must be made by the legislature, not by the courts.

Affirmed.

Judges JOHNSON and JOHN concur.

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[111 N.C. App. 441 (1993)]

STATE OF NORTH CAROLINA v. GLENDEN RAY SULLIVAN

No. 9312SC79

(Filed 3 August 1993)

Criminal Law § 1280 (NCI4th)— misdemeanor charge elevated to felony status—special indictment required under statute—special indictment charging defendant as habitual felon insufficient

When the State attempts to elevate a misdemeanor charge of breaking into a coin-operated machine to felony status, a special indictment charging defendant as being an habitual felon, based in part on an alleged prior conviction for feloniously breaking into a coin-operated machine, may not properly serve as a substitute for the special indictment required under N.C.G.S. § 15A-928 because of the material inconsistencies in their respective procedural requirements. Furthermore, an habitual felon special indictment may properly accompany only an indictment charging the defendant with a felony offense.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Appeal by defendant from judgment entered 3 September 1992 in Cumberland County Superior Court by Judge Peter M. McHugh. Heard in the Court of Appeals 9 July 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

Parish, Cooke & Russ, by James R. Parish, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 3 September 1992, which judgment is based on jury verdicts convicting defendant of felonious forcible breaking into a coin-operated machine, N.C.G.S. § 14-56.1, and misdemeanor larceny, N.C.G.S. § 14-72.

Defendant was indicted on 26 August 1991 for “unlawfully, willfully and feloniously . . . forcibly break[ing] into a coin-operated [Coca-Cola] machine” in Fayetteville, North Carolina, in violation of N.C.G.S. § 14-56.1. The indictment alleges that defendant previously

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was convicted of several counts of breaking into a coin-operated machine in December, 1988, and in May, 1990. Accompanying the principal indictment is a special indictment alleging that defendant qualifies as an habitual felon based on three prior felony convictions, including the same May, 1990, convictions for breaking into a coin-operated machine alleged in the principal indictment.

Defendant on 31 August 1992 filed in Cumberland County Superior Court a "motion to strike the surplus language" in the principal indictment on the ground that the allegations of defendant's prior convictions for breaking into a coin-operated machine violate N.C.G.S. § 15A-928. The trial court granted the motion, and defendant subsequently moved to dismiss the special indictment and remand the cases to district court on the grounds that the principal indictment alleges only misdemeanor offenses and therefore the district court has original jurisdiction to hear the cases, and the special indictment charging defendant as an habitual felon is of no effect because it attaches to no felony offense. The trial court determined that the allegations set forth in the special indictment charging defendant as an habitual felon "are sufficient to constitute the special indictment referred to and required by" N.C.G.S. § 15A-928, and denied defendant's motions.

After a trial, at which the State presented two witnesses who established defendant's prior conviction for feloniously breaking into a coin-operated machine, the jury convicted defendant of feloniously breaking into a coin-operated machine and misdemeanor larceny. The court, pursuant to N.C.G.S. § 14-7.5, presented to the same jury the bill of indictment charging defendant as an habitual felon, after which the jury returned a verdict finding defendant guilty of being an habitual felon. The trial court sentenced defendant on the underlying convictions to a prison term of twenty-five years. Defendant appeals.

The dispositive issue is whether, when the State attempts to elevate a misdemeanor charge of breaking into a coin-operated machine to felony status, a special indictment charging defendant as being an habitual felon, based in part on an alleged prior conviction for feloniously breaking into a coin-operated machine, may properly serve as a substitute for the special indictment required under N.C.G.S. § 15A-928.

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Defendant argues that the State properly indicted him only for misdemeanor breaking into a coin-operated machine. We agree.

Any person who forcibly breaks into any coin-operated machine with intent to steal any property or money therein shall be guilty of a misdemeanor. N.C.G.S. § 14-56.1 (1986); *State v. Sullivan*, 110 N.C. App. 779, 781, 431 S.E.2d 502, 503 (1993). However, if such person has been previously convicted of such a charge, he shall be punishable as a Class H felon. N.C.G.S. § 14-56.1. The procedure for elevating an offense of lower grade to one of higher grade based on the fact that the defendant has been previously convicted of an offense is delineated in N.C.G.S. § 15A-928. This statute provides that "an indictment or information for the higher offense may not allege the previous conviction." N.C.G.S. § 15A-928(a) (1988). Rather, the indictment for the offense "must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense," or the special indictment or information may be incorporated in the principal indictment as a separate count. N.C.G.S. § 15A-928(b). "After commencement of the trial and *before the close of the State's case*, the judge in the absence of the jury must arraign the defendant upon the special indictment" N.C.G.S. § 15A-928(c) (emphasis added); *accord State v. Jackson*, 306 N.C. 642, 651, 295 S.E.2d 383, 389 (1982). If the defendant admits the previous conviction, the prior conviction is established and "no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto" N.C.G.S. § 15A-928(c)(1). "If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case." N.C.G.S. § 15A-928(c)(2). Any jury trial held in superior court on the misdemeanor must be held in accordance with the foregoing procedure. N.C.G.S. § 15A-928(d).

We agree with defendant that the State failed to follow the provisions of Section 15A-928 in charging and trying defendant with felony-grade breaking into a coin-operated machine. Section 15A-928(a) explicitly states that the prior conviction used to elevate the offense of lower grade to one of higher grade may not be alleged in the principal indictment. For this reason, the trial court properly granted defendant's motion to strike from the principal indictment the allegations of defendant's prior convictions for the offense, effectively rendering the indictment one which charged

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only a misdemeanor because there was no accompanying special indictment alleging the prior conviction for the offense as required under Section 15A-928(b). Because there was no special indictment as required under Section 15A-928(b), the trial court did not arraign defendant upon it after the commencement of trial but before the close of the State's case, as required under Section 15A-928(c).

The State, however, insists—and the trial court found—that the special indictment charging defendant as an habitual felon serves as an adequate substitute for the special indictment required under Section 15A-928(b). We disagree. As previously discussed, Section 15A-928(c) mandates that the defendant be arraigned upon the special indictment required under subsection (b) after commencement of the trial and *before* the close of the State's case, and that, if the defendant denies the prior conviction or remains silent, the State may prove the prior conviction, which is an element of the elevated offense with which the defendant is charged, as part of its case. In contrast, a special indictment alleging that the defendant is an habitual felon “shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony,” in other words, *after* the close of the State's case and after the jury has returned a verdict of guilty. N.C.G.S. § 14-7.5 (1986) (emphasis added). Accordingly, a special indictment alleging that the defendant is an habitual felon cannot serve as a substitute for the special indictment required to elevate an offense from lower grade to higher grade under Section 15A-928 due to the material inconsistencies in their respective procedural requirements.

Furthermore, an habitual felon special indictment may properly accompany only an indictment charging the defendant with a *felony* offense. N.C.G.S. § 14-7.3 (1986). Because the State failed to follow the provisions of Section 15A-928, defendant was charged not with felony-grade breaking into a coin-operated machine, but with the misdemeanor grade of the offense. Therefore, no underlying felony charge exists to which the habitual felon special indictment can attach. Accordingly, the trial court should have dismissed the special indictment and remanded the cases to Cumberland County District Court. *See* N.C.G.S. § 7A-272(a) (1989) (district court has exclusive, original jurisdiction for the trial of misdemeanors); *Sullivan*, 110 N.C. App. at 781, 431 S.E.2d at 503.

For the foregoing reasons, the judgment of the superior court is

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Vacated.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. GLENN THOMAS HARRIS, DEFENDANT

No. 9226SC503

(Filed 3 August 1993)

1. Evidence and Witnesses § 374 (NCI4th)— sexual offense charged—evidence of prior sexual act admissible—time frame established by evidence

Testimony concerning an uncharged prior sexual act between defendant and the victim was properly allowed into evidence to show intent and plan or scheme where evidence established that the prior act happened within one year of the charged offenses.

Am Jur 2d, Rape § 84.**2. Rape and Allied Offenses § 5 (NCI3d)— sexual assault—evidence of two offenses—dismissal of indictments charging second offense not required**

There was no merit to defendant's contention that the evidence showed that there was only one sexual assault and that indictments charging a second offense should be dismissed, since there was sufficient evidence, including the testimony of the victim, an expert in weather observation, and other witnesses to whom the victim had talked, of the existence of two sexual assaults, and dismissal of the charges was not warranted even though the victim at one point apparently contradicted himself and indicated that there was only one incident.

Am Jur 2d, Rape §§ 88 et seq.

Appeal by defendant from judgment entered 4 December 1991 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 1993.

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Defendant was tried on two charges of first degree sexual offense and two charges of taking indecent liberties with a child. The events resulting in these convictions occurred on 15 June 1990 and 16 June 1990 while defendant and the victim were living at the victim's great-grandmother's house.

The victim testified generally that on one occasion defendant and the victim were alone in the living room, and defendant told the victim to get some vaseline from the bathroom. When the victim returned to the living room, defendant lowered the victim's pants and put some vaseline on his "bottom." Defendant then lowered his own pants, put some vaseline on his "private," and told the victim to get on the couch. At that point, defendant "put his private part" in the victim's "bottom." The victim described a similar incident which occurred on the day of his birthday party.

Defendant was convicted on all charges and sentenced. From this judgment defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Philip A. Telfer, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Allen W. Boyer, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first argues that testimony concerning an uncharged prior sexual act between defendant and the victim was improperly allowed into evidence. Defendant concedes that evidence of this type is commonly allowed under N.C.R. Evid. 404(b), but he contends that because there was no time frame established for the prior act, it was inadmissible. We disagree that no time frame was established for the prior act.

The charged offenses occurred on 15 June 1990 and 16 June 1990. The victim lived with his great-grandmother for approximately one year before those June 1990 incidents, and he moved from the great-grandmother's within a few days after he reported the incidents on 16 June 1990. The victim testified that the prior act in question occurred while he was living with his great-grandmother. The evidence thereby established that the prior act happened within one year of the charged offenses.

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We note that the judge had some indication of a time frame for the prior act before he ruled on its admissibility, but he did not know exactly how long the victim lived with his great-grandmother until after the ruling. Any possible error committed by the judge in allowing this evidence without a more precise time frame was harmless, however, in light of the subsequent testimony which established a time frame for the prior act.

The passage of as much as one year between the prior act and the charged offenses did not make the prior act impermissibly remote. See *State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990) (twenty eight months between charged offense and prior act not too remote); *State v. Roberson*, 93 N.C. App. 83, 376 S.E.2d 486 (nearly five years between charged offense and prior act not too remote), *disc. review denied*, 324 N.C. 435, 379 S.E.2d 247 (1989). In addition, the prior act was factually similar to the charged offenses in that it involved defendant lowering the victim's pants and "putting his private" in the victim's "bottom." Evidence of the prior act was, therefore, properly allowed under Rule 404(b) to establish intent or a plan or scheme. *Roberson*, 93 N.C. App. at 85, 376 S.E.2d at 487.

[2] Defendant also argues that the court erred by not dismissing the charges in 90 CRS 94959 and 94960 because the evidence did not support those charges. We disagree.

The indictments in 94959 and 94960 charged that defendant sexually assaulted the victim on 15 June 1990. Defendant contends the evidence showed that there was only one sexual assault and that it occurred on 16 June 1990. Our review of the record, however, reveals that sufficient evidence existed of sexual assaults occurring on both days. The victim initially testified to one occasion when defendant sexually assaulted him in the victim's great-grandmother's living room. When asked if he remembered anything special about that day, the victim replied that it was raining. The State called an expert in weather observation who testified that the only significant rainfall in June 1990 was on the 15th. He also testified that the next rainfall was on 18 June 1990.

Subsequently, the victim described a similar incident in his great-grandmother's living room that happened on the day of his birthday party, which was 16 June 1990. There was no rainfall on 16 June 1990. The victim's description of events which he said occurred on a rainy day together with the weather observer's

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testimony sufficiently distinguished the victim's first account of events from the events which occurred on 16 June 1990. Furthermore, the victim was corroborated by several witnesses who testified that the victim told them about two distinct events occurring on different days. This evidence was sufficient to overcome defendant's motion to dismiss.

Although during his testimony the victim apparently contradicted himself and indicated that there was only one incident in the great-grandmother's living room, dismissal of the charges was not warranted. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Smith*, 307 N.C. 516, 520, 299 S.E.2d 431, 435 (1983). See also *State v. Hinton*, 95 N.C. App. 683, 383 S.E.2d 704 (1989) (question raised by minor witness's conflicting testimony as to whether there had been a rape or only an attempted rape was properly given to the jury to resolve), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 117 (1990). For these reasons, we hold that the court properly denied defendant's motion to dismiss the charges in 94959 and 94960.

No error.

Judges COZORT and LEWIS concur.

DIANA RUTH WAGONER, PETITIONER v. WILLIAM S. HIATT, COMMISSIONER
NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 9221SC417

(Filed 3 August 1993)

Automobiles and Other Vehicles § 87 (NCI4th)— two offenses of driving while impaired—convictions in reverse order—four-year revocation of license proper

N.C.G.S. § 20-19(j) authorizes the Division of Motor Vehicles to amend its N.C.G.S. § 20-19(d) revocation orders when the convictions occur in reverse order than the offenses so as to allow the intended four-year revocation of the offender's driver's license; therefore, the trial court should have affirmed the four-year revocation of petitioner's license where she was arrested for driving while impaired on 9 November 1990 and

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9 December 1990, and was convicted of the second offense on 18 January 1991 and of the first offense on 25 January 1991.

Am Jur 2d, Automobiles and Highway Traffic § 144.

Appeal by respondent from order signed 25 February 1992, *nunc pro tunc* for 11 February 1992 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 1993.

On 9 November 1990, petitioner was arrested in Forsyth County on a charge of driving while impaired (hereinafter referred to as "first offense"). On 9 December 1990, petitioner was arrested again in Forsyth County on a separate charge of driving while impaired (hereinafter referred to as "second offense"). On 18 January 1991, petitioner was convicted of the second offense. On 25 January 1991, petitioner was convicted of the first offense. Petitioner received two notices of revocation of her driver's license, each for one year, one carrying an effective date of 18 January 1991 and one carrying an effective date of 9 March 1991. Petitioner also received a notice of revocation of her driver's license for four years effective 18 January 1991.

Petitioner filed a petition in Forsyth County Superior Court to contest the four-year revocation of her driver's license by respondent. The trial court granted her petition, concluded that the four-year revocation was unauthorized under N.C. Gen. Stat. §§ 20-17 and 20-19, and ordered the four-year revocation reversed and stricken. From this order, respondent appeals.

Paul C. Shepard for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Bryan E. Beatty, for respondent-appellant.

ORR, Judge.

Respondent contends that the Division of Motor Vehicles was authorized under N.C.G.S. § 20-19(d) and (j) to revoke petitioner's driver's license for four years. We agree.

Petitioner correctly argues that the statute should be given its plain meaning, and the plain meaning of N.C.G.S. § 20-19(d), when read alone, does support her contention that the four-year revocation was unauthorized. N.C.G.S. § 20-19(d) provides:

WAGONER v. HIATT

[111 N.C. App. 448 (1993)]

When a person's license is revoked under subdivision (2) of G.S. 20-17 [which requires revocation for the conviction of an impaired driving offense] and the person has another offense involving impaired driving for which he has been convicted, which offense occurred within three years immediately preceding the date of the offense for which his license is being revoked, the period of revocation is four years, and this period may be reduced only as provided in this section. . . .

However, "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible. . . ." *Justice v. Scheidt*, 252 N.C. 361, 363, 113 S.E.2d 709, 711 (1960). Thus, subsection (d) of the statute must be interpreted in the context of the entire section. N.C.G.S. § 20-19(j) specifically refers to subsection (d):

The Division is authorized to issue amended revocation orders issued under subsections (d) and (e), if necessary because convictions do not respectively occur in the same order as offenses for which the license may be revoked under those subsections.

In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish. *State ex rel. Hunt v. North Carolina Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). The language in contention is part of the Uniform Driver's License Act, which was designed

to safeguard the use of our highways from those who are not qualified to operate motor vehicles, from those guilty of certain violations of our statutes regulating the use of motor vehicles, e.g. . . . drunken driving, etc., to exercise some measure of control over such operators, and generally to make uniform, so far as practicable, the granting or withholding of this privilege to operate a motor vehicle in furtherance of the safety of the users of the State's highways.

Harrell v. Scheidt, 243 N.C. 735, 738, 92 S.E.2d 182, 184 (1956). We believe that the purpose of N.C.G.S. § 20-19 is to provide a uniform standard period for the withholding of the privilege to operate a motor vehicle following certain offenses. Under the trial court's interpretation of the statute, a two-time offender could easily circumvent the four-year revocation called for by subsection

IN RE COLEY

[111 N.C. App. 451 (1993)]

(d) by continuing his hearing on the first offense until after he is convicted of the second offense. "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). Thus we must read subsections (d) and (j) of N.C.G.S. § 20-19 together, giving consideration both to the legislative intent of ensuring standard penalties for the same offenses and to the policy of preventing circumvention of the statute.

We find that N.C.G.S. § 20-19(j) authorizes the Division to amend its subsection (d) revocation orders when the convictions occur in reverse order than the offenses, allowing the intended four-year revocation of the offender's driver's license. Therefore, the trial court should have affirmed the four-year revocation of petitioner's driver's license.

We reverse the order of the trial court and remand for the entry of judgment affirming the four-year revocation of petitioner's driver's license.

Reversed and remanded.

Judges JOHNSON and MCCRODDEN concur.

IN THE MATTER OF: KERVIEW WAYNE COLEY

No. 9210SC745

(Filed 3 August 1993)

Appeal by respondent from order entered 4 November 1991 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 1993.

Respondent was charged on a warrant dated 26 June 1986 with the first degree murder of David Carroll. The following day he was found incapable of proceeding to trial and therefore was committed to Dorothea Dix Hospital for examination and treatment pending a district court hearing. He was indicted by the Grand Jury for Wake County on 27 October 1986. Counsel for respondent gave notice of respondent's intention to rely on the insanity defense.

IN RE COLEY

[111 N.C. App. 451 (1993)]

On 11 May 1987, in Wake County Superior Court, Judge Henry W. Hight entered an order pursuant to N.C. Gen. Stat. § 15A-959(c) (1977) finding respondent not guilty by reason of insanity. Respondent was involuntarily committed to Dorothea Dix.

Thereafter respondent had several rehearings with recommitment being ordered by each district court judge based on the State's proof of continuing mental illness and dangerousness. Judge Stephens presided over respondent's seventh rehearing under the newly enacted provisions of Senate Bill 43, codified as N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) (Cum. Supp. 1991), and by order entered 4 November 1991 found respondent had not met his burden of proof and ordered his continued commitment for a period not to exceed one year. Respondent appealed the order to this Court.

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

Karl E. Knudsen for respondent-appellant.

ARNOLD, Chief Judge.

Respondent contends that the provisions of G.S. § 122C as amended by Senate Bill 43 in April 1991 violate the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as Article I, Section 19 of the North Carolina Constitution. Respondent also contends that Senate Bill 43 violates the Ex Post Facto Clause of the Federal Constitution and North Carolina Constitution. The questions presented by respondent on appeal are identical to the issues raised in *In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862 (1993), which was filed simultaneously with the case at bar. For the reasons stated in *Hayes*, we hold that respondent's assignments of error are without merit.

Affirmed.

Judges ORR and MARTIN concur.

IN RE SCOTT

[111 N.C. App. 453 (1993)]

IN THE MATTER OF: THOMAS EARL SCOTT

No. 9210SC744

(Filed 3 August 1993)

Appeal by respondent from order entered 4 November 1991 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 1993.

Respondent was charged in Robeson County on warrants dated 19 March 1990 with robbery with a dangerous weapon and the first degree murder of Earl Scott. Having been evaluated and found incapable of proceeding to trial, respondent was involuntarily committed on 13 June 1990 and recommitted on 31 July 1990. Respondent was indicted by the Grand Jury for Robeson County on 5 November 1990. Counsel for respondent filed notice of respondent's intention to rely on the insanity defense. On 18 March 1991, in Robeson County Superior Court, Judge Dexter Brooks entered an order pursuant to N.C. Gen. Stat. § 15A-959(c) (1988) finding respondent not guilty by reason of insanity and ordered him committed to Dorothea Dix Hospital for treatment.

Judge Stephens presided over respondent's first rehearing to determine whether respondent should continue to be involuntarily committed. By order dated 4 November 1991, Judge Stephens found that respondent had not met his burden of proof under Senate Bill 43, codified as N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) (Cum. Supp. 1991), and ordered him recommitted to Dorothea Dix for a period not to exceed 180 days. Respondent appealed the order to this Court.

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

Karl E. Knudsen for respondent-appellant.

ARNOLD, Chief Judge.

Respondent contends that the provisions of G.S. § 122C as amended by Senate Bill 43 in April 1991 violate the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as Article I, Section 19 of the North Carolina Constitution. Respondent also contends that Senate Bill 43 violates the Ex Post Facto Clause of the Federal

IN RE JOYNER

[111 N.C. App. 454 (1993)]

Constitution and North Carolina Constitution. The questions presented by respondent on appeal are identical to the issues raised in *In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862 (1993), which was filed simultaneously with the case at bar. For the reasons stated in *Hayes*, we hold that respondent's assignments of error are without merit.

Affirmed.

Judges ORR and MARTIN concur.

IN THE MATTER OF: ROBERT WELDON JOYNER

No. 9210SC791

(Filed 3 August 1993)

Appeal by respondent from order entered 30 March 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 1993.

Respondent was charged on a warrant dated 18 November 1985 with the first degree murder of Irma Louper Joyner. He was indicted by the Grand Jury for Wake County on 17 February 1986. Respondent's counsel filed notice of respondent's intention to rely on the insanity defense. On 1 October 1986, in Wake County Superior Court, Judge Donald Smith found respondent not guilty by reason of insanity pursuant to N.C. Gen. Stat. § 15A-959(c) (1977). Respondent was involuntarily committed to Dorothea Dix Hospital.

Thereafter respondent had several rehearings with recommitment being ordered by each district court judge based on the State's proof of continuing mental illness and dangerousness. On 27 March 1992, Judge Stephens presided over respondent's seventh rehearing under the newly enacted provisions of Senate Bill 43, codified as N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) (Cum. Supp. 1991), finding respondent had not met his burden of proof and, by order dated 30 March 1992, ordered his continued commitment for a period not to exceed one year. Respondent appealed the order to this Court.

IN RE JOYNER

[111 N.C. App. 454 (1993)]

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

Karl E. Knudsen for respondent-appellant.

ARNOLD, Chief Judge.

Respondent contends that the provisions of G.S. § 122C as amended by Senate Bill 43 in April 1991 violate the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as Article I, Section 19 of the North Carolina Constitution. Respondent also contends that Senate Bill 43 violates the Ex Post Facto Clause of the Federal Constitution and North Carolina Constitution. The questions presented by respondent on appeal are identical to the issues raised in *In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862 (1993), which was filed simultaneously with the case at bar. For the reasons stated in *Hayes*, we hold that respondent's assignments of error are without merit.

Affirmed.

Judges ORR and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 3 AUGUST 1993

CANNON v. MELTON No. 9322SC195	Iredell (90CVS1965)	No Error
CIBA v. CIBA No. 9225DC681	Catawba (92CVD286)	Affirmed
HAMILTON v. SHARPE No. 9211SC579	Johnston (90CVS1457)	No Error
IN RE KRAUSS No. 928DC878	Wayne (89J152)	Reversed & Remanded
IN RE STANLEY No. 9211DC828	Johnston (89J72) (89J73) (89J74)	Affirmed
IVEY v. PUROLATOR PRODUCTS, INC. No. 9310IC211	Ind. Comm. (036482)	Affirmed
JONES v. JONES No. 9218DC405	Guilford (90CVD3027)	Affirmed
LINDSEY v. LINDSEY No. 921DC646	Currituck (86CVD93)	Vacated & Remanded
POORE v. SWAN QUARTER FARMS, INC. No. 922SC927	Hyde (83CVS18)	Vacated & Remanded
ROBBINS v. OLIVER AMERICA No. 9310IC186	Ind. Comm. (979464)	Affirmed
ROCKINGHAM COUNTY DEPT. OF SOC. SERV. ex rel. SHAFFER v. HAMILTON No. 9217DC359	Rockingham (91CVD397)	Reversed
SCOTT v. EASTERN TURF EQUIPMENT, INC. No. 921SC585	Currituck (88CVS56)	Affirmed
SHEPARD v. BASDEN No. 924DC767	Onslow (91CVD1654)	No Error
SMITH v. HODGES No. 9325SC20	Catawba (92CVS1783)	Affirmed

STATE v. ARANT No. 9326SC129	Mecklenburg (92CRS1315) (92CRS1316)	No Error
STATE v. BARNES No. 937SC67	Wilson (91CRS6986) (91CRS6987) (91CRS6988)	No Error
STATE v. BRYANT No. 9218SC429	Guilford (91CRS37014) (91CRS37019) (91CRS37020) (91CRS37031) (91CRS37044) (91CRS37045)	New trial in part and no error in part
STATE v. CARGILE No. 9330SC267	Macon (90CRS1608) (91CRS63) (91CRS238) (91CRS247) (91CRS248) (91CRS816) (92CRS208) (92CRS250) (92CRS278)	Affirmed
STATE v. DIXON No. 924SC683	Sampson (91CRS2520)	New Trial
STATE v. ENGLE No. 9320SC232	Moore (91CRS9523)	No Error
STATE v. FLINT No. 9328SC175	Buncombe (92CRS54224) (92CRS56882)	Affirmed
STATE v. HAYES No. 9222SC833	Davidson (90CRS9901)	No Error
STATE v. HINSON No. 9315SC35	Alamance (92CRS7463) (92CRS7464) (92CRS7465) (92CRS7466) (92CRS7473) (92CRS7476)	No Error
STATE v. HODGE No. 933SC167	Carteret (91CRS10966) (91CRS10967) (91CRS10968) (91CRS11768)	No Error

STATE v. LEGRAND No. 9312SC204	Cumberland (91CRS41829)	No Error
STATE v. PIPKINS No. 939SC80	Franklin (91CRS5817) (91CRS5818) (91CRS5819)	91CRS5819 trafficking in cocaine—no error; 91CRS5818 felonious possession— arrested; 91CRS5817 maintaining a vehicle for drug purposes— remanded for resentencing
STATE v. PRIDDY No. 9221SC1154	Forsyth (91CRS52704)	No Error
STATE v. SMITH No. 9320SC125	Anson (91CRS3543) (91CRS3544)	No Error
STATE v. SMITH No. 9220SC936	Richmond (91CRS4878) (91CRS4880) (91CRS4925) (91CRS4926)	No Error
STATE v. SMYER No. 933SC284	Pitt (87CRS12852) (87CRS12853) (87CRS12854) (87CRS12903) (87CRS12904)	Affirmed
STATE v. WILSON No. 9226SC841	Mecklenburg (92CRS000935)	No Error
STATE v. YOUNG No. 9326SC258	Mecklenburg (91CRS21238)	No Error
STOCKS v. GREEN No. 9312SC183	Cumberland (92CVS4863)	Affirmed
TAYLOR v. N.C. DEPT. OF CRIME CONTROL AND PUBLIC SAFETY No. 925SC723	New Hanover (900SP0136)	Affirmed
TOWN OF HIGHLANDS v. SAVE OUR RIVERS, INC. No. 9210SC609	Wake (91CVS10513)	Affirmed

VICK v. THOMAS GIBSON & CO. No. 9210IC603	Ind. Comm. (667288)	Affirmed
VOSSBRUCH v. FINK No. 9324SC135	Avery (91CVS250)	Dismissed
WEISBECKER v. SMALL LUXURIES, INC. No. 9218DC277	Guilford (90CVD7889)	Affirmed
WHITECO INDUSTRIES, INC. v. HARRELSON No. 9210SC838	Wake (90CVS00643)	Reversed
WILLIAMS v. WILLIAMS No. 9218DC718	Guilford (89CVD2949)	Affirmed

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[111 N.C. App. 460 (1993)]

BONITA HARRIS SMITH v. OLLEN BRUTON SMITH

No. 9126DC1287

(Filed 17 August 1993)

1. Divorce and Separation § 117 (NCI4th)— equitable distribution—classification of property as separate or marital—appreciation or acquisition as focus of trial court

If an asset is characterized as separate property that has increased in value during the marriage, the court's focus is on the appreciation occurring during the marriage and whether that appreciation was active or passive; on the other hand, if an asset is characterized as marital property to which a contribution of separate property was made, in which case it is of a dual nature having a marital and a separate property component, then the primary focus is on acquisition, not appreciation.

Am Jur 2d, Divorce and Separation § 878 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. Divorce and Separation § 117 (NCI4th)— equitable distribution—holding company owned by defendant—classification as separate property error

In an equitable distribution case where the key asset in dispute was the Sonic Financial Corporation, a North Carolina corporation which served as a holding company for a variety of defendant's business interests, the trial court erred in characterizing Sonic as defendant's separate property which appreciated in value during the marriage, since Sonic did not even come into existence until after the parties had been married fifteen years, and the property owned by defendant prior to the marriage was not Sonic and was only a small part of what eventually became Sonic. The trial court should have focused on how and when defendant's interest in Sonic was acquired.

Am Jur 2d, Divorce and Separation § 878 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

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[111 N.C. App. 460 (1993)]

3. Divorce and Separation § 123 (NCI4th)— equitable distribution—property of dual nature—appreciation of separate property—failure to show whether active or passive—court's treatment appropriate

The trial court correctly recognized that defendant's interest in Sonic, a holding company for a variety of defendant's business interests, was of a dual nature, having both a marital property and a separate property component, and defendant showed by a preponderance of the evidence that part of his interest in Sonic was acquired through the use of, or in exchange for, a contribution of his separate property, valued at the date of marriage at \$1,196,862; however, defendant failed to show what amount, if any, of the increase in the value of that investment of his separate property occurring during the marriage was attributable to passive appreciation, and he was therefore entitled only to a return of the base amount of his contribution of separate property with no appreciation. Though such a return would not ordinarily be fair under the source of funds approach, it was the appropriate one in light of the evidence presented, and, additionally, there was ample competent evidence in the record to support the trial court's finding that all of the increase in value of defendant's separate property contributed toward acquisition of Sonic occurring during the marriage was due to active appreciation and therefore was marital property.

Am Jur 2d, Divorce and Separation § 891.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

4. Divorce and Separation § 117 (NCI4th)— equitable distribution—redemption of stock—payment after separation—payment as marital property

The trial court properly found that although part of the payment for the redemption of stock was made after the date of the parties' separation, the proceeds received after the separation were nevertheless marital property because they were from the sale of stock acquired during the marriage and sold prior to the date of separation and were received in exchange for marital property.

Am Jur 2d, Divorce and Separation § 878 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

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[111 N.C. App. 460 (1993)]

5. Divorce and Separation § 144 (NCI4th)— equitable distribution—stocks acquired during marriage—dividends paid during separation—failure to consider as distributional factor—error

The trial court in an equitable distribution action did not err in failing to include in the marital estate \$240,162 in dividend income received by defendant after the date of separation and prior to trial where the dividends were paid on stocks acquired during marriage and owned at separation; however, the court should have expressly considered defendant's receipt of this income as a distributional factor under N.C.G.S. § 50-20(c) in determining an equitable distribution of the marital property.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

6. Divorce and Separation § 141 (NCI4th)— equitable distribution—valuation of Charlotte Motor Speedway—no error

The trial court in an equitable distribution action did not err in its valuation of the Charlotte Motor Speedway, a wholly-owned subsidiary and by far the most valuable asset of defendant's holding company, where the court valued CMS based on a sound, well-accepted methodology, the excess earnings approach; the court found it necessary to make adjustments to the valuation by defendant's expert of CMS utilizing the excess earnings methodology in order to fairly and properly value this asset, and those adjustments were sufficiently supported by the evidence and the findings made; and because the court reasonably approximated the net value of CMS based on competent evidence and a sound valuation methodology, its valuation should not be disturbed.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

7. Divorce and Separation § 141 (NCI4th)— equitable distribution—valuation of insurance company—no error

In an equitable distribution action, there was no merit to defendant's contention that the adjustments made by the court concerning valuation of an insurance company, which was a wholly-owned subsidiary of defendant's holding company, were improper, were not supported by the evidence,

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[111 N.C. App. 460 (1993)]

and that as a result the value set for the holding company was \$2,157,000 more than it should be.

Am Jur 2d, Divorce and Separation § 937 et seq.**Divorce: equitable distribution doctrine. 41 ALR4th 481.****8. Divorce and Separation § 141 (NCI4th)— equitable distribution—valuation of automobile dealership—no error**

The trial court in an equitable distribution action did not err in its valuation of an automobile dealership which was a wholly-owned subsidiary of defendant's holding company since the court valued the dealership by use of the industry standard approach; under that approach value is determined by adding the net "hard asset" value, which is the value of its hard assets minus its liabilities, and its "blue sky" value, which is determined by multiplying the average pre-tax income of the dealership by a franchise multiple of one to five; the multiple chosen is subjective and is based upon factors such as the type of franchise, its market performance, location, demographics, etc.; the multiples selected by the court were not arbitrarily chosen but were based on the court's consideration of appropriate factors and the evidence; and the values obtained with the use of the multiples selected by the court were adequately supported by the evidence.

Am Jur 2d, Divorce and Separation § 937 et seq.**Divorce: equitable distribution doctrine. 41 ALR4th 481.****9. Divorce and Separation § 141 (NCI4th)— equitable distribution—valuation of automobile dealership—no error**

The trial court in an equitable distribution action did not err in its valuation of an automobile dealership which was a wholly-owned subsidiary of defendant's holding company where the trial court expressly recognized in its judgment that the hard asset value as determined by plaintiff's expert included intangible assets consisting of franchise rights and non-compete contractual rights; the court found that although it was a misnomer to include intangible assets within the "hard asset" value, it was not an inaccuracy since plaintiff's expert had not included those assets, which had a computable value, as part of a blue sky component; and the court's finding regarding the inclusion of the intangible assets in the hard asset value

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of the business was thus supported by plaintiff's expert's testimony and is therefore conclusive on appeal.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

10. Divorce and Separation § 136 (NCI4th)— equitable distribution—valuation of real estate—no error

Evidence consisting of the comparable range of values utilized by defendant's expert was sufficient to support the trial court's finding in an equitable distribution action that the fair market value of a particular parcel of real estate remained constant from the date of separation to the date of trial.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

11. Divorce and Separation § 136 (NCI4th)— equitable distribution—valuation of marital home—no error

The trial court in an equitable distribution action did not err in placing a value on the marital home which was \$25,000 higher than that placed on the home by defendant's expert, since testimony by the expert that she had made a \$75,000 downward adjustment based on needed repairs, that it was difficult to estimate how much the repairs would cost, and that she estimated them to be between \$50,000 and \$75,000 was sufficient to support the court's finding regarding the appropriate adjustment to be made and the resulting higher value placed on the property.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

12. Divorce and Separation § 144 (NCI4th)— equitable distribution—plaintiff's lack of homemaker contributions—trial court's consideration adequate

In an action for equitable distribution there was no merit to defendant's contention that the trial court erred in failing to consider his evidence regarding plaintiff's lack of homemaker contributions, since the court specifically found that both parties offered evidence on this factor, and the court considered the factor but chose not to give it any weight; furthermore,

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[111 N.C. App. 460 (1993)]

the weight to be given any factor is a matter in the trial court's discretion, and the court on appeal could not say that the court's decision not to give greater weight to this particular factor was manifestly unsupported by reason.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

13. Divorce and Separation § 144 (NCI4th)— equitable distribution—plaintiff's alleged economic misconduct—trial court's consideration adequate

The trial court in an equitable distribution action did not err in failing to find facts and consider evidence of plaintiff's alleged economic misconduct, since the offer of proof did not show that plaintiff's misconduct dissipated or reduced the value of marital assets or was related to the economic condition of the marriage, but the evidence was instead offered to prejudice the court against plaintiff based on her misconduct.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

14. Divorce and Separation § 154 (NCI4th)— equitable distribution—tax consequences—trial court's consideration adequate

In an equitable distribution award, there was no merit to defendant's contention that the trial court erred in failing to consider the adverse tax consequences to him inherent in its distributive award, since the court found that neither party had offered evidence regarding specific tax consequences that might result from the equitable distribution, but that other evidence regarding taxes had been presented with respect to various points, which evidence the court considered; for the court to distribute the property consistent with the parties' stipulations and preferences, a sizable distributive award to plaintiff was obviously going to be required; despite this obvious result, defendant presented no evidence regarding the adverse tax consequences he claimed were inherent in the distributive award; and the tax consequences claimed by defendant were purely speculative and were not inherent in the distribution actually ordered.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

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15. Divorce and Separation § 161 (NCI4th)— equitable distribution—distribution of postseparation appreciation of property—error

The trial court in an equitable distribution action erred in distributing part of the postseparation appreciation of the marital property to plaintiff and thereby exceeded its authority. The postseparation appreciation should be considered as a distributional factor and, upon remand, the court may determine, after considering the existence of the postseparation appreciation in the value of the assets distributed to defendant, that plaintiff must receive a higher percentage of the marital property in order to achieve an equitable distribution.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

16. Divorce and Separation § 148 (NCI4th)— equitable distribution—defendant's payments for mortgage on marital home—method of factoring into distribution adequate

There was no merit to defendant's contention that payments made by him toward the first mortgage on the parties' marital home should be included in the postseparation appreciation of the home, since the court chose to give defendant credit for those mortgage payments at another point in its calculations.

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

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

17. Divorce and Separation § 144 (NCI4th)— equitable distribution—postseparation appreciation to marital property—classification as to active or passive not required of trial court

Although it is appropriate and desirable for the trial court in determining an equitable distribution to take into consideration whether the postseparation appreciation of the marital property is passive appreciation, or resulted from the efforts of one or both spouses, the court is not required to make specific findings of fact classifying the appreciation as either passive or active.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

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[111 N.C. App. 460 (1993)]

18. Divorce and Separation § 155 (NCI4th)— equitable distribution—interest payments on first mortgage—discharge of second mortgage—calculation of award improper

The trial court in an equitable distribution action did not err in refusing to give defendant a credit or reimbursement for the interest portion of his mortgage payments, and did not err in reimbursing defendant in full, by way of a credit, for his payment of the property taxes due on the marital home; however, defendant was erroneously given double credit for his discharge of the second mortgage where defendant was given full credit for his discharge of the second mortgage and was awarded the house, which had increased in net value by \$189,956 as a result of the discharge of the second mortgage, but the trial court did not include the amount of the second mortgage in the total of the postseparation appreciation of the marital property, thereby depriving plaintiff of the benefit from the increase in value of the home to which she was entitled.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

19. Divorce and Separation § 147 (NCI4th)— equitable distribution—marital debts distributed to defendant—no error

The trial court did not abuse its discretion in distributing all of the marital debts to defendant since defendant was also awarded all of the property to which the debts were attached, except the residence purchased for plaintiff; the existence of the debt was included in the calculation of the net value of that property; and the only part of the assigned debt which was not taken into consideration in valuation of the marital property was approximately \$6,000,000, representing debts owed to defendant's holding company and its subsidiary, the Charlotte Motor Speedway, entities subject to defendant's control and manipulation.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

20. Divorce and Separation § 165 (NCI4th)— equitable distribution—\$15 million award over ten years—award proper

The trial court in an equitable distribution action did not err in ordering defendant to pay a distributive award of over

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\$15 million over a period of ten years where the findings made by the court regarding the need to extend payment of the distributive award over a period in excess of six years after the date of cessation of the marriage and regarding defendant's ability to pay the award were adequately supported by the record and sufficiently supported the award as ordered.

Am Jur 2d, Divorce and Separation § 340 et seq.**Divorce: equitable distribution doctrine. 41 ALR4th 481.**

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiff and defendant from judgment entered 5 April 1991 by Judge L. Stanley Brown in Mecklenburg County District Court. Heard in the Court of Appeals 3 December 1992.

Plaintiff and defendant both appeal from a judgment of equitable distribution. The parties were married on 6 June 1972, separated on 24 June 1988, and were granted an absolute divorce on 5 February 1990. Prior to the trial on their respective claims for equitable distribution, the parties entered into numerous stipulations relating to distribution of the marital property. The parties stipulated, among other things, that defendant would advance funds to obtain a residence and furnishings for plaintiff and the parties' children, and that defendant would be given a "dollar-for-dollar credit" in the subsequent equitable distribution for the funds advanced by him for that purpose. After a five week trial on the claims, the court took the matter under advisement and then entered judgment on 5 April 1991. Both parties gave timely notice of appeal from the judgment entered.

The judgment, which consumes 283 pages of the record on appeal, shows that the trial court determined that the net value of the marital property as of the date of separation was \$44,183,807; that an equal division of the marital property was not equitable; and that an unequal division awarding defendant 69% and plaintiff 31% of the net value of the marital property was equitable. The court found that the in-kind distribution of the marital property was largely controlled by the stipulations entered into, and the preferences expressed, by the parties; and that the preference of the parties was that all of the marital assets, except the proceeds in two bank accounts totalling \$6,249, be distributed to defendant. The court divided the marital property in accordance with the

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parties' stipulations and preferences and granted to plaintiff her share of the marital estate primarily in the form of a distributive award. The court determined that plaintiff was entitled to a distributive award in the amount of \$13,696,980, which is 31% of \$44,183,807, minus the total of the proceeds in the two bank accounts awarded her. The court further found that defendant was entitled to credits totalling \$575,268 for certain postseparation expenditures made by him, including his expenditure of funds to purchase a residence for plaintiff. These deductions reduced the amount of plaintiff's distributive award to \$13,115,461.

The court determined that some of the marital assets had appreciated in value since the date of separation while others had depreciated. Subtracting the total depreciation from the total appreciation, the court found the marital estate had appreciated in value since the date of separation in the net amount of \$6,546,805. In its conclusions of law, the court stated that postseparation appreciation is neither marital nor separate property, but is to be considered by the trial court as a distributional factor, and that the trial court could grant "an adjustive credit of all or any part of the post-separation appreciation . . . in any ratio which it deems to be equitable." The court found it was equitable to grant plaintiff an adjustive credit equal to 31% of the net postseparation appreciation and therefore gave plaintiff such a credit by adding 31% of \$6,546,805, which is \$2,029,509, to plaintiff's distributive award. As a result of the distribution ordered by the court, defendant was awarded marital property having a net value as of the date of separation of \$30,486,826, which is 69% of \$44,183,807, and plaintiff was awarded two bank accounts containing a total of \$6,249 plus a distributive award of \$15,144,971. The total of the award to plaintiff therefore is \$15,151,220, which amount is greater than 31% of the net value of the marital property as of the date of separation.

The court ordered that the distributive award be paid as follows: (1) that defendant make a lump sum payment of \$2,144,971 on or before 14 June 1991; and (2) that defendant pay the balance of the award by making 120 equal payments (extending over a period of ten years) of \$157,725 per month, with the first payment being due on or before 1 July 1991. The trial court, however, on motion of defendant, granted a stay of its judgment pending the outcome of the present appeals.

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Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr., Mark W. Merritt, and John B. Garver, III, for plaintiff.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., John S. Arrowood, and G. Russell Kornegay, III, for defendant.

ARNOLD, Chief Judge.

OVERVIEW

This case involves a marital estate with a net value as of the date of trial of over fifty-one million dollars. Issues pertaining to classification, valuation, and distribution of property are presented. As is particularly shown by the judgment, the trial court thoroughly sifted through the evidence; addressed in detail each issue presented, many of which are extremely complex; and did a commendable job of the tasks assigned him. Despite the laudable effort of the trial judge, there is error appearing from the judgment which requires that the case be remanded for correction of those errors.

Upon application of a party for an equitable distribution, the trial court "shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20 (Cum. Supp. 1992)]." N.C. Gen. Stat. § 50-20 (Cum. Supp. 1992). In so doing, the court must conduct a three-step analysis. *Willis v. Willis*, 86 N.C. App. 546, 358 S.E.2d 711 (1987). First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991). Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988); *Willis*, 85 N.C. App. 708, 355 S.E.2d 828 (1987); N.C. Gen. Stat. § 50-21(b) (Cum. Supp. 1992). Third, the court must distribute the marital property in an equitable manner. *Beightol*, 90 N.C. App. 58, 367 S.E.2d 347.

In performing the latter task, the trial court is vested with wide discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). "[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there

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was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision. . . . Only when the evidence fails to show *any* rational basis for the distribution ordered by the court will its determination be upset on appeal.

Nix v. Nix, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986) (citation omitted). Furthermore, for purposes of appellate review, the trial court's findings of fact are conclusive if supported by any competent evidence in the record. *Nix*, 80 N.C. App. 110, 341 S.E.2d 116.

Finally, we note that many of the figures relied upon by the court were rounded off, a fact which should be kept in mind in checking the mathematical accuracy of the calculations referred to herein. We now turn to the issues presented.

CLASSIFICATION

A. *Sonic*

The key asset in dispute in this case is defendant's interest in Sonic Financial Corporation ("Sonic"), a North Carolina corporation that serves as a holding company for a variety of defendant's business interests. On the date of the parties' separation, defendant owned 90.4% of the stock of Sonic. The court found that the net value of defendant's interest in Sonic as of the date of separation was \$35,515,000. It appears that the court found defendant's interest in Sonic was of a dual nature, having both a marital property component and a separate property component. The court found the asset to be primarily marital in that it found the separate property component had a net value as of the date of separation of only \$1,196,862, leaving a marital property component with a net value as of that date of \$34,318,000.

Sonic, as a North Carolina corporation and holding company, did not come into existence until December 1987. Sonic was the product, however, of a long series of mergers, name changes, and acquisitions involving various business entities in which defendant had an interest, which for the most part occurred during the parties' marriage. The trial court approached the classification of Sonic by first identifying the assets in which defendant had an interest

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as of the date of marriage, which after the date of marriage were contributed by defendant towards the eventual creation of Sonic. In so doing, the court traced the history of much of defendant's business dealings during the marriage and the history of the events leading to the creation of Sonic. Despite the fact Sonic did not exist on the date of marriage, the court, in effect, classified Sonic by treating it as defendant's separate property that had appreciated in value during the marriage. The court determined that all of the appreciation in value of Sonic during the marriage had been active, and therefore was marital property.

The court found that the assets owned by defendant prior to the marriage which were utilized in the eventual creation of Sonic, comprised the separate property component of Sonic, and had a total net value as of the date of marriage of \$1,196,862. Consistent with its finding that all of the appreciation in Sonic during the marriage had been active, the court found that there had been no passive appreciation during the marriage in the separate property component of Sonic. The court further found that \$1,196,862 was the date of separation net value of Sonic, and that this was defendant's separate property which was to be returned to him.

Two arguments are made by defendant that the court erred in classifying Sonic: (1) by failing to provide him with a fair and proportionate return on his investment of separate property in the marital estate; and (2) by "classifying [his] separate property as marital." In the latter argument he contends the court's finding that all of the appreciation of Sonic during the marriage was active is unsupported by the record. We uphold the court's classification of Sonic, but we use a different analysis from that utilized by the trial court.

The trial court's first task in an action for equitable distribution is to classify all property owned by the parties as marital or separate in accordance with the definitions set forth in N.C. Gen. Stat. § 50-20(b) (Cum. Supp. 1992). See N.C. Gen. Stat. § 50-20(a) (Cum. Supp. 1992); *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988). N.C. Gen. Stat. § 50-20(b)(1), in pertinent part, defines marital property as "all . . . property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently

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owned, except property determined to be separate property” Separate property is defined by the statute as including the following:

all . . . property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C. Gen. Stat. § 50-20(b)(2).

The key term in both definitions is “acquired.” In *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), this Court adopted a dynamic rather than a static interpretation of the term “acquired” as used in G.S. § 50-20(b), stating “that acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained.” *Wade*, 72 N.C. App. at 380, 325 S.E.2d at 268-69. This Court further recognized that since acquisition is an ongoing process, property may have a dual nature and consist of both marital property and separate property components. *Wade*, 72 N.C. App. 372, 325 S.E.2d 260.

By recognizing that acquisition is an ongoing process and that property may have a dual nature, this Court adopted what is known as the “source of funds” approach. *Id.*; *Willis*, 86 N.C. App. 546, 358 S.E.2d 711. *See also* Lawrence J. Golden, *Equitable Distribution of Property* (1983) (Cum. Supp. 1993 by B. Turner at § 5.07) (hereinafter “Turner”) (The source of funds rule is a combination of a payment-based definition of acquired, and the recognition that property may be of a dual, or mixed, nature.). The Court explained the source of funds approach as follows:

Under this [approach], when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the prop-

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erty. . . . Thus, both the separate and marital estates receive a proportionate and fair return on its investment.

Wade, 72 N.C. App. at 382, 325 S.E.2d at 269 (citation omitted).

In *Wade*, this Court also distinguished between active and passive appreciation of separate property occurring during marriage and before separation. The Court interpreted that part of G.S. § 50-20(b)(2), which classifies the increase in value of separate property as separate property, as referring only to increases due to passive appreciation, such as that due to inflation or other market forces. Increases due to active appreciation, on the other hand, should be classified as marital property. *Wade*, 72 N.C. App. 372, 325 S.E.2d 260. Appreciation is considered active when it results from contributions, monetary or otherwise, made by one or both of the spouses. *Id.* See also *Turner*, *supra* § 5.39 at 153 (“Active appreciation is appreciation caused by marital funds or marital efforts”).

This passive versus active distinction for classifying increases in the value of separate property occurring during marriage and prior to separation is a refinement of the source of funds approach and is designed to ensure that marital contributions to the appreciation of separate property are credited to the marital estate. Sally B. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 214 (1987). There has been some confusion, however, in this State and in other source of funds states over the relationship between the source of funds rule and the active/passive appreciation rule. See Sharp, *supra* at 213-20; *Turner*, *supra* § 5.07A at 86. One authority has attempted to clarify the relationship between these two rules as follows:

[T]he active/passive rule is used only for classifying appreciation in separate property. All active/passive jurisdictions agree that appreciation in marital property remains marital, regardless of cause. Thus, before applying the active/passive rule, one must first determine whether the underlying property is separate or marital. To the extent the property was acquired during the marriage, its entire appreciated value is marital If, after applying the source of funds rule, there is any separate interest in the underlying property, then any

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appreciation in that separate portion must be classified under the active/passive rule.

Turner, *supra* § 5.07A at 86.

Our decision in *Wade* has been criticized as contributing to this confusion by failing to make clear the relationship between these aspects of the source of funds approach. See Sharp, *supra* at 212-20. In particular, criticism has been leveled at this Court for focusing in *Wade* on the issue of how to treat the increase in value of a party's separate property occurring during marriage, rather than on the more fundamental issue of whether the property should have been regarded as separate in the first instance. *Id.* In this regard, it has been said that this Court overlooked the importance of the distinction between characterization of an asset as an increase in value of separate property, and characterization of an asset as marital property to which a contribution of a party's separate estate was made. *Id.* This criticism is well taken and is particularly relevant to the present case.

[1] If an asset is characterized as separate property that has increased in value during the marriage, the court's focus is on the appreciation occurring during the marriage and whether that appreciation was passive or active. If, on the other hand, an asset is characterized as marital property to which a contribution of separate property was made, in which case it is of a dual nature having a marital and a separate property component, then the primary focus is on *acquisition*, not appreciation. It logically follows from the definitions set forth at G.S. § 50-20(b) and *Wade* that the appropriate characterization and classification of an asset depends upon when and how the asset was acquired. See G.S. § 50-20(b)(1) and (2); *Wade*, 72 N.C. App. 372, 325 S.E.2d 260.

[2] Because the trial court characterized Sonic as defendant's separate property that appreciated in value during the marriage, it had to utilize the active/passive distinction to determine whether the appreciation was marital or separate in nature. A fundamental flaw with this characterization is that Sonic did not even come into existence until after the parties had been married fifteen years. To characterize Sonic as property owned by defendant prior to the marriage when, in fact, it did not even exist at that time, clearly seems inappropriate. It appears the court characterized Sonic in this manner because defendant owned at the date of marriage certain business interests that were utilized in, and contributed

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towards, the creation of Sonic during the marriage. The property owned by defendant prior to the marriage, however, was not Sonic and was only a small part of what eventually became Sonic, as is shown by the findings of fact made by the court.

The findings made by the court regarding the history of defendant's business dealings leading up to the creation of Sonic are summarized as follows: One year before the parties married, defendant and two associates formed a Texas corporation known as Pioneer Ford, Inc. ("Pioneer Ford"). Defendant purchased 90% of the capitalizing stock of Pioneer for a total of \$1,800. On the date of the parties' marriage, and in the year preceding the marriage, Pioneer Ford had no employees, no income other than the \$2,000 generated from the initial stock purchase, no expenses, and operated no business that was in actual operation. We note that defendant contended at trial that Pioneer Ford was an operating automobile dealership on the date of marriage. The trial court expressly rejected that contention, however, finding no credible evidence to support it.

On the date of marriage, defendant also owned a minority interest of Charlotte Motor Speedway ("CMS") stock, consisting of 29,750 out of the 1,884,723 shares issued; 80% of the shares of stock of Sharpstown Dodge, Inc., an automobile dealership; 100% interest in another automobile dealership known as Marietta Dodge d/b/a Cars of the Continent; 90% of the shares of stock of yet another automobile dealership, Frontier Ford, Inc.; and a 50% partnership interest in Viking Investment Associates. All of the property just mentioned was contributed or utilized in some fashion after the date of marriage towards the creation of Sonic, and was identified by the trial court as the separate property component of Sonic, and found to have a total net value as of the date of marriage of \$1,196,862.

After the date of marriage, the following occurred: Pioneer Ford was renamed Lone Star Ford, Inc. ("Lone Star"), and defendant purchased additional shares of Lone Star. Defendant further increased his ownership percentage in Lone Star by exchanging all or part of his shares of stock in CMS, Sharpstown Dodge, Frontier Ford, and Marietta Dodge for shares in Lone Star. In the spring of 1986 and again in December 1987, a number of the corporate entities in which defendant had an interest were reorganized. As part of the 1986 reorganization, Lone Star merged with

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and assumed the name of one of its wholly owned subsidiaries, a Texas corporation known as Sonic Financial Corporation. As a result of the December 1987 reorganization, Sonic Financial Corporation merged with CSF Corporation, a North Carolina corporation, which immediately changed its name to Sonic Financial Corporation, a North Carolina corporation. As part of the December 1987 reorganization, Sharpstown Dodge, Frontier Ford, and three other corporations—Viking Financial, Inc., American General Advertising Corporation, and Marcus David Leasing Company—each merged into Sonic. From these findings, the trial court found that the “pre-marriage entity of Pioneer Ford, Inc., became, through this series of mergers and name changes, Sonic Financial Corporation,” the holding company now in dispute.

After December 1987, Sonic continued to grow and evolve. *As of the date of separation*, the following were *wholly owned* subsidiaries of Sonic: (1) Charlotte Motor Speedway, Inc., and its subsidiary, the Speedway Club, Inc., (“CMS”); (2) Provident American Insurance Co., an insurance company licensed and headquartered in Texas; (3) Town and Country Ford, Inc. (“Town and Country”), an automobile dealership in Charlotte; and (4) Lone Star Ford, Inc., an automobile dealership in Texas that is *not* the same entity as the Lone Star mentioned previously herein. In addition to these wholly owned subsidiaries, Sonic also consisted of the following on the date of the parties’ separation: (a) Chartown, a North Carolina partnership holding real estate assets, which is wholly owned by one of Sonic’s wholly owned subsidiaries; (b) STC, another North Carolina partnership consisting of real estate assets, which is owned by Sonic and one of its subsidiaries; (c) Smith-Egan Interiors Division, a dormant operation with a net value of zero; (d) a 9.1% ownership interest in Viking Investment Associates, a Texas partnership that owns the land and facility used by Lone Star Ford, Inc.; and (e) a Service Contracts Division, which is used by Town and Country Ford with respect to warranty contracts involved in its automobile sales.

It appears the court’s characterization of Sonic as defendant’s separate property that increased in value during the marriage is based on its finding that the pre-marriage entity, Pioneer Ford, “became” Sonic. We do not believe that the fact there was a corporate entity existing on the date of marriage, Pioneer Ford, that was later utilized and contributed along with numerous other entities and assets, after the date of the parties’ marriage, towards

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creation of Sonic requires that the totality of defendant's interest in Sonic be viewed as separate property that simply increased in value during the marriage. Although Sonic is a successor in interest of sorts of Pioneer Ford, it is not the same entity that existed as Pioneer Ford on the date of the marriage. Pioneer Ford, as it existed on the date of marriage, having no employees, virtually no income, no expenses, and no business in operation, bears no resemblance to Sonic, the holding company existing on the date of the parties' separation. Sonic is not simply Pioneer Ford under a different name; it is a separate entity unto itself, which we conclude was acquired during the marriage.

We believe the trial court should have approached the classification of Sonic differently by focusing on when and how defendant's interest in Sonic was acquired. It is difficult to say, under the complex set of facts presented here, exactly when defendant's interest in Sonic was acquired. We do not believe, however, that it is appropriate to characterize defendant's interest in the holding company existing on the date of separation as having been acquired before the marriage when no entity even remotely resembling that holding company existed on the date of marriage. If defendant's interest was not acquired *before* the marriage, it follows that it must have been acquired *during* the marriage, and thus falls within the definition of marital property.

[3] We have sufficiently established *when* Sonic, and therefore defendant's interest in Sonic, was acquired, and must now determine *how* it was acquired—that is, the source of assets with which it was acquired. It is clear from the evidence and the findings made that defendant owned assets prior to the marriage that were contributed *during* the marriage towards *acquisition* of defendant's interest in Sonic. Those assets were properly identified by the court as the separate property component of Sonic. The remaining component of defendant's interest would appear to be marital since it was acquired during the marriage, except to the extent it represents passive appreciation of the separate property component. *See Turner, supra* § 5.07A at 86; *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), *overruled on other grounds, Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1987). From this, we conclude the trial court correctly recognized that defendant's interest in Sonic was of a dual nature, having both a marital property and a separate property component. More precise identification of the separate

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property and marital property components of this asset, however, requires application of the source of funds approach and consideration of the applicable burdens of proof.

Under the source of funds approach, where both the marital estate and the separate estate contribute towards acquisition of an asset, each estate is entitled to an interest in the asset acquired and entitled to a fair return on its investment. *Wade*, 72 N.C. App. 372, 325 S.E.2d 260. The source of funds approach dictates that a party retain as separate property the amount the party contributed towards acquisition of an asset plus the increase on that investment due to passive appreciation. *McLeod*, 74 N.C. App. 144, 327 S.E.2d 910; *Turner, supra*, § 5.07A at 82 ("The heart of the source of funds rule is in its recognition that the marital and separate estates are entitled not only to the amount of their contributions, but also to any passive appreciation in those contributions."). Increases on that investment of separate property due to active appreciation, however, and contributions made by the marital estate plus the increases on the marital contributions (whether because of passive or active appreciation) are marital property. *McLeod*, 74 N.C. App. 144, 327 S.E.2d 910. *See also* *Turner, supra*, § 5.07A at 86.

Determination of the relative size of the interests of the marital and separate estates, including the return on investment to which each estate is entitled, requires consideration of the burdens of proof placed on the parties. Classification of property as marital or separate depends upon the proof presented to the trial court regarding the nature of the asset. *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. . . . A party may satisfy her burden by a preponderance of the evidence. . . .

The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was "acquired by either spouse or both spouses"; and (2) was acquired "during the course of the marriage"; and (3) was acquired "before the date of the separation of the parties"; and (4) is "presently owned." N.C.G.S. § 50-20(b)(1).

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Atkins, 102 N.C. App. at 206, 401 S.E.2d at 787 (citations omitted). The party claiming the property is separate meets his burden by showing by the preponderance of the evidence that the property falls within the definition of separate property set forth in N.C. Gen. Stat. § 50-20(b)(2). *Id.*; see also *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991). "If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property." *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 788.

Plaintiff here met her burden of showing that defendant's interest in Sonic was acquired by defendant during the marriage and before the date of separation, and was presently owned, and therefore falls within the definition of marital property. Defendant then had the burden of showing that this asset, or any part of it, is separate in nature. Defendant did show, by a preponderance of the evidence, that part of his interest in Sonic was acquired through the use of, or in exchange for, a contribution of his separate property, valued at the date of marriage at \$1,196,862. By so doing, defendant met his burden of showing there is a separate property component to his interest in Sonic, at least in the amount of that contribution.

Defendant failed to show, however, what amount, if any, of the increase in the value of that investment of his separate property occurring during the marriage was attributable to passive appreciation. Indeed, counsel for defendant conceded in oral argument before this Court that defendant did not meet his burden of showing what proportion of the increase in value of Sonic during the marriage was due to passive appreciation. Since defendant showed only that he made a contribution of assets from his separate estate valued at \$1,196,862, and did not show any return on that investment of his separate property attributable to passive appreciation, the trial court correctly determined that the separate property component of defendant's interest in Sonic had a value of only \$1,196,862. While ordinarily under the source of funds approach, a mere return of the base amount of one's contribution of separate property is not a fair return on the investment made, such return is the appropriate one here given the evidence presented. See *Turner*, *supra* § 5.07A; *Sharp*, *supra*, at 215 n.113.

Additionally, there is ample competent evidence in the record to support the trial court's finding that all of the increase in value

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of defendant's separate property (contributed towards acquisition of Sonic) occurring during the marriage was due to active appreciation, and therefore was marital property. The court made extensive findings of fact in support of its determination that all of the increase in value of the assets in question was attributable to active appreciation. In its findings, the court addressed in considerable detail defendant's management, acquisition, utilization, and control of the assets both brought into and acquired during the marriage, as well as defendant's assistance in the acquisition of business opportunities, loans to the businesses, and waivers of salary. The findings made are sufficient to support the court's determination that all of the appreciation in the value of Sonic, and the assets contributed towards Sonic, occurring during the marriage was active, and those findings are amply supported by the evidence presented.

In sum, we find no reversible error in the trial court's classification of Sonic, and reject defendant's arguments pertaining to classification of that asset. The trial court properly recognized that defendant's interest in Sonic was of a dual nature, properly identified the marital and separate property components of that asset, and properly determined that the appreciation in the separate property contributed by defendant towards acquisition of Sonic was wholly active, and therefore marital property.

B. Stock Redemption

[4] Defendant next contends the court erred by classifying cash proceeds received by him after the date of separation from First Westwood National Corporation ("First Westwood") as marital property. The court found that during the marriage the parties acquired 800 shares of stock in First Westwood. In September 1986, this stock was redeemed by the issuing corporation. In October 1986, defendant received a check for \$499,895.25 marked "Redemption" along with a letter stating, in pertinent part:

Enclosed please find the settlement checks in connection with the redemption of your First Westwood National Stock. It is my understanding that you are still writing with us at the present time and any business written by your two Dealerships after June 30, 1986 will automatically be credited to your ongoing (runoff) account. In other words, your account is still growing as you continue to produce business.

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In July 1989, over one year after the date of separation, defendant received an additional payment of \$300,000 from First Westwood in the form of a check marked "Final Redemption of Stock". The court found that no other First Westwood stock owned by defendant was redeemed between September 1986 and July 1989, that there was no credible evidence that the July 1989 redemption payment arose from any activity occurring after the date of separation, and that defendant declared the \$300,000 in his 1989 U.S. Individual Income Tax Return as a long term capital gain received by him from the sale of stocks, bonds, and other securities. Based on these findings, the court found that although part of the payment for the redemption of the stock was made after the date of separation, the proceeds received in July 1989 were nevertheless marital property because they were from the sale of stock acquired during the marriage, and sold prior to the date of separation, and were received in exchange for marital property. Since neither party presented evidence that the cash proceeds received in July 1989 had a value different than that on the date of their receipt, the court found the proceeds had a net value as of the date of separation of \$300,000.

Defendant contends the court erred both in its classification and valuation of the proceeds received in July 1989. Relying on *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988), defendant contends that since the proceeds were received after the date of separation, they are neither marital, nor separate property, and may not be included in the marital estate. In *Becker*, this Court held that the trial court erred by classifying as marital property the rental value of the marital residence for the period after the date of separation and before distribution. In so holding, this Court noted that for purposes of classification, the marital estate is frozen as of the date of separation, and thus no new property may be added to the marital estate after that date. *Id.* In other decisions as well, this Court has reaffirmed the proposition that the marital estate is limited to property that is owned by the parties on the date of separation and may not be augmented by property acquired after that date. See *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992); *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Certain exceptions to this general rule, however, have been recognized. For example, this Court has recognized that when there has been an exchange or conversion of marital assets after the

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date of separation, the new property acquired as a result of the exchange or conversion may properly be classified as marital property. *See, e.g., Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985); *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985). Additionally, our appellate courts have recognized that funds received after the date of separation may appropriately be classified as marital property under certain circumstances when the right to receive those funds is acquired during the marriage and before separation. *See Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (Settlement received after the date of separation upon a spouse's claim for personal injuries sustained during the marriage is marital property to the extent it represents compensation for economic loss.); *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992) (Where a spouse is injured during marriage and before separation but does not receive a workers' compensation award until after the date of separation, the award is nevertheless marital property to the extent it represents compensation for economic loss prior to the separation.); *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985) (Where a loan was made during the marriage from marital funds and collected by one of the spouses after the date of separation, the funds collected should be considered marital property.).

In *Johnson*, our Supreme Court expressly refused to hold that the personal injury settlement received by the husband had to be classified as his separate property because it was received after the date of separation, explaining as follows:

To summarily classify the \$95,000 as separate property of the plaintiff-husband merely because a check in that amount was received by him after separation of the parties would ignore the classification scheme of our Equitable Distribution Act. In order to classify the \$95,000 for equitable distribution purposes, the trial court was required to determine the nature of the asset. Was it a gift? An inheritance? Earnings of a spouse? Proceeds from the sale of marital property? . . . Only after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other to be "marital property," may a classification be made of that asset as between "marital" or "separate" property.

Johnson, 317 N.C. at 452, 346 S.E.2d at 438-39. Additionally, the Court quoted with approval the following: "The literal language

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of the statute ought not limit our inquiry to the time when the compensation is received. The purpose for which the property is received should control." *Johnson*, 317 N.C. at 451, 346 S.E.2d at 438 (quoting *Amato v. Amato*, 180 N.J. Super. 210, 434 A.2d 639 (App. Div. 1981)).

The trial court here correctly applied these principles in that it classified the asset in question by looking at the nature of the asset and the purpose for which it was received. The court determined that the check received in July 1989 represented part of the proceeds from the sale of the First Westwood stock to the issuing corporation. The stock that was sold appeared to be marital in nature because it was acquired during the marriage, and defendant does not argue otherwise, and was sold prior to the date of separation. Since the check received after separation represented proceeds from the sale of a marital asset occurring prior to the parties' separation, the court classified the proceeds as marital property. This classification is consistent with the law of this State and is supported by the evidence presented and the findings made. We therefore find no error in the classification of the proceeds received in July 1989 as marital property.

We further find no error in the court's valuation of this asset. There is competent evidence in the record that supports the value placed on this asset by the trial court; therefore, we shall not disturb that valuation. *See Nix*, 80 N.C. App. 110, 341 S.E.2d 116.

C. Dividend Income

[5] Plaintiff presents one argument pertaining to classification. She contends the trial court erred by failing to include in the marital estate \$240,162 in dividend income received by defendant after the date of separation and prior to trial. The court found that the parties owned on the date of separation shares of preferred and common stock, and stock warrants in the N.C. Federal Savings and Loan Association, that had been acquired during the marriage, and that this property was marital property. The court further found that defendant received dividend income of \$240,162 from this stock between the dates of separation and trial. The court did not, however, include the dividend income in the marital estate, and did not expressly consider defendant's receipt of this income as a distributional factor under G.S. § 50-20(c) in determining an equitable distribution of the marital property. Plaintiff contends the court should have either treated this income as postseparation

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appreciation of marital property and considered it as a distributional factor under G.S. § 50-20(c)(11a) or (12), or treated the income as marital property that was converted by defendant. Plaintiff contends that in either case the court should have distributed the income between the parties in the same proportion as the marital property.

Although we have not previously considered the classification or treatment of dividend income received after the date of separation, we have considered the classification and appropriate treatment of income from another source received by one party after the date of separation. In *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992), this Court held that rental income from marital property received after the date of separation, and before the date of trial, may not be added to the marital estate and distributed as marital property, but instead must be considered by the court as a distributional factor. The Court explained that “[r]ather than distributing the . . . income received from marital property, the trial court must consider the existence of this income, determine to whose benefit the income has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.” *Id.* at 69, 422 S.E.2d at 590.

We find no basis on which to distinguish the dividend income received here from the rental income received in *Chandler*, and therefore find *Chandler* controlling on this issue. Additionally, plaintiff has shown no reason why the dividend income here should fall outside the general rule stated in *Becker* limiting the marital estate to property owned on the date of separation. See *Becker*, 88 N.C. App. 606, 364 S.E.2d 175. The record does not show that the dividend income was the result of an exchange or conversion of marital assets after the date of separation, and does not show other circumstances regarding the nature of the asset requiring classification of the property as marital. See *Johnson*, 317 N.C. 437, 346 S.E.2d 430; *Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512. We therefore conclude the court properly refused to include the dividend income in the marital estate. The court erred, however, by not considering defendant’s receipt of this income as a factor in determining an equitable distribution. *Chandler*, 108 N.C. App. 66, 422 S.E.2d 587. As is further explained herein, we have determined that this cause must be remanded for redetermination of what constitutes an equitable distribution of the marital property

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and entry of a new judgment. On remand, the trial court shall expressly consider defendant's receipt of the dividend income in determining the appropriate division of the marital property.

VALUATION

After classifying the property owned by the parties as either marital or separate, the trial court's next task is to determine the net value of the marital property as of the date of separation. *Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749. Defendant presents several arguments pertaining to the court's valuation of the marital property here, most of which pertain to valuation of Sonic and its component businesses. After carefully reviewing those arguments, we find no error in the court's valuation of the marital property.

A. *Sonic*

Defendant argues the court erred in its valuation of Sonic in that it allegedly erred in valuing several of Sonic's component businesses. Because Sonic is a holding company, its value necessarily depends upon the value of its components. Under the methodology utilized by the court in valuing this asset, an error in valuing one of the component businesses of Sonic would necessarily taint the value placed on Sonic itself.

In reviewing the trial court's valuation of an ongoing business or an interest therein for purposes of equitable distribution, the task of the appellate court is to determine whether the approach used by the trial court reasonably approximates the net value of the business interest. *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991); *Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). If it does, the valuation will not be disturbed. *Fox*, 103 N.C. App. 13, 404 S.E.2d 354. In *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985), we stated that:

In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence

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and on a sound valuation method or methods, the valuation will not be disturbed.

Although we were addressing the valuation of a professional practice in *Poore*, the requirements and standard of review set forth therein apply to valuation of other business entities as well. *Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (valuation of an interest in an accounting partnership); *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 406 (1988), *disc. review allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989) (valuation of closely-held corporation); *Draughon*, 82 N.C. App. 738, 347 S.E.2d 871 (valuation of sole proprietorship). With this in mind, we now review the valuations contested by defendant.

1. *Charlotte Motor Speedway, Inc.*

[6] Defendant first argues the court erred in its valuation of Charlotte Motor Speedway, Inc. ("CMS"), which is a wholly owned subsidiary of Sonic and by far its most valuable asset. He contends the court erred in its valuation of CMS in that: (1) the court failed to use a sound valuation methodology; and (2) the evidence does not support the findings made or the method, or methods, used by the court in valuing this asset.

In its judgment, the court stated that in valuing CMS it primarily relied on the testimony of defendant; Bill Brooks, defendant's accountant; J. Ray Nicholson, plaintiff's valuation expert; and Robert O. Beck, defendant's valuation expert; and placed the most reliance on the opinions of Nicholson and Beck. In valuing CMS, Nicholson used an income approach as his primary methodology, and used a market multiple approach as a secondary methodology to test the reasonableness of the values obtained by his primary approach. Beck used the excess earnings approach and did not utilize any alternative approaches as a comparison or check on the values obtained by that methodology.

The court rejected as inaccurate the market multiple approach used by Nicholson as his secondary methodology, but found both the income approach and the excess earnings approach to be reasonable and accurate methodologies for use in valuing CMS. The court found "the methodologies and valuations of each expert are conservative, and even these approaches could have used defensible discretionary factors, such as multiples, for which there was evidentiary support and which would have produced higher indications of value than those given." The court, however, found defects

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in Nicholson's valuation of CMS based on Nicholson's lack of familiarity with and knowledge of the type of asset being valued, and based on his application of his primary methodology to this asset. The court also found defects in Beck's valuation of CMS with respect to: (1) the degree of risk claimed by defendant and Beck to be inherent in an investment in an asset such as CMS; (2) Beck's lack of care in key data and mathematical computations; (3) the computation of CMS's weighted average income, which is a key component in determining excess earnings; and (4) the capitalization rate chosen by Beck.

The court chose to determine the value of CMS by use of the excess earnings approach, because it found that approach had a structural flexibility that permitted the court to correct the defects contained in Beck's valuation, and thereby obtain an accurate valuation. Defendant contends the court correctly sought to value CMS under the excess earnings approach, but erred by the adjustments made to Beck's valuation, and that the adjustments made affect the validity, or soundness, of the values ultimately obtained. Specifically, defendant argues the court erred: (1) in its calculation of the weighted average of pre-tax income used in determining excess earnings; and (2) in selecting a capitalization rate defendant claims is unsupported by the evidence.

Determination of the merits of these arguments requires an examination of the excess earnings methodology. Under the excess earnings approach used herein, the net value of CMS was determined by adding the following three components: (1) the net value of its facilities; (2) the capitalized excess earnings currently realized by its operational activities; and (3) its book value, excluding the appraised value of its facilities. The court accepted the values given by Beck for the first and third components of this asset but did not accept as accurate Beck's calculation of the capitalized excess earnings.

This methodology defines excess earnings as the net income from operations in excess of a normal return on value from a net lease of the real property owned by CMS, or, stated differently, the amount by which expected net income from operations would exceed the expected rental income. To determine the value of CMS's capitalized excess earnings, Beck first reviewed the three twelve-month periods preceding each valuation date to estimate the projected level of income for CMS as of those dates. The projected

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levels of income were reduced to net income figures by subtracting the total of operating expenses. Beck converted those net figures into a weighted average income for each valuation date, arriving at the weighted average of pre-tax income. From those averages, Beck subtracted the gross rental income that a reasonable investor would expect from his investment. The resulting figures constituted the excess earnings over rental value as of each valuation date. From those figures, Beck subtracted the estimated income tax applicable to the excess earnings. Lastly, a capitalization rate was applied to arrive at the amount of the capitalized excess earnings, which amount represents the value of the operating earnings as of each valuation date.

When Beck calculated the weighted average of pre-tax income for CMS, he included amounts for depreciation and interest within the operating expenses subtracted from the projected levels of income. The trial court found that "[t]his substantially reduced the pre-tax income for each year involved and substantially depressed the weighted average obtained therefrom." The court further found that "[a]n investor would not be experiencing depreciation or interest in computing the expected return on investment, and depreciation is not an actual dollar expenditure; similarly, Mr. Beck conceded that interest should not have been deducted from total net revenues to reach pre-tax income." The court found the depreciation and interest had been improperly included within the operating expenses deducted and therefore utilized in its valuation of CMS a recomputed weighted average pre-tax income that did not include deductions for depreciation and interest.

Defendant contends this was error. He argues that failing to permit deduction for depreciation and interest in computing the weighted average pre-tax income results in a valuation based on capitalized excess cash flow, rather than capitalized excess earnings, and that there was no evidence showing that use of capitalized excess cash flow is a sound valuation method. We reject defendant's contention.

The record shows that on cross-examination, Beck conceded that because depreciation and interest had been taken into consideration in setting the amount of expected rental income, those items should not have also been included within the operating expenses deducted. In later testimony, Beck attempted to retract his concession, and stated that if depreciation and interest were

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not included within the operating expenses, then the resulting figure was weighted average cash flow, not weighted average income. The court made note of this conflict in the evidence in its findings of fact, and expressly rejected Beck's attempted retraction. Findings of fact made by the trial court resolving conflicts in the evidence are binding on appellate courts. *In Re Estate Of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991). The court heard extensive testimony from Beck as he attempted to retract his concession on this point. The court nevertheless rejected that testimony and resolved the conflict in the evidence in plaintiff's favor. The findings made by the court regarding this conflict in the evidence and the need to recompute the weighted average pre-tax income without including deductions for depreciation and interest are supported by competent evidence in the record and therefore are binding on appeal. *Id.*; *Nix*, 80 N.C. App. 110, 341 S.E.2d 116. Accordingly, we reject defendant's argument pertaining to the court's calculation of the weighted average of the pre-tax income.

Defendant next argues the court erred by applying a capitalization rate of 16% in calculating the capitalized excess earnings of CMS. He contends the evidence and the findings made are insufficient to support the court's selection of this particular rate. Again, we find defendant's argument unpersuasive.

A critical element of the excess earnings methodology is the capitalization rate used. Under this methodology, a capitalization rate is applied to the excess earnings of the business so as to take into consideration the degree of risk associated with an investment in the business. Barth H. Goldberg, *Valuation of Divorce Assets* § 6.6 (1984); 2 John P. McCahey, *Valuation and Distribution of Marital Property* § 22.08[2] (1993). "[T]he risk involved refers to the degree of uncertainty that there will be any return on the investment. The greater the uncertainty as to a return, the higher the risk." McCahey, *supra* § 22.08[2] at 22-104. "[I]t is generally true that the higher the risk of creating future earnings, the higher will be the annual rate of return which an investor will seek, and hence, the higher the capitalization rate." Goldberg, *supra* § 6.6 at 146. Thus, the capitalization rate represents the rate of return a prudent investor would expect annually on his investment given current interest rates and the relative risk involved in the type of business in question. McCahey, *supra* § 22.08[2] at 22-103. Determination of the proper percentage of rate to use in the capitalization of earnings of a particular business is somewhat

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speculative. Goldberg, *supra* § 6.6. In fact, criticism of the excess earnings methodology has been based on the difficulty in selection of an appropriate capitalization rate. *Id.*

Defendant's valuation expert, Robert O. Beck, selected a capitalization rate of 33%. With respect to the rate selected by Beck, the court found:

359. That while the Court has never seen an expert select such a high capitalization rate, that in itself would not discredit the rate selected; for the reasons stated below, the Court finds that this rate is far too high and inaccurately depressed indicated value.

360. Mr. Beck gave only one reason for his selection of a 33% rate, this being the "volatility of earnings" of the corporation. That an examination of the corporate earnings reveals no such volatility. Whether one includes depreciation and net interest or excludes them, in the years he considered, beginning with the corporate fiscal year 1984, and continuing thereafter, all the key earnings components show a consistent and upward trend, with no year indicating a loss. This is true of race event revenues, gross profit from racing, club restaurant revenues, total net revenues, total income from operations and pre-tax income. That, except for a moderate reduction in some of these components between the 12/31/87 and 12/31/88 figures, each annual earnings component is successively higher.

361. That, even if the earnings had been volatile, unless a developing history of net operating loss was exhibited, an accurate valuation process would require more justification than given by Mr. Beck for an assumption that the average prudent investor would require the relatively brief period of approximately 37 months for return of investment for an investment to be indicated.

362. This overstates risk, and indicates a degree of investment risk the financial history of this corporation simply does not substantiate. That the evidence shows . . . that the highest interest rate paid by "junk bonds", a higher rate of return being required by an investor for these bonds because of the highest degree of risk incurred by investing in them, was 13.34%.

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363. In addition, there was evidence that all NASCAR events have had huge surges in popularity, attendance, and advertising revenues, including television revenues and the Court so finds.

In comparing the rate selected by plaintiff's valuation expert, J. Ray Nicholson, the court stated that "while the capitalization rate selected by Mr. Nicholson of 18% is substantially lower than the defective rate being discussed at this point, it is only a rough corollary to the multiple used in the Excess Earnings methodology and does not perform an identical valuation function." The court had noted earlier in its findings that the capitalization rate obtained by Nicholson under his primary methodology, the income approach, was actually "a discount rate . . . of 18%, minus a risk adjusted growth rate of 6%, giving a capitalization rate, for perpetuity value, of 12%." Thus, because of differences in the methodologies employed and the function of the capitalization rate within each methodology, surface comparison of the capitalization rates selected by the two experts was not overly helpful.

Nicholson's testimony shows, however, that the methodologies used by Beck and Nicholson are comparable in that both utilize a discretionary figure that relates to the risk of the investment, which figure significantly affects the bottom line. Because of this similarity, Nicholson testified at length regarding the degree of risk associated with an investment in CMS. He stated that in his opinion, an investment in the race track industry is no riskier than an investment in the stock market in general, and that if there was any volatility in CMS, it was "all on the upside and increase."

In its findings of fact, the court stated that it was not persuaded that an investment in the racing industry, particularly in CMS, has the high degree of risk claimed by defendant and Beck, but that it also was not persuaded that such an investment is of no greater risk than an investment in the stock market generally. The court further stated that "[c]onsidering all the evidence relating to this factor, including corporate earnings record, history, expansion, competitive position within the industry, and the substantial, expanding reinvestment of capital and capital additions into CMS and by CMS, the Court finds that an appropriate capitalization rate, as of both valuation dates, is 16%." The court noted that this rate was still a conservative one, and applied only to one

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portion of the overall income conceptualized as excess earnings under the valuation methodology being utilized.

Defendant contends there is no evidence in the record to support the court's selection of this particular capitalization rate, and that even assuming there is sufficient evidence to support use of this rate, the court failed to make sufficient findings of fact to support its selection. We disagree with defendant's assessment of the sufficiency of the evidence and findings.

The record shows that extensive evidence was presented regarding valuation of CMS, particularly regarding the degree of risk associated with an investment in an asset such as CMS, the effect the degree of risk has on the ultimate value placed on the asset, and the use of a capitalization rate or other means to take into account that risk in placing a value on the asset. Additionally, expert testimony from both Nicholson and Beck was presented regarding an appropriate capitalization rate to be used in valuing CMS under the different methodologies suggested. We do not believe the court was so restricted in its authority that it was prohibited from selecting a capitalization rate of 16% simply because neither expert specifically identified that rate as the appropriate one to be used under the valuation methodology utilized by the court. See *Hartman v. Hartman*, 82 N.C. App. 167, 346 S.E.2d 196 (1986), *aff'd*, 319 N.C. 396, 354 S.E.2d 239 (1987).

This Court has previously recognized that when there is conflicting testimony as to the value of marital property, the court is not required to choose between the values suggested but may arrive at a value of its own choosing so long as that value is based on the appropriate factors to be considered in the valuation process and the evidence. *Nix*, 80 N.C. App. 110, 341 S.E.2d 116. See also *Hartman*, 82 N.C. App. 167, 346 S.E.2d 196. This same flexibility should certainly be afforded the trial court here in selecting an appropriate capitalization rate to be employed under the valuation methodology accepted by the court, particularly given the critical importance and highly discretionary nature of capitalization rates. Just as the trial court is not permitted to merely guess at the value of marital property, *Nix*, 80 N.C. App. 110, 341 S.E.2d 116, however, it may not arbitrarily select a capitalization rate to be used in the valuation process.

It is clear from the findings of fact made in this case that the 16% rate selected by the court was not arbitrarily chosen

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but, in fact, resulted from the court's thorough and conscientious review of all the evidence and pertinent factors. We find no abuse of discretion in the court's selection of this rate, *see id.*, and further find sufficient evidence in the record to support its selection and to support the values ultimately obtained by the court for CMS with the use of that rate. Furthermore, we find no deficiency in the findings made by the court in support of its determination of an appropriate capitalization rate.

In sum, we find no error in the court's valuation of CMS. The court valued CMS based on a sound, well-accepted methodology, the excess earnings approach. The court found it necessary to make the adjustments discussed herein to Beck's valuation of CMS utilizing the excess earnings methodology in order to fairly and properly value this asset, and those adjustments are sufficiently supported by the evidence and the findings made. It appears from our review of the entire record, particularly the lengthy judgment of equitable distribution and its extensive findings of fact, that the court reasonably approximated the net value of CMS based on competent evidence and based on a sound valuation methodology; therefore, its valuation shall not be disturbed. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266.

2. *Provident American Insurance Company*

[7] Defendant next argues the court miscalculated the date of trial value of Provident American Insurance Company ("Provident"), an insurance company that was wholly owned by Sonic as of the date of trial. In valuing Provident, the court accepted the methodology utilized by one of defendant's valuation experts, Mr. Steven H. Mahan, who specializes in valuing insurance companies. Mahan valued Provident by combining the separately obtained values of three components—its adjusted net worth, the value of its insurance in force, and the value of its existing structure. Defendant's primary valuation expert, Beck, then incorporated the value obtained for Provident into the balance sheet on which the various component businesses of Sonic were consolidated. Beck determined the net value of Sonic by combining the values obtained for Sonic's component subsidiaries and partnerships on a balance sheet that also eliminated the carrying value of those same assets on Sonic's books. This was achieved by calculating appraisal increments and decrements, which represented the amount by which an entity's actual value differed from its book value, and incorporating those

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increments and decrements into the balance sheet. This approach was the one chosen by both parties and the court for determining the overall value of Sonic.

In calculating Provident's adjusted net worth, Mahan took into consideration a surplus debenture, or note, by which Provident was obligated to repay to Sonic the balance due. The balance due on the note as of the date closest to the date of trial for which its balance could be determined was \$1,079,000. The court found that "while this note is a liability of Provident . . . , it is an intercompany asset of Sonic being actively repaid by Provident American, and its value must be added, as of the respective valuation dates, as a part of valuing Sonic's ownership interest in this company."

In reviewing Beck's incorporation of the appraised value of Provident into the consolidated balance sheet, particularly his calculation of the appraisal increment/decrement for Provident, the court found certain inaccuracies relating to consideration of the surplus note. It first found that \$1,079,000 needed to be added to the appraised value of Provident because that amount had been erroneously deducted twice. Beck conceded that this error had occurred and that this addition was necessary. Second, the court found that the book value of Sonic's investment in Provident as of the date of trial was not \$5,295,000 as determined by Beck, but instead was \$4,217,000 as shown by the 31 December 1989 consolidated balance sheet for Sonic offered as defendant's exhibit 109-H. The difference between the book value as set by the court and as set by Beck is attributable to the balance of the surplus note. Beck, on cross-examination, conceded that the \$4,217,000 figure appearing on the 31 December 1989 balance sheet included Sonic's investment in both Provident's stock and the surplus note, and that therefore an additional \$1,079,000 adjustment to his figures needed to be made. After a break in the proceedings during which Beck consulted with defendant's accountant, Bill Brooks, Beck attempted to retract this concession. The court obviously was not persuaded by Beck's retraction and agreed with plaintiff that two separate adjustments of \$1,079,000 were needed to Beck's calculations.

Defendant contends that the adjustments made by the court concerning valuation of Provident were improper, are not supported by the evidence, and that as a result, the value set for Sonic

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as of the date of trial is \$2,157,000 (two times \$1,079,000) more than it should be. We reject this contention. Notwithstanding defendant's assertion to the contrary, there is support in the record for the trial court's findings that \$1,079,000 needed to be added to the appraised value of Provident as incorporated by Beck and that the book value of Sonic's investment in Provident as of the date of trial was \$4,217,000. This support comes both from Beck's testimony on cross-examination and from defendant's own exhibits. Once again, there was a conflict in the evidence regarding whether adjustments to Beck's valuation were needed, which conflict was resolved by the court in plaintiff's favor. Since there is competent evidence in the record that supports the court's findings regarding the adjustments made, those findings are binding and shall not be disturbed. *Nix*, 80 N.C. App. 110, 341 S.E.2d 116. Accordingly, we find no error in the court's valuation of Provident or its calculation of the appraisal increment/decrement for that entity.

3. *Town and Country Ford, Inc.*

[8] Defendant next argues the court erred in its valuation of Town and Country Ford ("Town and Country"), an automobile dealership that is a wholly owned subsidiary of Sonic. The court valued Town and Country by use of the industry standard approach, the approach utilized by plaintiff's expert, Nicholson. Under this approach, the value of the dealership is determined by adding the net "hard asset" value (the value of its hard assets minus its liabilities) and its "blue sky" value.

The expert testimony showed that the blue sky value is basically the value of the dealership over and above the value of its hard assets and is roughly equivalent to goodwill. The blue sky value is determined by multiplying the average pre-tax income of the dealership by a franchise multiple of one to five. The multiple chosen is subjective and is based upon factors such as the type of franchise, its market performance, location, demographics, median income, economy status, sales, and number of locations. The court here used a multiple of three in determining the date of separation value of Town and Country and a multiple of two for the date of trial value. Defendant contends there was no basis for the franchise multiples used by the court and that therefore its valuation of this asset is fatally flawed. We disagree.

Defendant presented evidence showing that Town and Country had a value of \$4,900,000 as of the date of separation and \$2,400,000

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as of the date of trial. These values were obtained, however, by use of a methodology that was not accepted by the court. The court accepted as valid the industry standard approach, used by Nicholson, noting that it was recognized by a national automobile dealers association as a legitimate tool for valuing automobile dealerships. The court found error in Nicholson's application of this methodology, however, in that Nicholson used franchise multiples that the court found inaccurately high. Nicholson valued Town and Country at \$7,938,000 as of the date of separation with use of a multiple of five and at \$1,931,000 as of the date of trial with use of a multiple of three. The trial court, using multiples of three and two, respectively, valued Town and Country at \$5,494,000 as of the date of separation and \$876,000 as of the date of trial.

The court made numerous findings regarding the multiples selected including the multiples selected by Nicholson and his justification for his selections; alternative computations of the blue sky component offered by defendant's witnesses, including alternative computations made by defendant's witness, Brooks, with use of different multiples; and the multiples selected by the court, including the reason for its use of a lower multiple for determining the date of trial value. The findings show, among other things, that the dealership declined in value in the two years preceding the trial due to a decrease in earnings and a slowdown in the economy and that, as a result, use of a lower multiple for determining its date of trial value was necessary to reflect that decline. Moreover, extensive evidence was presented regarding computation of a dealership's blue sky value and selection of an appropriate multiple. In fact, sufficient evidence was presented that defendant's counsel stated to the court that "when this case is over there will be enough evidence for the Court to make its own determination as to what the Court thinks is the blue-sky value, and the Court may or may not choose to use a multiple," thereby inviting the court to select its own multiples.

We conclude there is a sufficient basis in the record for the franchise multiples selected by the court. As is demonstrated by the findings made, the multiples selected by the court were not arbitrarily chosen but were based on the court's consideration of appropriate factors and the evidence. We further conclude that the values obtained with the use of the multiples selected by the court are adequately supported by the evidence and the findings and appear to be a reasonable approximation of the value of this

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entity. We therefore find no error in the court's valuation of Town and Country.

4. *Frontier Oldsmobile-Cadillac, Inc.*

[9] Defendant assigns as error the court's valuation of Frontier Oldsmobile-Cadillac, Inc. ("Frontier Oldsmobile"), on the ground the evidence is insufficient to support the court's findings regarding the value of this business. Frontier Oldsmobile is an automobile dealership that was purchased by defendant and Sonic in September 1988, after the date of the parties' separation. As of the date of trial, Sonic owned 85% of the stock in the corporation and defendant owned the remaining 15%. Since this entity was not owned by either of the parties as of the date of separation, it was not subject to distribution but was properly considered by the court as a factor in determining an equitable distribution. N.C. Gen. Stat. § 50-20(b) and (c).

Plaintiff's expert, Nicholson, used the industry standard approach to value Frontier Oldsmobile. In valuing the business, Nicholson did not calculate any blue sky value for the entity but did include certain intangible assets, which were listed as assets on Frontier Oldsmobile's books, in his calculation of the hard asset value. The court accepted the methodology used by Nicholson and the values obtained by use of that methodology in valuing the business. Defendant contends the evidence does not support the court's valuation of this entity because the value of these intangible assets was allegedly erroneously included in the hard asset value of the business.

The trial court expressly recognized in its judgment that the hard asset value as determined by Nicholson included intangible assets, consisting of franchise rights and non-compete contractual rights. The court found that although it was a misnomer to include intangible assets within the "hard asset" value, it was not an inaccuracy since Nicholson had not included those assets, which have a computable value, as part of a blue sky component. The court's finding regarding the inclusion of the intangible assets in the hard asset value of the business is supported by Nicholson's testimony and is therefore conclusive on appeal. *Nix*, 80 N.C. App. 110, 341 S.E.2d 116. The evidence supports the findings made regarding the value of Frontier Oldsmobile; therefore, this assignment of error is overruled.

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5. *Chartown*

[10] Defendant next assigns as error the value placed on Chartown as of the date of trial. Chartown is a partnership owned by CMS and Town and Country, whose assets consist of parcels of real property including a 17.97 acre tract of land located on Krefield Drive in Charlotte. Defendant contends the evidence is insufficient to support the court's finding that the fair market value of the Krefield Drive property remained constant from the date of separation to the date of trial. Defendant presented evidence showing that the value of the Krefield Drive property decreased between the dates of separation and trial, and plaintiff presented evidence showing that the property had increased in value during this time. The court was not persuaded that the property either increased or decreased in value during this period but accepted as accurate the comparable range of values utilized by defendant's expert. The court's finding regarding the date of trial value of the Krefield Drive property is supported by the comparable range of values established by defendant's expert as reliable indicators of the date of trial value of this property; therefore, we overrule this assignment of error as well. *See Nix*, 80 N.C. App. 110, 341 S.E.2d 116.

B. *The Marital Home*

[11] Defendant also assigns as error the value placed on the marital home as of the date of trial. For the most part, the court accepted the values placed on the marital home by defendant's expert, Kelly I. Harris. Harris, however, made a \$75,000 downward adjustment to the date of trial value based on several items of deferred maintenance on the property. The court found that this adjustment was inaccurately high, that a more accurate adjustment would be \$50,000, and therefore determined that the date of trial value was \$25,000 higher than the value set by Harris. Defendant contends there is no evidence in the record to support the court's adjustment to Harris's valuation. The record shows that when Harris was questioned about her \$75,000 downward adjustment, she conceded that it was difficult to estimate the cost of the repairs needed to the property but that she estimated the cost to be \$50,000 to \$75,000. This testimony is sufficient to support the court's finding regarding the appropriate adjustment to be made and the resulting higher value placed on the property. We find no error as claimed by defendant in the court's valuation of the marital home.

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DISTRIBUTION

The trial court's final task is to determine what constitutes an equitable distribution of the marital property. To guide courts in making this determination, our Supreme Court has stated:

[N.C. Gen. Stat. § 50-20] is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the . . . factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.

When evidence tending to show that an equal division . . . would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division.

White v. White, 312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985). The trial court is vested with such wide discretion in carrying out this task that its distribution will not be disturbed on appeal absent a showing that the distribution is manifestly unsupported by reason. *White*, 312 N.C. 770, 324 S.E.2d 829. One restriction on the court's exercise of its discretion, however, is that the court must make findings and conclusions that support its division, including findings sufficient to address the statutory factors on which evidence was presented. *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).

The parties here have presented numerous issues pertaining to the distribution ordered. Although we reject most of the arguments presented, we agree there is error in the distribution that requires this matter be remanded to the trial court for redetermination of an equitable distribution.

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A. Consideration of Distributional Factors

Defendant argues the court erred by “failing to find and consider distributional factors which were raised and supported by the evidence and law.” Specifically, defendant assigns as error the court’s failure: (1) to find facts and consider his evidence regarding plaintiff’s alleged economic misconduct and lack of homemaker contributions; and (2) to take into consideration the adverse tax consequences to defendant inherent in its distributive award.

1. Plaintiff’s homemaker contributions

[12] Defendant first contends the evidence shows that the only contributions made by plaintiff to the marriage and the marital estate were her “intangible or indirect” contributions as a spouse, parent, or homemaker; that plaintiff’s contributions were “at best minimal”; and that it was prejudicial error for the court to fail to give weight to the evidence showing plaintiff’s lack of contribution. In determining an equitable distribution, the court must consider “[a]ny equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.” N.C. Gen. Stat. § 50-20(c)(6). The court here expressly found that: “Both parties offered evidence on this factor regarding Plaintiff’s role or lack thereof as a spouse, parent, wage earner or homemaker. The Court has considered, but chooses not to give weight to, this factor, and therefore makes no further findings on it.” Thus, the judgment shows the court considered the evidence presented on this statutory factor and made a finding of fact regarding that evidence, and the weight assigned it. Defendant’s assignment of error that the court failed to find facts and consider his evidence regarding plaintiff’s lack of homemaker contributions is, therefore, patently meritless.

Defendant’s real dissatisfaction here is with the weight the court chose to give this factor. The weight to be given any factor is a matter committed to the discretion of the trial court. *White*, 312 N.C. 770, 324 S.E.2d 829. We cannot say the court’s decision not to give greater weight to this particular factor is manifestly unsupported by reason; therefore, we find no error in the court’s consideration of this evidence.

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2. *Marital misconduct*

[13] As part of this same argument, defendant next contends the court erred by refusing to consider his evidence of plaintiff's alleged economic misconduct. Defendant states that he "attempted to offer evidence to show both the inclination and opportunity of [plaintiff] to commit adultery, as well as the availability and use of a substantial amount of marital funds to facilitate its commission." The court excluded the evidence on the basis it was evidence of non-economic fault. Defendant contends the evidence of plaintiff's misconduct was relevant to show plaintiff's dissipation of marital assets for a nonmarital purpose, and that its exclusion was prejudicial error.

In *Smith v. Smith*, 314 N.C. 80, 81, 331 S.E.2d 682, 683 (1985), our Supreme Court held that:

[M]isconduct during the marriage which dissipates or reduces the value of marital assets for nonmarital purposes may properly be considered under N.C.G.S. 50-20(c)(12). Marital fault or misconduct which does not adversely affect the value of marital assets is not a just and proper factor within the meaning of N.C.G.S. 50-20(c)(12).

The Court explained that since the first eleven factors set forth in N.C. Gen. Stat. § 50-20(c) all concern the economy of the marriage, the only other considerations that are "just and proper" and therefore appropriate for consideration under N.C. Gen. Stat. § 50-20(c)(12) are those that are relevant to the marital economy. The Court therefore ruled that "marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered." *Smith*, 314 N.C. at 87, 331 S.E.2d at 687.

Although the trial court refused to hear or consider defendant's tendered evidence, it permitted defendant to make an offer of proof to show the substance of the excluded evidence for purposes of appellate review. The offer of proof, together with the other evidence presented, shows that during one period of the marriage, from approximately 1985 until the spring of 1987, plaintiff went on numerous trips to health spas, resort cities, and other places with the use of marital funds; that she went on the trips without defendant, but with his permission; and that she committed adultery while on some of the trips. Plaintiff admitted that the

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adultery occurred while she was on the trips, but denied that the purpose of any of the trips was to commit adultery, or to facilitate its commission, and denied spending any monies on the men with whom she became involved.

After reviewing the offer of proof, we conclude the proffered evidence was properly excluded. The offer of proof does not show that plaintiff's misconduct dissipated or reduced the value of marital assets or was related to the economic condition of the marriage. It is clear the tendered evidence was offered to prejudice the court against plaintiff based on her misconduct, rather than to show any economic impact on the marriage resulting from that conduct; therefore, it was not evidence that could be appropriately considered in determining an equitable distribution. *Smith*, 314 N.C. 80, 331 S.E.2d 682.

3. Tax consequences

[14] Finally, defendant contends the court erred by failing to consider the adverse tax consequences to him inherent in its distributive award. Pursuant to N.C. Gen. Stat. § 50-20(c)(11), the court is to consider the tax consequences to each party in determining an equitable distribution. Notwithstanding defendant's assertion to the contrary, the court did consider this statutory factor and made a finding of fact regarding it. The court found that neither party had offered evidence regarding specific tax consequences that might result from the equitable distribution, but that other evidence regarding taxes had been presented with respect to various points, which evidence the court considered.

Defendant notes, however, that the court, in ordering him to make an initial lump sum payment of \$2,144,971 towards the distributive award, specifically found that defendant has the ability to pay that amount either from the sale of assets distributed to him, or by borrowing, or by a combination of both means. Defendant contends this finding shows that the court realized he would likely have to sell some of his assets in order to comply with the judgment, that it is "common knowledge" that adverse tax consequences will result from such a sale, and that the court should have considered those tax consequences in determining an equitable distribution. We find this contention unpersuasive.

As the party seeking an unequal division of marital property in his favor, defendant had the burden of producing evidence con-

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cerning the tax consequences of the anticipated distribution. See *White*, 312 N.C. 770, 324 S.E.2d 829. He failed to present any such evidence. As plaintiff correctly notes in her brief, "common knowledge" is not evidence. In the absence of evidence concerning the tax consequences of the anticipated distribution, the court may still properly consider the tax consequences in determining an equitable distribution but it is not required to do so. *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). Moreover, even when evidence pursuant to this factor is presented, the court is only required to consider the tax consequences that will result from the distribution the court actually orders. *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985).

The parties here stipulated to the in-kind distribution of some of the marital assets and expressed to the court their preference that the remaining marital assets, except the proceeds in two relatively small bank accounts, be distributed in kind to defendant. For the court to distribute the property consistent with the parties' stipulations and preferences, a sizable distributive award to plaintiff was obviously going to be required. Despite this obvious result, defendant presented no evidence regarding the adverse tax consequences he now claims are inherent in the distributive award. Furthermore, the tax consequences now claimed by defendant are of a purely speculative nature and are not inherent in the distribution actually ordered. For these reasons, we find no error in the consideration given this factor by the court.

*B. Postseparation Appreciation and Depreciation
of Marital Property*

[15] Defendant's next argument pertains to the court's treatment of the postseparation appreciation and depreciation of the marital property. Defendant assigns as error the court's failure to make findings of fact distinguishing between the postseparation active versus passive appreciation (or depreciation) of the marital property and failure to consider those findings in determining an equitable distribution. Although we do not agree that the court's findings concerning the postseparation appreciation of the marital property are insufficient, we agree there is error in the court's treatment of the postseparation appreciation that requires that this matter be remanded to the trial court for correction.

The court made detailed findings regarding the changes in value of the marital property occurring after the date of separation.

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Those findings show that after the date of separation, some of the marital assets decreased in value, while others increased in value. The court subtracted the total of the depreciation of the marital assets from the total of the appreciation of the assets and thereby determined that since the date of separation there had been a \$6,546,805 net increase in value of the marital estate. Since, by the distribution ordered, defendant was awarded all of the assets that had appreciated in value, the court gave plaintiff an "adjustive credit" equal to 31% of the net postseparation appreciation of the marital estate, or \$2,029,509, and added that amount to the share of the marital property awarded plaintiff. In so doing, the court actually distributed part of the postseparation appreciation of the marital property to plaintiff and thereby exceeded its authority.

"[T]his Court has held that post-separation appreciation of a marital asset, whether passive appreciation or appreciation due to the efforts of an individual spouse, is not marital property and cannot be distributed by the court." *Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992). Instead, the increase in value of marital assets between the date of separation and the date of trial should be considered by the court pursuant to N.C. Gen. Stat. § 50-20(c)(11a) or (c)(12) in determining what constitutes an equitable distribution of the marital estate. *Chandler*, 108 N.C. App. 66, 422 S.E.2d 587; *Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992); *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988). "Rather than distributing the sums representing the appreciation, the trial court must consider the existence of this appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable." *Gum*, 107 N.C. App. at 738, 421 S.E.2d at 790.

Because the court here distributed part of the postseparation appreciation, this cause must be remanded for redetermination of what constitutes an equitable distribution of the marital estate and entry of a new judgment. We recognize that on remand the court may determine, after considering the existence of the postseparation appreciation in the value of the assets distributed to defendant, that plaintiff must receive a greater percentage than 31% of the marital property in order to achieve an equitable distribution. That would certainly be permissible and within the discretion of the trial court and is the appropriate means by which to take

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into consideration the increase in value of marital assets occurring after the date of separation.

[16] On a related note, both parties concede the court made a clerical error in its calculation of the net postseparation increase in value of the marital assets in that the court erroneously listed the amount of appreciation in the marital home, \$25,405, in the depreciation column, rather than in the appreciation column. This error should be corrected on remand as well. We reject defendant's argument that the correct amount to be listed as the postseparation appreciation in the marital home is \$9,999.35, rather than \$25,405, with the difference being attributable to payments made by defendant towards the first mortgage on the property. The judgment shows the court chose to give defendant credit for those mortgage payments at another point in its calculations, rather than include them in its calculation of the net postseparation appreciation of the marital property, and we find no error in that decision.

[17] Defendant further contends the court, in considering the postseparation appreciation as a distributional factor, must distinguish between the appreciation that is active in nature, and the appreciation that is passive in nature, and make findings of fact in effect classifying the appreciation in each asset as either active or passive. We find no support for this position in G.S. § 50-20 or in the cases interpreting that statute and decline to impose this unnecessary burden on the trial court.

The distinction between active and passive appreciation in the value of an asset occurring during marriage and before the date of separation must necessarily be drawn in order to classify property as either marital or separate, and thereby identify the property subject to distribution. It is not essential that this same distinction be drawn with respect to appreciation occurring after the date of separation since that appreciation is not marital property and not subject to distribution. This Court has previously recognized that there are limits on what can reasonably be required of the trial court with respect to its consideration of evidence presented pursuant to G.S. § 50-20(c). *See Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (Where this Court refused to require the trial court to place a value on the contribution made by one spouse towards the education and career development of the other spouse.). Although it is certainly appropriate, and indeed desirable, for the trial court in determining an equitable distribution to take into

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consideration whether the postseparation appreciation of the marital property is passive appreciation, or resulted from the efforts of one or both of the spouses, the court is not required to make specific findings of fact classifying the appreciation as either passive or active. We find no error, therefore, in the court's failure to make additional findings concerning the nature of the postseparation appreciation.

Finally, as part of this same argument, defendant contends the court improperly refused to consider the net postseparation depreciation in the value of his interest in the Riverfall Partnership. The record shows that the property held by the Riverfall Partnership was acquired by Chartown after the date of the parties' separation, that the depreciation referred to by defendant was included in the court's calculation of the date of trial value of Chartown, and that ample findings of fact were made regarding the Riverfall Partnership and property and the decline in value of that property after the date of separation. We find no error in the consideration afforded the postseparation depreciation of this asset.

C. Credits for Postseparation Expenditures

[18] Both parties present arguments pertaining to the credit given defendant for certain postseparation expenditures. Defendant argues the court erred by failing to give him a dollar-for-dollar credit for payments he made after the date of separation to preserve marital property and to reduce marital debts. Based on the assignments of error listed as corresponding to this argument, it appears that the payments made by defendant for which he seeks additional credit consist of interest payments on the first mortgage on the marital home; payments reducing certain debts associated with defendant's business interests, which were found to be marital debts; and advances to preserve the assets of one of the partnerships in which defendant is a general partner, Gardner-Smith Associates. Defendant contends he spent millions of dollars servicing marital debt and preserving marital property since the date of separation, but only received a credit for his reduction of the principal on the two mortgages on the marital home, and for his payment of property taxes. Defendant contends he should have received a greater credit and that it is unfair to permit trial courts to "only loosely consider" postseparation payments made to preserve marital property and to reduce marital debt as distributional factors. Plaintiff, on the other hand, argues that the court, in effect,

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gave defendant greater credit than it should have for his postseparation payments made towards the mortgages on the marital home and property taxes.

The judgment shows that the court gave defendant a full credit for his payment of the property taxes due on the marital home, a full credit for his discharge of the second mortgage on the home, and a partial credit for mortgage payments made towards the first marital home mortgage, and considered the remaining payments made by defendant to reduce marital debts and to preserve marital property as distributional factors in determining what constituted an equitable distribution. The court found that as of the date of separation, the marital home was encumbered by two mortgages—a first mortgage with a balance due as of that date of \$388,738, and a second mortgage with a balance due of \$189,956. Between the dates of separation and trial, defendant caused the second mortgage to be retired in its entirety, made property tax payments on the home totalling \$19,907.14, and made payments towards the first mortgage totalling \$103,333.72. Of the payments made towards the first mortgage, \$15,405.65 reduced the principal owed on the mortgage and the remaining \$87,928.07 consisted of interest payments. The court gave defendant a full dollar-for-dollar credit for the property tax paid, his discharge of the second mortgage, and the principal payments made towards the first mortgage, in the total amount of \$225,268.79, which amount was subtracted from plaintiff's distributive award. In keeping with the parties' stipulations, the court also gave defendant a full credit for the funds advanced by him for the purchase of a residence and furnishings for plaintiff and the parties' children.

The court specifically found that it was not equitable to grant defendant a credit for his interest payments on the first mortgage because defendant had the benefit of the use and possession of the marital home since the date of separation and the benefit of a reduced income tax liability because of the interest payments made. Complicating matters, however, the court further stated that to avoid a double treatment of defendant's discharge of the second mortgage, which increased the net value of the home as of the date of trial by \$189,956, the court was going to subtract that amount from the postseparation appreciation attributed to this asset.

Apparently, the remaining postseparation payments for which defendant claims he was entitled to a dollar-for-dollar credit consist

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of his advances towards the partnership, Gardner-Smith Associates; his discharge of the Riverfall Partnership debt, the STC properties' debt, and the NCNB debt; and his payments reducing his debt to Sonic. In considering the factors set forth at N.C. Gen. Stat. § 50-20(c) in determining an equitable distribution, the court found, pursuant to N.C. Gen. Stat. § 50-20(c)(11a), that:

Defendant has since the date of separation expended substantial monies in an endeavor to preserve all property, whether marital or separate. Marital debts outstanding as of the time of separation have been paid as found elsewhere herein. The [marital] residence has been maintained. A new home . . . was purchased for Plaintiff and paid for by Defendant. Advances have been made by Defendant to prevent the loss of real estate held by the partnership, Gardner-Smith Associates. Defendant has obtained release of in excess of \$13,000,000.00 in outstanding judgments owing on the date of separation.

Pursuant to N.C. Gen. Stat. § 50-20(c)(12), the court further found that defendant had "made certain payments since the date of separation benefitting the marital estate, including . . . principal, interest, insurance and property taxes [on the marital home], advances to preserve Gardner-Smith, Sonic debt paid, STC debt paid and the NCNB debt paid . . ." In addition to these findings, the judgment contains a portion devoted exclusively to the marital debts, consisting of findings of fact numbers 836-904, in which the court addresses in detail each of the alleged marital debts, including the two mortgages on the marital home, the STC debt, the debt owed to Sonic, the NCNB debt, the debts associated with the Riverfall Partnership, as well as other debts, and payments made by defendant after the date of separation towards those debts.

To evaluate the merits of the arguments presented by the parties, we must review the law in this State regarding marital debts and postseparation payments made towards marital debts in the equitable distribution context. In determining an equitable distribution, the trial court must consider the debts of the parties. See *Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989); *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987). If the debt is a separate debt of one of the parties, then the court must consider it pursuant to N.C. Gen. Stat. § 50-20(c)(1). *Byrd*, 86 N.C. App. 418, 358 S.E.2d 102. If the debt is a marital debt, that is, a debt incurred during the marriage for the joint benefit of the parties,

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then it must be valued and distributed. *Id.* Payments made after the date of separation towards marital debts or obligations flowing from marital property, including mortgage payments and payment of property taxes, have been treated by this Court as payments made towards a marital debt. *See, e.g., Bowman v. Bowman*, 96 N.C. App. 253, 385 S.E.2d 155 (1989); *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).

“The court has the discretion, when determining what constitutes an equitable distribution of the marital assets, to also apportion or distribute the marital debts in an equitable manner.” *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429-30 (1987). *See also Rawls*, 94 N.C. App. 670, 381 S.E.2d 179. The manner in which the court distributes or apportions marital debts, which necessarily includes taking into consideration payments made after the date of separation towards those debts, is a matter committed to the discretion of the trial court. *Rawls*, 94 N.C. App. 670, 381 S.E.2d 179; *Geer*, 84 N.C. App. 471, 353 S.E.2d 427. This Court, in reviewing the treatment of marital debts and postseparation payments made towards those debts, has approved the apportioning of debts between the parties, *Geer*, 84 N.C. App. 471, 353 S.E.2d 427; ordering one spouse to reimburse the other spouse for payments made towards the debts, *Bowman*, 96 N.C. App. 253, 385 S.E.2d 155; *Rawls*, 94 N.C. App. 670, 381 S.E.2d 179; consideration of postseparation payments as a distributional factor, *Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565 (1992), *rev'd in part and remanded on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993); *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991); and *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990); “crediting” a spouse in an appropriate manner for postseparation payments made, *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*, 88 N.C. App. 285, 363 S.E.2d 95; and *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987); and actual use of a credit, *Smith v. Smith*, 104 N.C. App. 788, 411 S.E.2d 197 (1991). Additionally, our Supreme Court impliedly approved the use of a credit as a means of taking into consideration postseparation payments made towards marital debts in *Wienczek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992).

Determination of the appropriate treatment of marital debts and postseparation payments made towards those debts depends

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upon the particular facts of each case and is left to the discretion of the trial court, included within the discretion afforded the court generally in determining what constitutes an equitable distribution. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985); *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993); *Rawls*, 94 N.C. App. 670, 381 S.E.2d 179; *Geer*, 84 N.C. App. 471, 353 S.E.2d 427. "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." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

Looking first at the court's treatment of defendant's postseparation mortgage payments and payment of property taxes, we find no abuse of discretion in the court's decision not to give defendant a credit, or reimbursement, for the interest portion of his mortgage payments. The court's decision not to give defendant a credit for that portion of his payments was not arbitrary but instead was a reasoned decision, as shown by the findings of fact. See *White*, 312 N.C. 770, 324 S.E.2d 829. We further find no abuse of discretion in the court's decision to reimburse defendant in full, by way of a credit, for his payment of the property taxes due on the marital home. Plaintiff contends that since defendant had the use of the home after the date of separation and received the home in the distribution, and she did not, defendant should only have been partially reimbursed for his tax payments. The court's decision to give defendant a full, rather than a partial, credit for his tax payments does not appear to be manifestly unsupported by reason; therefore, we shall not disturb it. *Id.*

We agree with plaintiff, however, that it appears defendant was erroneously given double credit for his discharge of the second mortgage. By giving defendant a full credit for his discharge of the second mortgage, the court reimbursed defendant in full for his expenditure towards that debt and restored him to the position he would have been in, monetarily, had he not made any payments towards that debt, thereby putting the parties on equal footing with respect to that debt and asset. Defendant's discharge of the second mortgage increased the net value of the marital home as of the date of trial by \$189,956, which increase inured to the benefit of defendant since he was awarded the home. Since defendant received the benefit of that increase in value by the distribution of the home to him, plaintiff was entitled to have that increase taken into consideration by the court in determining an equitable

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distribution. This was not done, however, because the court did not include the amount of the second mortgage in the total of the postseparation appreciation of the marital property, thereby depriving plaintiff of the benefit from the increase in value of the home to which she was entitled. On remand, the court should either include the \$189,956 in the postseparation appreciation considered by it in determining what division is equitable, or explain more fully in its findings of fact how deletion of this amount from the postseparation appreciation does not result in a double credit to defendant.

Plaintiff also argues that the court erred by giving defendant a credit against the distributive award for his reduction of principal on the first mortgage. She contends it would have been more appropriate for the court to credit defendant for those payments through its calculation and consideration of the postseparation appreciation on the home. We find no abuse of discretion in the manner chosen by the court for crediting defendant for his principal payments.

With respect to defendant's reduction of the debts associated with his business interests and advances towards Gardner-Smith Associates, the judgment shows the court chose to give defendant credit for those payments by considering them as a factor in determining what distribution was equitable. The court's decision to credit defendant in that manner, rather than by giving him a dollar-for-dollar credit for the payments made, is not manifestly unsupported by reason and therefore is not an abuse of discretion. See *White*, 312 N.C. 770, 324 S.E.2d 829. Furthermore, it is clear from the judgment as a whole, particularly the detailed findings made regarding the marital debts and defendant's payments towards those debts, that the court did not just "loosely" consider defendant's payments but instead gave them the serious and extensive consideration they deserved. Accordingly, we reject defendant's argument that he was not given sufficient credit for his postseparation expenditures.

D. Distribution of the Marital Debts

[19] Defendant argues the court erred by distributing all of the marital debts to him. He contends that a proportionate share of the debts should have been assigned to plaintiff and that distribution of all the debts to him constitutes an abuse of discretion. We find this argument unpersuasive.

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The judgment shows the court made extensive findings of fact regarding the debts of the parties, both separate and marital. With respect to the debts alleged to be marital, the court addressed each individual debt; the balance due on each debt as of the date of separation and the date of trial; events occurring after the date of separation with respect to the debts, including payments made towards the debts; and, where appropriate, whether the debt had been taken into consideration by the court in determining the net value of the asset to which the debt was attached. For purposes of clarity, the court also included in its judgment a chart listing the marital debts and the balance due on each debt as of the pertinent dates. The chart shows that there were marital debts totalling \$28,054,292 as of the date of separation and \$23,829,680 as of the date of trial. With respect to those debts, the court found that, except for the mortgage remaining on the marital home and the mortgage associated with the residence purchased by defendant for plaintiff and the children, that:

[E]ach of these marital debts are of a business nature, and are integrally related to the continuing, complex business activities of the Defendant, all of which are extremely inter-related, and none of which, to any practical extent, can be segregated from the complex interrelationship of the Defendant's holdings and capital financings. Considering their nature, and the substantial disparity between the incomes of each party, none could be borne by the Plaintiff.

In addition, the court found that defendant had guaranteed the payment of various debts of the business entities controlled by him, which debts totalled \$53,566,536 as of the date of trial. This amount includes \$20,150,000 attributable to defendant's purchase of the Atlanta Motor Speedway one week before the equitable distribution trial began. With respect to these debts guaranteed by defendant, the court found:

That it is unknown . . . whether the Defendant will ever be called upon to pay any of these debts. Some occurred after separation. The history of the Defendant's business activities reveals a pattern by which actual "personal" exposures are eliminated by transactions which functionally shift the debts involved to one or more of the separate entities which are controlled by him.

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Based on these findings, the court distributed all of the marital debts to defendant.

Distribution of the marital debts is a matter committed to the discretion of the trial court. *Rawls*, 94 N.C. App. 670, 381 S.E.2d 179; *Geer*, 84 N.C. App. 471, 353 S.E.2d 427. Although defendant was assigned all the marital debts, which had a total balance due as of the date of distribution of \$23,829,680, he was also awarded all of the property to which the debts were attached, except the residence purchased for plaintiff, and the existence of the debt was included in calculation of the net value of that property. The only part of the assigned debt that was not taken into consideration in valuation of the marital property was a total of \$6,135,611, representing debts owed to Sonic and its subsidiary, CMS, entities subject to defendant's control and manipulation. Defendant's control over those entities would certainly appear to include the ability to shift these debts elsewhere at some point or possibly even eliminate them; therefore, their true value as a liability is questionable. Given the circumstances and the distribution ordered, we see no abuse of discretion in the court's decision to distribute all of the marital debts to defendant.

E. Unequal Distribution

Plaintiff assigns as error the court's determination that an equitable distribution is an unequal one in which defendant is awarded 69% of the marital property and plaintiff only 31%. She contends this unequal distribution constitutes an abuse of discretion and reversible error. Because we have determined that this case must be remanded to the trial court for redetermination of what constitutes an equitable distribution, we need not address plaintiff's contention. We note, however, that the trial court's determination as to an equitable division of the marital property is one that is to be accorded great deference and will not be upset on appeal absent a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *White*, 312 N.C. 770, 324 S.E.2d 829.

F. The Distributive Award

[20] Both parties present arguments pertaining to the distributive award ordered by the court. Plaintiff contends the court erred and abused its discretion by structuring payment of the award over a period of ten years. Defendant contends the court erred

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and abused its discretion by ordering him to pay a distributive award of over \$15 million without making any findings from which it could reasonably be concluded that he has the ability to comply with the judgment without suffering catastrophic economic consequences. Because of the likelihood that on remand plaintiff will be awarded her share of the marital property by a substantially similar distributive award, we find it appropriate to address the parties' arguments.

N.C. Gen. Stat. § 50-20(e) authorizes the trial court to provide for a distributive award whenever a distribution of all or portions of the marital property in kind would be impractical or whenever a distributive award is necessary to facilitate, effectuate, or supplement a distribution of the marital property. *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917, *disc. review allowed*, 331 N.C. 287, 417 S.E.2d 255 (1992); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987). Although the court may make the distributive award payable over an extended period of time, it may not order that an award be paid over a period in excess of six years after the date of the cessation of the marriage "except upon a showing by the payor spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period." *Lawing v. Lawing*, 81 N.C. App. 159, 184, 344 S.E.2d 100, 116 (1986). Additionally, "[w]ith the requirement that the payor spouse make a showing that grounds exist for extending the period of payment beyond six years is a concurrent duty on the part of the trial court to affirmatively find the existence of such grounds." *Harris*, 84 N.C. App. at 363, 352 S.E.2d at 876. Providing further guidance, this Court stated in *Lawing* that:

Awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible. This will serve both statutory goals: affording the recipient's share non-recognition treatment under the [Internal Revenue] Code, and fairly wrapping up the marital affairs as quickly and certainly as possible.

Lawing, 81 N.C. App. at 184, 344 S.E.2d at 116. Except for this restriction concerning the length of payment of the distributive award, the structure and timing of payment of the award rests with the discretion of the court. *See Sonek*, 105 N.C. App. 247, 412 S.E.2d 917; *Lawing*, 81 N.C. App. 159, 344 S.E.2d 100.

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The judgment here reflects a conscientious and thorough effort by the trial court to fashion a fair and reasonable means of payment of the distributive award owed plaintiff. The court found, among its numerous detailed findings made concerning the distributive award, that the total amount of the award could not be paid within the six year period after the date of the parties' divorce because of: (1) certain legal impediments to transfer; (2) business impediments to transfer; (3) disputes concerning the value of the property owned at the time of the cessation of the marriage; and (4) "other factors." As the "other factors" found by the court preventing payment of the award within the six year period, the court noted that defendant did not have the present liquidity or ability to pay the award within that time, and that a reasonable social policy does not require the forced dissolution and liquidation of a substantial marital estate in order to effectuate complete payment of a distributive award within a six year period.

The court further addressed in detail defendant's ability to pay the distributive award as ordered. The court found that defendant has the ability to make substantial monthly payments and to pay the distributive award within the time required by the court; that given defendant's age (63 when the judgment was entered), a reasonable period in which to accomplish transfer of the distributive award as promptly as possible is ten years, or 120 months; and that this period of time for payment of the award is a reasonable period that assures completion of the payment as promptly as possible under the circumstances. The court further found:

962. That, for many years, the Defendant has had, and has made use of, access to the substantial net incomes of, and borrowing capacities of, the various businesses owned by him.

963. That, as an example, the Defendant has caused Sonic Financial Corporation to loan to him, only since the date of separation, approximately \$2,000,000, these monies not being connected with other financings related to the acquisition of new assets, such as Atlanta Motor Speedway, Inc.

964. That the Defendant . . . has a personal net value of such magnitude that he is capable of borrowing substantial amounts, and maintaining the payments involved, to a degree substantially in excess of what would normally be supported by his claimed primary earned income from one of the sub-

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subsidiaries of Sonic Financial Corporation. A review of his tax returns show even declared income far in excess of his claimed salary.

965. That the Defendant has the ability to obtain, either from sale of assets distributed to him herein which are more liquid by their nature, or by borrowings, or by a combination of the two, the sum of \$2,144,971 [the amount of the lump sum portion of the award] within 75 days from the filing date of this judgment.

The findings made by the court regarding the need to extend payment of the distributive award over a period in excess of six years after the date of cessation of the marriage and regarding defendant's ability to pay the award are adequately supported by the record and sufficiently support the award as ordered, including the structure and timing of the award. We find no abuse of discretion in the means by which the court ordered the distributive award to be paid. To the contrary, the means chosen reflects a careful balancing of the respective interests of the parties. Accordingly, we reject the parties' arguments concerning the distributive award.

DISPOSITION

In summary, we discern no reversible error in, and specifically affirm, that part of the judgment addressing the classification and valuation of the property owned by the parties. We find reversible error, however, in the court's failure to consider defendant's receipt of dividend income of \$240,162 after the date of separation as a factor in determining an equitable distribution and in the court's calculation and treatment of the postseparation appreciation of the marital property, including the credit given defendant for his discharge of the second mortgage on the marital home. We therefore vacate that part of the judgment addressing 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. In so doing, the court shall rely on the existing record, as a new trial on these issues is not needed, but may hear additional arguments from the parties and take such additional evidence as the court finds necessary to correct the errors identified herein.

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Affirmed in part, vacated in part, and remanded.

Judge COZORT concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I do not agree with the majority that it "is not essential" for the trial court to specifically characterize as active, when such evidence is presented at trial, increases in the value of marital property occurring after the date of separation which are attributable to the acts of one spouse. Otherwise, I fully concur with the majority's treatment of the issues raised in this appeal.

"In determining whether a particular distribution [of marital property] will be equitable, the judge must [to the extent evidence is presented] consider the statutory equitable factors set out in Section 50-20(c)." *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988). To insure that due consideration has been given by the trial court to the evidence relating to any of the Section 50-20(c) factors, the findings must so reflect. *Id.*; *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988). When evidence is presented of a postseparation increase in the value of marital property, the judgment must include findings reflecting this evidence and the increase must be considered by the trial court as a "distributional factor." *Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 366 S.E.2d 512, 516 (1988). In this context, consideration as a "distributional factor" requires that the party not receiving the asset which has increased in value be given some favorable consideration by the trial court in its determination of how to apportion the marital property between the parties in an equitable manner.

Evidence of the "[a]cts of either party to maintain, preserve, develop, or expand . . . marital property, during the period after separation . . . and before the time of distribution" is a specific statutory distributional factor, as is evidence of acts of either party "to waste, neglect, [or] devalue" the marital property. N.C.G.S. § 50-20(c)(11a) (Supp. 1992). Any resulting increase (or decrease) in the value of marital property is "active" in nature, as that term has been used in the context of increases in the value of separate property occurring during the marriage. See *Ciobanu v. Ciobanu*,

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104 N.C. App. 461, 465, 409 S.E.2d 749, 752 (1991) (increases in value of separate property attributable to contributions of marital estate are active). Pursuant to *Armstrong*, to the extent evidence is presented that either party has, after the date of separation, taken some action that causes the value of the marital property to increase (or decrease) in value, this evidence must be considered by the trial court in its determination of what is an equitable distribution and findings must be entered to reflect such consideration. See *Mishler v. Mishler*, 90 N.C. App. 72, 77, 367 S.E.2d 385, 388, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988) (“where there is evidence of active . . . appreciation of the marital assets after [the date of the parties’ separation], the court must consider such appreciation as a factor under G.S. 50-20(c)(11a) or (12), respectively”).

In the instant case, the trial court, as reflected in its judgment, determined the increase or decrease in the value of each item of marital property occurring after the date of the parties’ separation. Specifically raised by defendant is the court’s finding reflecting an increase in the value of the marital portion of Sonic Financial Corp. in the amount of \$13,594,000.00 between the date of separation and the date of trial. Significantly, as defendant argues in his brief, the trial court did not determine the extent to which this increase is attributable to the actions of defendant, despite the fact that ample evidence thereof was presented at trial. This was error, and on remand the trial court should also make findings regarding the extent to which the postseparation increase in the value of Sonic is attributable to defendant’s actions and consider that in making an equitable distribution of the marital property.

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MARCIA L. MORGAN, ANCILLARY ADMINISTRATOR OF THE ESTATE OF PHILIP N. TILGHMAN JR., PLAINTIFF-APPELLANT v. CAVALIER ACQUISITION CORPORATION, D/B/A CAVALIER CORPORATION, AND COCA-COLA BOTTLING COMPANY AFFILIATED, INC., DEFENDANTS-APPELLEES

No. 9228SC577

(Filed 17 August 1993)

1. Products Liability § 28 (NCI4th) — soft drink vending machine — negligence of manufacturer — summary judgment improper

In a products liability case where a soft drink vending machine fell on decedent, the trial court erred in entering summary judgment for the manufacturer where genuine issues of material fact existed as to whether defendant was negligent in the design, servicing, and failure to give notice of the danger of the vending machine, since the alleged defect in the machine, its instability, was latent; evidence indicated that defendant knew of the possible misuse of its machines, knew of the dangers arising from that misuse, and failed to provide warnings to the users of its product; and defendant failed to place safety devices on its machines, though they were available at a relatively small cost.

Am Jur 2d, Products Liability §§ 289, 736-760.

2. Products Liability § 28 (NCI4th) — soft drink vending machine — negligence of owner in failing to correct defects — summary judgment inappropriate

In a products liability case where a soft drink vending machine fell on decedent, the trial court erred in granting summary judgment for defendant bottling company which owned the machine where a genuine issue of material fact existed regarding defendant's negligence in failing to respond to information about defects in the vending machine and failing to take action to bolt the machine to the wall or place warning stickers on the machine after complaints from the business manager of the school where the machine was located.

Am Jur 2d, Products Liability §§ 289, 736-760.

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3. Products Liability § 18 (NCI4th)— soft drink vending machine falling on minor—decedent's contributory negligence—genuine issues of material fact

In a products liability case where a soft drink vending machine fell on decedent, the trial court erred in granting summary judgment for defendants where there were genuine issues of material fact as to whether decedent placed money in the machine and was attempting to retrieve the canned drink for which he had already paid, or whether he was attempting to tilt the machine to steal a drink, and reasonable people could disagree as to whether decedent exercised prudence in the events immediately prior to his death.

Am Jur 2d, Products Liability §§ 924-750.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 ALR4th 538.

4. Products Liability § 28 (NCI4th)— soft drink vending machine falling on decedent—gross negligence of manufacturer—sufficiency of evidence

In a products liability case where a soft drink vending machine fell on decedent, plaintiff presented evidence sufficient to withstand defendants' motion for summary judgment as to the issue of gross negligence where defendant manufacturer had knowledge of the potentially dangerous situation with the machine, and reasonable minds could differ as to whether defendant must be able to show that a thorough investigation concerning the existence of potential problems with the machine had occurred in order to assert that even slight care was exercised by defendant; reasonable minds could differ as to whether defendant was grossly negligent in its indifference to the safety of consumers in light of the evidence that warning labels were placed on the vending machine for trained technicians who serviced the machines but not for consumers who attempted to purchase a canned drink; inexpensive safety devices which operated to prevent canned drinks from being shaken loose were installed in defendant's new machines but not its old ones, in spite of defendant's knowledge of problems with similar machines; and reasonable minds could differ on the issue of gross negligence as to defendant owner

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of the machine where defendant had knowledge of the safety campaign of another drink vending machine manufacturer and knowledge through its employee that this particular machine was generating complaints of money loss.

Am Jur 2d, Products Liability §§ 289, 736-760.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials. 78 ALR2d 594.

5. Corporations § 208 (NCI4th)— one corporation as successor to another—responsibility for products liability claim—summary judgment improper

A genuine issue of material fact existed as to whether defendant Cavalier Acquisition Corporation was a successor corporation and therefore responsible for products liability claims against Cavalier Corporation, which manufactured the drink vending machine involved in this products liability case, and the trial court therefore erred in granting summary judgment for defendants on this issue.

Am Jur 2d, Corporations §§ 2862-2870.

Appeal by plaintiff from orders signed 29 January 1992 by Robert W. Kirby in Buncombe County Superior Court. Heard in the Court of Appeals 29 April 1993.

This is a products liability action. Defendant Cavalier Acquisition Corporation d/b/a Cavalier Corporation (hereinafter "Acquisition Corporation") is a Tennessee corporation which purchased the assets of Cavalier Corporation (hereinafter "Cavalier") upon Cavalier's bankruptcy in 1987. Defendant Coca-Cola Bottling Company Affiliated, Inc. (hereinafter "Bottling Company") is a Delaware corporation. Plaintiff is a North Carolina resident and the ancillary administrator of the estate of Philip N. Tilghman Jr. (hereinafter "decedent"). At the time of his death, decedent was 17 years old and a student at Christ School. Plaintiff appeals from 29 January 1992 orders granting summary judgment in favor of each defendant.

The pertinent facts are as follows: decedent died on 11 November 1988 shortly after a soft drink vending machine at Christ School fell on him. The vending machine was manufactured by Cavalier in March 1986. In April 1986, Cavalier sold this vending machine

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to Bottling Company in Asheville. Bottling Company delivered and placed the vending machine in operation at Christ School shortly thereafter. On the date of decedent's death (11 November 1988), the vending machine was located in an unsupervised room next to the school's activity center, known as the "'C' Club."

The parties submitted conflicting evidence regarding the events which occurred immediately prior to decedent's death. For example, the affidavit of Christopher Ramm provided:

On November 11, 1988, I was a sophomore at the Christ School in Arden, North Carolina. That evening Philip Tilghman, Jr. [decedent], Griffin Keel, Jason Austin (from Wilmington) and I were on our way to play four-man volleyball in the school gymnasium. The "C" Club was on our way. We went by the "C" Club so that Phil could get a Coke. As we came into the "C" Club, Phil said that he was going to get some change. I stopped to talk to Dr. Burke, a former teacher, and Phil went elsewhere. After I had talked to Dr. Burke for some time, Jason Gibson joined us. It was very noisy in the "C" Club. We had recently had a pep rally and the biggest football game of the year was the next day. About 5 to 10 minutes after we entered the "C" Club, and while I was still talking to Dr. Burke, I heard a terrible crash, ran into the drink room off to the side of the "C" Club, and observed the Coke machine on top of Phil. Several of us threw the machine off him, and I stayed with him until the paramedics came.

Jason Gibson and Jay Morgan, who were also students at Christ School, had told me before this incident that they had shaken or tipped the Coke machine that fell on Phil to get a drink out of it. I have never heard of Phil doing this. I myself never did it. It was widely rumored that students would shake or tilt this machine to get it to yield a drink, half dozen or so times a week for about a year before Phil's death. This machine took my money quite a few times without giving me a drink. I believe that I lost at least several dollars to it in this fashion, prior to Phil's death. It was widely known that there was a considerable chance of this machine taking your money without giving you a drink.

The affidavit of Jason Austin, another student, tends to show that decedent deposited coins in the vending machine:

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On November 11, 1988, I was a student at the Christ School. . . . That evening I went to the Christ School "C" Club with Phil Tilghman. As we entered Phil asked me and Chris Ramm and someone else for change for a dollar. None of us had any change. I went over and watched the TV and Phil went and talked to some boys playing pool. A little while later Phil went into the room off to the side of the "C" Club where the drink and snack machines are located. I heard him dropping coins into a machine. They went "clink," "clink." Usually you then hear a slamming noise, as the drink comes out. I did not hear any slamming noise, but I heard Phil getting mad, and could hear him making a sound as if he was pushing down the coin return lever. I then left the "C" Club and returned to my dormitory room.

On the other hand, Jay Morgan, another student, testified that he did not observe decedent put change in the machine. Jay Morgan further testified that decedent said "[h]elp me get a Coke" and testified that he helped decedent "to tilt the Coke machine." Jay Morgan also testified that after they shook the machine, "[t]he Coke fell," decedent said "thanks," and he (Jay Morgan) walked away. Thereafter, the machine fell upon decedent. Jason Gibson, another student, testified that "[h]e [decedent] said, 'Would you all help me tip this machine?' I don't remember him saying anything about he lost money or nothing. He could have, but I just don't remember." Jason Gibson refused to help decedent tip the machine. The affidavit of Peter Conway, the Headmaster of Christ School, provided that upon arrival at the scene that evening "I found Philip Tilghman, Jr. lying on the floor, near death. I remained with him until an ambulance arrived, and rode with him in the ambulance to the hospital. During this ride I noticed that he had a dollar bill clutched in his hand."

On 9 November 1990, plaintiff filed a complaint against defendants seeking recovery based upon negligence, breach of implied warranty, and strict liability. Plaintiff alleges *inter alia* that the vending machine was defective because: 1) it was unstable (having a top-heavy design) and did not have a warning device or label alerting the consumer that the machine would fall over when tilted; 2) it did not have a device to prevent drink cans from falling out when the machine was tilted, and; 3) it did not have brackets to anchor it to the ground or wall or a permanent fixture to prevent tilting. Plaintiff further alleges that because the machine would

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dispense canned drinks without payment upon being tilted, the next customer who placed coins in the machine would not receive a canned drink. Plaintiff alleges that defendants negligently and wantonly failed to provide these safety devices, with knowledge that it was possible to steal drinks by tilting the machine and with knowledge that many individuals had been killed or seriously injured by tilting soft drink vending machines.

Cavalier experienced serious financial trouble and was placed into involuntary bankruptcy by its creditors in July 1987, approximately sixteen months before decedent's death. Plaintiff claims that defendant Acquisition Corporation was formed for the sole purpose of acquiring Cavalier and argues that defendant Acquisition Corporation was not even formed until the sale of Cavalier was agreed upon. Norman Sarkisan, currently chief executive officer and chairman of the board of defendant Cavalier Acquisition Corporation d/b/a Cavalier Corporation and the sole stockholder of its parent corporation The Beacon Group, Inc., submitted an affidavit stating that "[o]n August 17, 1987 Cavalier Acquisition Corporation was created as an affiliate of The Beacon Group, Inc., and The Beacon Group assigned its rights to purchase the assets of the Debtor [Cavalier] to Cavalier Acquisition Corporation" and on that same date defendant Acquisition Corporation "executed a Memorandum of Sale with the Debtor evidencing its agreement to purchase the assets of the Debtor." (Following the purchase, Mr. Sarkisan was chief executive officer and president of Acquisition Corporation and Doyle Camp was its chief engineer. Mr. Camp also had served as the chief engineer of Cavalier prior to its bankruptcy. Sometime after 1989, Mr. Camp was promoted to president.) Defendant Acquisition Corporation contends *inter alia* that it has no liability because the vending machine was manufactured and sold prior to its corporate existence. Thomas Kale, a Tennessee attorney, submitted an affidavit which stated that he had represented Cavalier throughout the bankruptcy proceedings and that "[t]o the best of my recollection, at the time it went into bankruptcy Cavalier had a claims made liability insurance policy for product liability claims. The renewal premium on this policy came due within a few months after Cavalier went into bankruptcy and the policy was not renewed." Defendant Bottling Company also denied liability.

On 29 January 1992, the trial court granted summary judgment for defendants. Plaintiff appeals.

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George Daly, P.A., by George Daly, for plaintiff-appellant.

Roberts Stevens & Cogburn, P.A., by Frank P. Graham and Vernon S. Pulliam, for defendant-appellee Coca-Cola Bottling Company Affiliated, Inc.

Ball Barden Contrivo & Lewis, P.A., by Frank J. Contrivo, for defendant-appellee Cavalier Acquisition Corporation, d/b/a Cavalier Corporation.

EAGLES, Judge.

Plaintiff brings forward two assignments of error. After a careful examination of the briefs, transcript, and record, we reverse the trial court's entry of summary judgment for defendants and remand for trial.

I.

Regarding G.S. 1A-1, Rule 56, our Supreme Court has stated:

The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). As this Court remarked in *Koontz*, "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518, 186 S.E.2d at 901. All inferences are to be drawn against the moving party and in favor of the opposing party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379; *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897.

Branks v. Kern, 320 N.C. 621, 623-24, 359 S.E.2d 780, 782 (1987). Furthermore, it is well established that

certain claims or defenses are not well suited to summary judgment. For example, summary judgment is rarely appropriate in a negligence case. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). This is because the determination of essential elements of these claims or defenses to these claims are within the peculiar expertise of the fact finders. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419

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(1979); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2729 (2d ed. 1973). Similarly, contributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible. *City of Thomasville*, 300 N.C. at 658, 268 S.E.2d at 195-196; *Cowan v. Laughridge Const. Co.*, 57 N.C. App. 321, 326, 291 S.E.2d 287, 290 (1982). “[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.” W. Prosser, *Handbook of the Law of Torts* § 45, at 290 (4th ed. 1971); see *Williams v. Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979).

Smith v. Selco Products, Inc., 96 N.C. App. 151, 155-56, 385 S.E.2d 173, 175 (1989), *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990). Here, reasonable persons could differ as to whether decedent exercised prudence in the events immediately prior to his death. Because the evidence could support a finding that defendants’ negligence was the proximate cause of decedent’s death, we conclude that the trial court erred in granting summary judgment for defendants.

II.

Plaintiff argues that “[t]here are genuine issues of material fact, precluding summary judgment, as to: 1) whether defendants were negligent in the design, servicing, and failure to give notice of danger of the vending machine which fell on Phil Tilghman [decedent]; 2) whether he was contributorily negligent; and 3) whether defendants were grossly negligent, thus making irrelevant plaintiff’s contributory negligence, if any.” We agree and reverse the trial court’s entry of summary judgment for defendants.

Plaintiff’s action against defendants is a products liability action since it has been “brought for or on account of . . . death . . . [allegedly] 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 a product, namely, the Cavalier vending machine. G.S. 99B-1(3). Here, plaintiff’s products liability claim

is based on two separate theories, negligence and breach of warranties. See *Morrison v. Sears, Roebuck & Co.*, 319 N.C.

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298, 303, 354 S.E.2d 495, 498 (1987) (action for breach of implied warranty of merchantability is products liability action where action is for injury to person resulting from sale of product); *Wilson Bros. v. Mobil Oil*, 63 N.C. App. 334, 341, 305 S.E.2d 40, 45, *disc. rev. denied*, 309 N.C. 634, 308 S.E.2d 718 (1983) (products liability actions determined by principles of negligence and breach of warranty); C. Daye & M. Morris, North Carolina Law of Torts §§ 26.10, 26.30 (1991) (because Products Liability Act not source of liability, liability determined by rules of negligence, breach of warranty, or other theory of recovery).

. . . .

As with other negligence actions, the essential elements of a products liability action based upon negligence are (1) duty, (2) breach, (3) causation, and (4) damages. *McCullum v. Grove Mfg. Co.*, 58 N.C. App. 283, 286, 293 S.E.2d 632, 635 (1982), *aff'd per curiam*, 307 N.C. 695, 300 S.E.2d 374 (1983).

Crews v. W. A. Brown & Son, 106 N.C. App. 324, 329, 416 S.E.2d 924, 928 (1992). *See Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 527, 430 S.E.2d 476, 482 (1993) ("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"); *Stiles v. Chloride, Inc.*, 668 F.Supp. 505 (W.D.N.C. 1987), *aff'd*, 856 F.2d 187 (4th Cir. 1988). In her assignment of error, plaintiff brings forward only a negligence theory of products liability.

A. Defendants' Negligence

1. Defendant Acquisition Corporation

[1] It is well established that "[a] manufacturer must properly inform users of a product's hazards, uses, and misuses or be liable for injuries resulting therefrom under some circumstances." *Smith*, 96 N.C. App. at 156, 385 S.E.2d at 173 (citation omitted). Additionally, a manufacturer must inform itself about what safety designs and methods are available in its industry and is under a duty to make reasonable tests and inspections to discover any latent hazards. *Id.*; *Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E.2d 651, *disc. review denied*, 300 N.C. 195, 269 S.E.2d 622 (1980); *Jenkins v. Helgren*, 26 N.C. App. 653, 217 S.E.2d 201 (1975). Plaintiff presented the testimony of Lindley Manning, a registered professional mechanical engineer and a retired

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associate professor of mechanical engineering, who testified that the vending machine had latent hazards arising from its

instability—in that it can be pushed over so easily is probably the largest of the defects . . .

. . . .

. . . Other defects, of course the vending of a free product and the subsequent ability to buy an empty space are really things that entrap people into the rocking of the machine to achieve their goal and there is this latent defect of instability that surprises them and injures or kills them.

Q: Let me ask you about that. What is latent about the instability?

A: It isn't obvious to the layman. The first time I pushed on one of these, I thought there is a problem here. When I was first called about the first case I was in, I was a little skeptical, but I never tried to rock one of these big machines . . .

Q: You don't deny that grabbing ahold [sic] of the machine and pulling it either anywhere from 800 to 1200 to 1400 pounds—I mean that is a lot of weight, isn't it?

A: Exactly. It will kill you, and it has in this case and in many others.

Q: And what's latent about the fact that the machine weighs a lot?

A: You can't necessarily see it nor do you think it, and of course the size of it, it looks like a big stable thing, and it isn't. When I found how easy it was to rock them by pushing on it, I was surprised because I hadn't realized the internal configuration and the weight distribution, but even looking at it is not enough to tell.

Because the alleged defect in the vending machine “is hidden and not apparent, the alleged defect is properly classified as a latent one.” *Crews v. W.A. Brown & Son, Inc.*, 106 N.C. App. 324, 329, 416 S.E.2d 924, 928 (1992) (citing *Sutton v. Major Prods. Co.*, 91 N.C. App. 610, 614, 372 S.E.2d 897, 899 (1988)).

Furthermore, evidence in the record indicates that defendants knew of the possible misuse of the machines, knew of the dangers

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arising from that misuse, and failed to provide warnings to the users of its product. The existence of several genuine issues of material fact precludes summary judgment. For example, in 1987 Mr. Sarkisan received a letter dated 1 September 1987 from the chief executive officer of The Vendo Company (hereinafter "Vendo"), a competitor in the industry, describing problems with its (Vendo's) vending machines. The Vendo letter stated that "[r]ecently, there have been several accidents where venders have been tipped over, causing serious personal injury or even death." Vendo's machines were the subject of an ongoing investigation by the United States Consumer Product Safety Commission. The record contains evidence that the Cavalier machine which fell upon decedent had the same generic mechanism as the Vendo machine, which, as described in the letter, dispensed a drink when tilted.

Enclosed with the Vendo letter was a sample "warning label decal" which warned consumers of the problem. Regarding Vendo's safety efforts, the letter stated that "we will promptly send you as many warning label decals as you need. We are also offering at our cost, safety kits to secure the vender In addition, starting in September The Vendo Company will be enclosing in every vender's flavor label package the warning label decal and safety bulletin." In *Fowler v. General Electric Co.*, 40 N.C. App. 301, 307, 252 S.E.2d 862, 866 (1979), this Court stated that "[t]he general function of warnings and instructions on use of the product is to supply information to individual consumers that is better provided by the manufacturer than obtained by independent sources. A warning is needed when consumers can take steps on their own behalf when they have notice that possible perils are associated with product use. The duty to warn applies to . . . latent dangers . . ." (citation omitted). Regarding these actions by Vendo, Mr. Sarkisan testified as follows:

A: I knew that a major manufacturer of vending machines called Vendo, which is located in California, was having a substantial problem with their machine.

Q: Tell me what else you knew about that whole matter.

A: We were of the judgment that they, Vendo was manufacturing a defective machine, and that the people found out about it and realized that they might, if they shook the thing hard enough, it would give free product out of it. Essentially that's what I knew about it.

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I also knew that Vendo was attempting to bring all of the other manufacturers into the process by claiming that all vending machines potentially are dangerous. We took a contrary position, and that's about it.

Furthermore, Mr. Sarkisan testified that "we did have a discussion about warning labels, and we were of the opinion that our machines were manufactured safe and did not require warning labels." Evidence in the record also reflects that Acquisition Corporation had warning labels on the Cavalier vending machines "in regard to electrical shock hazards and leveling machines, how you set it up and the do's the don'ts of setting the machine up" (quoting Mr. Camp) for technical personnel who installed the machines. However, the machines displayed no warning labels for consumers who, having inserted money in the machine in anticipation of receiving a canned drink in return, might choose to rock or tilt the machine to cause it to yield the desired canned drink for which payment had been properly made.

Additionally, plaintiff presented evidence regarding the existence of safety devices which were not placed on the Cavalier machine at issue. Mr. Camp conceded that "one of the things you look for in designing a soft drink vending machine [is] the propensity of children to want to get products out of it without putting the coins in." He further testified that "[w]e have made some kits through the years that bolts [sic] machines to the floor, bolts [sic] machines to the wall." Mr. Sarkisan also testified that "we had a device in new Cavalier's equipment that caused the machine to be fail-safe, you could not shake a product and cannot shake a product loose." In response to plaintiff's requests for admissions, defendant Acquisition Corporation admitted that "Cavalier Acquisition Corporation never incorporated into any soft drink vending machine any device to prevent tipping prior to August 1990." Additionally, there was evidence in the record that even before decedent's death in November 1988 Cavalier had developed a device, known as a "product retainer" or an "anti-rob" mechanism, designed to prevent the dispensing of a product upon the tipping of the machine. The devices cost 15 to 20 cents each. These devices were not placed in the Cavalier machine at issue. Viewed in the light most favorable to plaintiff as non-movant, reasonable minds could differ as to the adequacy of defendant Acquisition Corporation's actions in evaluating the need for the use of these safety devices or for the implementation of safety measures similar to those of

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Vendo, the manufacturer of a similar product, the problems of which defendant Acquisition Corporation had knowledge.

2. *Defendant Bottling Company*

[2] Plaintiff also presented evidence of defendant Bottling Company's negligence. Vendo's 1 September 1987 letter was sent to each of Vendo's customers, and defendant Bottling Company was a Vendo customer which had purchased several hundred vending machines from Vendo. Defendant Bottling Company concedes that at least four or five of these machines were "triple-depth" models similar to the Cavalier model at issue here. Ron Fisher, defendant Bottling Company's operations manager and formerly its service department manager, stated that the Cavalier machine had the "same generic mechanism" as the Vendo machine which dispensed a drink when tilted. Defendant Bottling Company presented the testimony of several officers and employees who denied knowledge of the Vendo letter and safety campaign. This conflict in the evidence presents a genuine issue of material fact.

Further, Garrett Barnwell, defendant Bottling Company's service technician for the Cavalier machine at issue testified that he had received complaints from the school's business manager about student complaints regarding the machine's taking money without dispensing drinks. He testified that upon his investigation he discovered that the machine was working well mechanically. He stated that he told the business manager that given that the machine was working well mechanically, the problem was that people "were tilting the machine and getting free drinks" and suggested that the solution was "to either bolt the machine to the wall or put stickers on it, but I didn't have any stickers at the time." However, he testified that he did not report these conclusions or the problem to anyone at defendant Bottling Company.

Given all of this evidence, we conclude that a genuine issue of material fact exists regarding the issue of defendant Bottling Company's negligence.

B. *Decedent's Contributory Negligence*

[3] Defendants argue that G.S. 99B-4(3) supports the trial court's entry of summary judgment because "plaintiff's own expert testified that the specific vending machine at issue in this case was working properly, that it had been set up properly by the defendants without alteration in any way, and that it was close to inconceivable that

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the machine could have fallen without some deliberate voluntary act to tip the machine.” G.S. 99B-4 provides:

No manufacturer or seller shall be held liable in any product liability action if:

. . . .

(3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

On this record, we cannot conclude as a matter of law that decedent failed to exercise reasonable care under the circumstances. Several students, contemporaries of decedent, testified that it was well known that if the Cavalier machine at issue was tilted, a canned drink would be dispensed. *See Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 800 (1987) (stating that evidence need only show that plaintiff acted reasonably under the circumstances, not that he “chose the best or wisest alternative”). Plaintiff presented evidence that decedent was attempting to retrieve the canned drink for which he had already paid. Jason Austin, a student who was present at the activity center, stated that he heard decedent’s coins drop into the vending machine. Additionally, plaintiff presented an affidavit from another student detailing the decedent’s honesty, which, when viewed in the light most favorable to plaintiff, is indicative of the likelihood that the decedent actually put money in the vending machine to pay for the canned drink and is supportive of Jason Austin’s statement.

There was contradictory evidence as to whether decedent placed money in the machine. Defendants presented the testimony of another student who stated that the decedent did not put money in the vending machine and that the decedent asked for help in tipping the vending machine: the statements of two other students tend to corroborate this testimony. However, when viewed in the light most favorable to plaintiff as non-movant (as is required in ruling on a motion for summary judgment), the testimony of at least one, if not all, of these students could be subject to impeachment at trial. For example, in his deposition Jason Gibson was asked to comment on his previous statement given in the days following the accident and testified as follows:

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Q: Is that [Jason Gibson's prior statement] accurate?

A [Jason Gibson]: No.

Q: What's inaccurate about that?

A: The part leading up to it: "I was watching T.V." That was accurate, and when Dr. Burke went and called me out.

Q: Everything else is inaccurate?

A: See, I told you, for a long time, I tried to figure out what really happened. *And I was thinking that I was going to get charged for manslaughter.* My mind was so messed up when I wrote these things.

Q: So, if Mr. Peake was—testified, that this is what you said, would that be correct, or incorrect?

MR. FERGUSON: Objection

A: If he testified—if he testified that I—that I said that, sure. I don't remember him coming, but he probably did. But my memory's bad. But if he said that was an accurate description of what happened, no. It's not.

Q: But if he was to say that's what you said—

A: Yeah.

Q: —that would be correct?

A: Yes, sir.

(Emphasis added.) Additionally, Jay Morgan testified that "There was [sic] three of us, me, Jason [Gibson], and [Roscoe] Keel. You know, we talked before that happened, and we hadn't signed that or anything, so it was like a collaboration before I talked to the police officer, so it was like a collaboration of what all three of us saw and heard." Viewed in the light most favorable to plaintiff as non-movant, Jason Gibson's admitted fear of a manslaughter charge, as well as his faded recollection, subjects his testimony to possible impeachment. Similarly, the pre-interview collaboration described by Jay Morgan also subjects the testimony of Jay Morgan, Jason Gibson, and Roscoe Keel to possible impeachment. Even assuming *arguendo* that these statements were not subject to impeachment, the conflicts in the evidence regarding the events

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just prior to the decedent's death present genuine issues of material fact which must be resolved by a jury.

Here, when the evidence tending to show that decedent placed coins in the machine is viewed in the light most favorable to plaintiff, we conclude that reasonable people could disagree as to whether decedent exercised prudence in the events immediately thereafter. *See Branks v. Kern*, 83 N.C. App. 32, 36, 348 S.E.2d 815, 818 (1986), *rev'd on other grounds*, 320 N.C. 621, 359 S.E.2d 780 (1987) ("Issues of contributory negligence, like those of ordinary negligence, are rarely appropriate for summary judgment. Only where plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted"); *Taylor*, 320 N.C. at 734, 360 S.E.2d at 800 (evidence need only show that plaintiff acted reasonably under the circumstances, not that plaintiff "chose the best or wisest alternative"). *Compare Oden v. Pepsi Cola Bottling Company of Decatur, Inc. & The Vendo Company*, --- Ala. ---, 1993 W.L. 179428 (No. 1910502, No. 1910503, May 28, 1993) (affirming entry of summary judgment against plaintiff-administrator where it was undisputed that decedent was attempting to steal a soft drink from the vending machine; interpreting Alabama case law as barring "any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude" and noting public policy grounds in support thereof). Because the evidence here can support a finding that defendants' negligence was the proximate cause of decedent's death, we conclude that the trial court erred in granting summary judgment in defendants' favor.

C. Defendants' Gross Negligence

[4] Plaintiff argues that *assuming arguendo* decedent was "contributorily negligent as a matter of law, summary judgment is still not appropriate, because there is an issue of fact as to whether defendants were grossly negligent." As noted *supra*, on this record we cannot conclude as a matter of law that decedent was contributorily negligent. Additionally, we conclude that there is a genuine issue of material fact as to whether defendants' conduct was grossly negligent.

Recently, in *Cowan v. Brian Center Management Corp.*, 109 N.C. App. 443, 448-49, 428 S.E.2d 263, 266 (1993), this Court defined gross negligence as follows:

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[G]ross negligence is "something less than willful and wanton conduct," *Cole [v. Duke Power Co.]*, 81 N.C. App. [213] at 218, 344 S.E.2d [130] at 133 [*disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 462 (1986)], and includes "the absence of even slight care," *Beck [v. Carolina Power & Light Co.]*, 57 N.C. App. [373] at 384, 291 S.E.2d [897] at 904 [*aff'd per curiam*, 307 N.C. 267, 297 S.E.2d 397 (1982)], "indifference to the rights and welfare of others," *id.*, and "negligence of an aggravated character." *Cole*, 81 N.C. App. at 219, 344 S.E.2d at 133; *Henderson [v. LeBauer]*, 101 N.C. App. [255] at 262, 399 S.E.2d [142] at 146 [*disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991)].

In her brief, plaintiff argues that a jury could find defendants grossly negligent through their "wanton indifference to a known product defect" in that

[i]t is reasonable for a jury to find that defendants' failure to correct or issue any warning about the deceptively dangerous drink machines exhibited reckless and wanton indifference to Phil Tilghman [decedent]. This is especially true in view of the defendants' knowledge that shaking and tilting of the machine was commonplace in general and at Christ School in particular, and that such shaking and tilting could result in injury unless precautions were taken. This problem was well known in the industry. Cavalier had designed a safety device to remedy the problem, but then failed to fit or retrofit the machine involved here. Coke had knowledge of the problem in general and knowledge in particular through Garrett Barnwell.

Viewed in the light most favorable to plaintiff as non-movant, plaintiff has presented evidence sufficient to withstand defendants' motion for summary judgment as to the issue of gross negligence. For example, when asked about Acquisition Corporation's response to Vendo's safety campaign (which occurred well before decedent's death) for machines that were substantially similar to its (Acquisition Corporation's) own, Mr. Sarkisan merely stated that "We took a contrary position, and that's about it." Merely taking a "contrary position" in no way demonstrates that Acquisition Corporation exhibited reasonable care in light of the alleged potentially dangerous condition of which Acquisition Corporation had knowledge. (In addition to the documents regarding the Vendo safety campaign, plaintiff presented numerous articles in industry trade journals and print media describing various accidents involving falling vending

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machines). Mr. Sarkisan and Mr. Camp both admitted that they had knowledge of incidents in which persons were injured by falling soft drink machines. There is no indication of any research, investigations, reports, or any other type of documented studies showing that Acquisition Corporation at least investigated the potential existence of problems with its own machines at that time. In view of evidence that Cavalier's machines were substantially similar to those of Vendo, which prior to decedent's death was under investigation by the Consumer Product Safety Commission for problems involving the stability of its machines, we conclude that reasonable minds could differ as to whether Acquisition Corporation must be able to show that a thorough investigation had occurred in order to assert that "even slight care," *Beck*, 57 N.C. App. at 384, 291 S.E.2d at 904, was exercised by Acquisition Corporation.

Additionally, labels warning of electrical hazards were placed on the machine for *trained technicians* who serviced these machines, yet no labels existed for consumers to warn of arguably more hidden and deceptive hazards, the machine's top-heavy design and weight. We conclude that reasonable minds could differ as to whether Acquisition Corporation was grossly negligent in its indifference to the safety of consumers in light of the evidence that warning labels were placed on the machine for trained technicians who serviced the machines but not for consumers who attempted to purchase a canned drink. Further, plaintiff presented evidence that inexpensive safety devices which operated to prevent canned drinks from being shaken loose were installed in Acquisition Corporation's *new* machines, but were not installed in the old machines like the one at issue here, despite Acquisition Corporation's knowledge of the problems with Vendo's machines. Acquisition Corporation's chief engineer, Mr. Camp, even conceded that "one of the things you look for in designing a soft drink vending machine [is] the propensity of children to want to get products out of it without putting the coins in."

Similarly, we conclude that reasonable minds could differ on the issue of gross negligence as to defendant Bottling Company. As a customer of Vendo, Bottling Company also had knowledge of the Vendo safety campaign. Bottling Company concedes that at Christ School there were "complaints of money loss," which tends to show that the machine was dispensing free canned drinks, depriving a subsequent purchaser of a canned drink. As noted

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supra, Mr. Barnwell suspected, based upon his inspections of the machine which killed decedent, that the machine was dispensing canned drinks when tilted by the students at Christ School. Mr. Barnwell testified that during the weeks prior to decedent's death, he (Mr. Barnwell) was out of warning labels and that it was his impression that Christ School was going to take care of the problem by creating its own labels or bolting the machine to the wall. Defendant Bottling Company owned the machine and its lease agreement with Christ School provided that Bottling Company "shall have the right at all times during business hours to enter dealer's premises for the purpose of . . . maintaining, repairing or removing any beverage equipment owned by [defendant]." Mr. Barnwell did not report his suspicions (regarding the tilting of the machine or the reasons for the money loss) to his superiors. The record is devoid of any evidence indicating that Mr. Barnwell violated company procedure by keeping this information to himself. Additionally, Bottling Company conceded that it had no "safety or loss prevention officer or department" prior to decedent's death. When all of this evidence is viewed in the light most favorable to plaintiff as non-movant, we conclude that a genuine issue of material fact exists as to the issue of defendant Bottling Company's gross negligence.

Given the evidence presented in this record, we conclude that defendants have failed to meet their burden of showing that no genuine issue of material fact exists as to the issue of gross negligence. *Cf. Akzona, Inc. v. Southern Railway Co.*, 314 N.C. 488, 334 S.E.2d 759 (1985) (reversing directed verdict for defendants on gross negligence issue). Accordingly, we remand for trial. *See Cowan v. Brian Center Management Corp.*, 109 N.C. App. at 449-51, 428 S.E.2d at 266-67; *Berrier v. Thrift*, 107 N.C. App. 356, 360, 420 S.E.2d 206, 208 (1992), *disc. rev. denied*, 333 N.C. 254, 424 S.E.2d 918 (1993).

III.

[5] Plaintiff contends that "[t]here are genuine issues of material fact, precluding summary judgment, as to whether Cavalier Acquisition is responsible for the products liability claims of Cavalier." We agree and remand for trial on this issue.

In *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988), this Court stated:

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A corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities. See *McAlister v. Express Co.*, 179 N.C. 556, 103 S.E. 129 (1920); *Robinson*, North Carolina Corporation Law and Practice, section 25-6 (1983); 15 *Fletcher Cyc Corp*, section 7122 (perm. ed. 1983). Exceptions exist where: (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985); *Robinson, supra*; 15 *Fletcher Cyc Corp, supra*. Some cases cite inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value, as a separate exception, see *Kemos, Inc. v. Bader*, 545 F.2d 913 (5th Cir. 1977); *Cyr v. B. Offen & Co. Inc.*, 501 F.2d 1145 (1st Cir. 1974), although those are generally considered only as additional factors in determining whether the transaction was for the purpose of avoiding creditors' claims, *Bud Antle, Inc., supra*, or whether the new corporation is a mere continuation of the old one. *Robinson, supra*. Our case law is less recent but has adopted essentially the same exceptions. See *McAlister v. Express Co., supra* at 560, 561, 565, 103 S.E. at 130-131, 133.

One of the *Budd Tire* exceptions exists where it is shown that "the transfer of assets was done for the purpose of defrauding the corporation's creditors." *Budd Tire*, 90 N.C. App. at 687, 370 S.E.2d at 269. "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." *Statesville Stained Glass v. T.E. Lane Construction & Supply*, 110 N.C. App. 592, 430 S.E.2d 437, 441 (1993) (*citing Budd Tire*, 90 N.C. App. at 687, 370 S.E.2d at 269) (emphasis in original). Here, plaintiff has made this minimum showing. In its attempt to establish that defendant Acquisition Corporation is not a successor corporation to the dissolved corporation (Cavalier), defendant Acquisition Corporation relied on the affidavits of Mr.

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Sarkisan and Mr. Kale *inter alia*. We conclude that these affidavits are insufficient to establish that Acquisition Corporation is not a successor corporation of Cavalier for summary judgment purposes. See *Heather Hills Home Owners v. Carolina Cust. Dev.*, 100 N.C. App. 263, 266, 395 S.E.2d 154, 155, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 327 (1990). Drawing all inferences against defendant Acquisition Corporation as movant and in favor of plaintiff as non-movant, we conclude that defendant Acquisition Corporation has failed to show that no genuine issue of material fact exists. Accordingly, we remand for trial as to this issue. Although we rest our decision here on plaintiff's forecast of evidence regarding one of the *Budd Tire* exceptions, we do not intend to foreclose plaintiff's right upon retrial to try to prove defendant Acquisition Corporation's liability by the other *Budd Tire* exceptions or by any other theory at trial. See *Budd Tire*, 90 N.C. App. at 687, 370 S.E.2d at 269.

IV.

In sum, we conclude that plaintiff's evidence raises genuine issues of material fact which a jury must determine. Since genuine issues of material fact exist regarding plaintiff's claims, we conclude that the trial court erred by granting summary judgment for defendants. For the reasons stated, we reverse the entry of summary judgment for defendants and remand the cause for trial as to all issues.

Reversed and remanded.

Judges MARTIN and JOHN concur.

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[111 N.C. App. 541 (1993)]

HOMER GENE WILKINS, PLAINTIFF-APPELLEE v. SHIRLEY EVANS WILKINS,
DEFENDANT-APPELLANT

No. 9218DC419

(Filed 17 August 1993)

1. Divorce and Separation § 142 (NCI4th) — equitable distribution — value of retirement plans — consideration of hypothetical tax consequences — error

In determining the present value of plaintiff's retirement plans, the trial court erred in relying on hypothetical tax consequences arising from speculative early withdrawals, most of which defendant could not have made at the date of separation under the terms of the retirement plans, since the Equitable Distribution Act requires that "marital property shall be valued as of the date of the separation of the parties"; the expert at trial testified that the "before tax" value of the pension plans was \$157,242.81 as of the date of separation; and the trial court therefore erred in concluding that the net present value of the pensions as of the date of separation was \$93,084.60.

Am Jur 2d, Divorce and Separation §§ 948, 949.**2. Divorce and Separation § 154 (NCI4th) — equitable distribution — pension plans — consideration of hypothetical tax consequence as distributional factor — error**

The trial court in an equitable distribution action erred in considering hypothetical tax consequences with regard to plaintiff's pension plans as a distributive factor in favor of plaintiff if the retirement plans' net present value as of the date of separation could not be discounted by the amount of the tax consequences, since to predict variables, such as the government's tax structure, plaintiff's financial condition, the date of plaintiff's early withdrawals, if any, and the date of plaintiff's early retirement, would require the court to engage in impermissible speculation.

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

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3. Divorce and Separation § 149 (NCI4th)— equitable distribution—consideration of alimony order improper

The trial court erred by considering an ancillary order for alimony *pendente lite* in rendering an equitable distribution award.

Am Jur 2d, Divorce and Separation § 925.

4. Divorce and Separation § 161 (NCI4th)— equitable distribution—rental value of marital residence—consideration of spouse's share—effect of alimony order

The trial court could properly consider defendant's share of the rental value of the marital residence as a distributional factor pursuant to N.C.G.S. § 50-20(c) only if use of the residence was not awarded to defendant as part of the ancillary order for alimony *pendente lite*.

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

Appeal by defendant from judgment and order signed 12 December 1991 and order signed 3 February 1992 by Judge Benjamin D. Haines in Guilford County District Court. Heard in the Court of Appeals 31 March 1993.

The parties were married on 9 February 1958. The parties separated 14 January 1989. A judgment of divorce was entered 4 April 1990. The equitable distribution judgment was entered 12 December 1991. At this time, plaintiff and defendant were each 51 years of age.

In the 12 December 1991 "Judgment and Order of Equitable Distribution," the trial court noted that in a pre-trial order the parties had stipulated to "all issues of classification" regarding various items of property (attached as Schedule A to the order) and that the net present value of those items amounted to \$17,092.42 for plaintiff and \$20,388.14 for defendant. Additionally, the parties stipulated that the net present value of the marital home was \$91,000.00. The trial court made the following findings of fact regarding plaintiff's employment benefits:

[Finding of Fact No.] 12. That at the time of the separation of the parties, the Plaintiff was entitled to certain employment benefits at his place of employment at Richardson-Vicks including the Richardson-Vicks Incentive Plan (hereinafter

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“RVIP”), the Richardson-Vicks Employee Savings Plan (hereinafter “ESP”), and the Individual Retirement Option Trust Plan (hereinafter “IROTTP”), and that by order of this Court on April 30, 1991, pursuant to Rule 706 of the North Carolina Rules of Evidence and with the consent of the parties, this Court appointed and designated Mr. Keith Hiatt, CPA of the accounting firm of Deloitte & Touche as a court designated expert witness in order to determine the net value of the above employment benefits pursuant to N.C.G.S. Section 50-20, and also to determine the tax consequences of the receipt of said benefits by the Plaintiff with cost of this court appointed expert witness to be taxed as a part of the cost of this action and to be divided equally between the Plaintiff and Defendant.

13. The above designated court appointed expert, Mr. Keith Hiatt, is a Senior Tax Manager of Deloitte & Touche, having done a significant amount of work with Retirement Plans, specifically plan distributions and the taxation of these distributions, and the Court accepts as credible his testimony on the net present value of said employment benefits as well as the tax consequences thereon.

14. That pursuant to the provisions of the above referenced three employment benefit plans, there are restrictions on when the monies can be withdrawn, particularly as follows:

A. ESP: The before tax portion can only be withdrawn upon a showing of financial hardship, or at age 59-1/2 or if the Plaintiff leaves the company. The after-tax funds can be taken out at any time but only once a year. Only 50% of the company contributions can be taken out in any one year. The Employee Stock Ownership portion (ESOP) can only be withdrawn when the Plaintiff actually leaves the company.

B. RVIP: None of this money can be withdrawn initially. The Plaintiff can take withdrawals once he retires through an annuity over his life expectancy which would stop at the time of his death. In the event that the Plaintiff took early retirement at age 55 he would get a reduced benefit from that amount.

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C. IROTP: These funds are not available until the age of 65, normal retirement age, or at an early retirement at age 55.

15. That the maximum net present value of the employment benefits including the ESP, the RVIP and IROTP as of January 14, 1989, is \$93,084.60.

16. In the event that the Plaintiff was able to withdraw the above retirement benefits at the time of the valuation date, then the total North Carolina and Federal income taxes due on the total account balance of \$157,242.81 would be \$64,158.21, leaving a net value after tax of \$93,084.60.

17. The Plaintiff is employed at Richardson-Vicks as a supervisor of a cough drop operation and has been employed there for 32 years. His current annual income is \$44,000.00. He has been offered a package to leave the company including 14 month salary and medical insurance, but he has not considered any type of termination, early retirement, or other job change. He intends to work there until he retires which would be approximately at age 62.

Regarding defendant's receipt of alimony *pendente lite* pursuant to an ancillary order, the trial court made the following findings of fact:

[Finding of Fact No.] 22. That the Plaintiff and Defendant entered into a Consent Order in an ancillary proceeding in the General Courts of Justice, Guilford County, styled "Shirley Evans Wilkins vs. Homer Gene Wilkins" 89 CVD 6646, wherein Mr. Wilkins was obligated to pay to Mrs. Wilkins the sum of \$600/month, for alimony, *pendente lite*, as well as being responsible for any reasonable and necessary uninsured medical and dental expenses. Said order also obligated Mr. Wilkins to be financially responsible for all reasonable and necessary routine maintenance and repairs of the residence of the parties provided that an equitable distribution adjustment at the time of the equitable distribution hearing would be preserved.

23. As a result of the subsequent *pendente lite* hearing, Mr. Wilkins was ordered to pay the total sum of \$1,000/month in temporary alimony, said alimony *pendente lite* hearing being held on the 11th day of January, 1991.

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24. The Defendant Shirley Evans Wilkins worked in several production line jobs up until the job she had at AMP in 1983. When Mr. Wilkins then injured his back, the Defendant Mrs. Wilkins stayed out of work for approximately 9 months to take care of Mr. Wilkins. However, there were times when Mrs. Wilkins was in bad physical condition and Mr. Wilkins took care of her.

25. After Mr. Wilkins return to work in 1983, Mrs. Wilkins' physical problems did not prevent her from returning to gainful employment. Her hearing problem never prevented her from working at AMP, and does not prevent her from now engaging in gainful work similar to what she did at AMP. Her back problems, which have been most recently treated by Dr. Steven A. Grubb at the North Carolina Spine Center, do not prevent her from returning to gainful employment. Dr. Grubb indicates, and the Court finds this documented testimony to be credible, that Mrs. Wilkins could return to light duty work and that she could lift repetitively 5-10 pounds, and occasionally up to 25 pounds provided that she had a frequent change of position. After Mr. Wilkins returned to work in 1983, Mr. Wilkins never demanded that Mrs. Wilkins go back to work and Mrs. Wilkins never chose to go back to work at that time. Mrs. Wilkins' failure to resume working was her own choice.

26. That the parties have an underground storage tank on their premises which the defendant alleges needs to be replaced for what the Defendant Mrs. Wilkins testified to be the sum of \$2,500.00, based upon one estimate from Jones Oil Company, but even though she is unemployed, the defendant Mrs. Wilkins testified that she has been too "busy" to get a second estimate, did not produce any written estimate from Jones Oil Company at this hearing and has not been told by any governmental agency or health department that this had to be done. Although the Court allowed this testimony over objection, the Defendant submitted no written documentation in the form of estimates or otherwise and the Court finds that the Defendant has not met her burden of proof on this issue.

27. Mrs. Amanda Coble, Vocational Rehabilitation [sic] who has worked in the vocational rehabilitation office in Greensboro

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for approximately 3 years, testified that she was not in the position to place Mrs. Wilkins in a job but from her doctor's assessment she can go back to some kind of formal work. The defendant Mrs. Wilkins, has been cleared for light duty work by her orthopedic specialist, Dr. Steven Grubb, which is an assessment that the vocational specialist Mrs. Coble would rely on. Ms. Coble accepts Dr. Grubb's testimony as being determinative of this.

28. Ms. Coble's own rehabilitation records and entry made on 4/25/91 indicated that Mrs. Wilkins had a problem with motivation and cooperation with Vocational Rehabilitation. Furthermore, an entry on January 25, 1991 indicated that Mrs. Wilkins had not been back to Goodwill for 9 days and that they had not heard from her at Vocational Rehabilitation and would terminate her out of evaluation. Also, on an entry of February 21, 1991, Ms. Coble's records indicated that from a conversation with Dr. Cronin, her chiropractor, it appeared that Mrs. Wilkins did not tell the truth to her chiropractor, saying that it was manual labor and Ms. Coble had to explain to the chiropractor that the work at Goodwill was not manual labor.

29. The Court also finds that contemporaneously with these events, the Defendant Mrs. Wilkins was receiving an alimony pendente lite award by Order of the Court referred to hereinabove of \$1,000/month.

In its conclusions of law, the trial court concluded that an equal distribution of marital property was not equitable:

10. Based on N.C.G.S. Section 50-20(c), the following factors herein set forth were determinative of the Court's finding an unequal division of the marital estate to be an equitable distribution:

A. The acts of the Plaintiff to maintain, preserve, develop or expand the homeplace of the parties . . .

B. The Defendant's use of the marital home for 28 months without paying the Plaintiff $\frac{1}{2}$ of the fair rental value of \$700-\$800/month.

C. That based on the Court's determination that the said present value computation should include the calculation of

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the tax consequences of the receipt of said monies by the Plaintiff, the net present value of the Plaintiff's employment benefits is no greater than the sum of \$93,084.60.

D. As an alternative Conclusion of Law, the Court finds that had the net present value not included the tax consequences, then the Court would have found that pursuant to N.C.G.S. Section 50-20(c)(11) the tax consequences of the receipt of these employment benefits by the Plaintiff should be a distributional factor in the amount of \$64,158.21.

Regarding the retirement benefits, the trial court specifically concluded that

5. That the proper method of evaluation of the plaintiff, Mr. Gene Wilkins' employment benefits pursuant to *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506, *reh. denied*, 319 N.C. 678, 356 S.E.2d 790 (1987), is the net present value approach and not the fixed percentage method since the Defendant Mrs. Wilkins will be receiving the homeplace which is of comparable value to the net present value of said employment benefits and the plaintiff must receive the net present value of these assets to fairly equalize the distribution of marital property.

6. That pursuant to N.C.G.S. Section 50-20(b)(1), the marital estate and status of the Plaintiff's employment benefits are frozen as of date of separation, *Becker v. Becker*, [88 N.C. App. 606], 364 S.E.2d 175 (1988). Pursuant to [G.S.] 50-20(b)(1)(3)(d), the Plaintiff's employment benefits should be calculated as of date of separation, and the value of the employment benefits should be done at the net value as of date of separation which should include the taxes which would be payable upon receiving the benefits, *Mishler v. Mishler*, [90 N.C. App. 72,] 367 S.E.2d 385 (1988) [, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111]. Therefore, the court finds as a Matter of Law that the net present value of said employment benefits as supported by the evidence is \$93,084.60.

Plaintiff was awarded the retirement benefits (which the trial court valued at \$93,084.60) and defendant was awarded the marital residence (valued at \$91,000.00 by the parties' stipulation in the pre-trial order). Adding to this award the value of the items stipulated to by the parties in the pre-trial order, the trial court stated that

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plaintiff received property worth \$110,177.06 and defendant received property worth \$111,388.14. Finally, the trial court concluded that

15. Based on the above division of marital property, the following distributive award should be paid by the Defendant to the Plaintiff:

A. Difference in above division of marital property	\$ 1,211.12
B. One-half of home improvement/ repairs and appraisal	\$ 4,377.90
C. One-half of fair rental value of homeplace (\$350/month)	<u>\$ 9,800.00</u>
TOTAL:	\$15,389.02

On 20 December 1991, defendant filed a motion for a new trial pursuant to G.S. 1A-1, Rule 59. On 3 February 1992, the trial court denied defendant's motion for a new trial. Defendant appeals from both the 12 December 1991 order and judgment and the 3 February 1992 order denying her motion for a new trial.

Gabriel Berry & Weston, by M. Douglas Berry, for plaintiff-appellee.

Douglas, Ravenel, Hardy, Crikfield & Moseley, by G.S. Crikfield and David W. McDonald, for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred in rendering its 12 December 1991 equitable distribution order. We agree. We reverse the trial court's 12 December 1991 equitable distribution order and accordingly remand for a new trial.

I.

First, defendant contends that "the trial court erred in reducing the nominal value of the retirement benefits." We proceed with an examination of the trial court's order.

A. *Valuation Pursuant to G.S. 50-21(b) (Date of Separation)*

[1] G.S. 50-20(b)(1) provides that "[m]arital property includes all vested pension, retirement, and other deferred compensation rights."

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Marital property must be valued as of the date of separation. G.S. 50-21(b). See G.S. 50-20(b)(3) ("vested accrued benefit" is to be "calculated as of the date of separation").

From findings of fact Nos. 12-16 and conclusions of law Nos. 6 and 10, it is apparent that the trial court relied on hypothetical tax consequences arising from speculative early withdrawals, most of which defendant could not have made at the date of separation under the terms of the retirement plans. Conclusion of law No. 10 provided:

C. That based on the Court's determination that the said present value computation should include the calculation of the tax consequences of the receipt of said monies by the Plaintiff, the net present value of the Plaintiff's employment benefits is no greater than the sum of \$93,084.60.

D. As an alternative Conclusion of Law, the Court finds that had the net present value not included the tax consequences, then the Court would have found that pursuant to N.C.G.S. Section 50-20(c)(11) the tax consequences of the receipt of these employment benefits by the Plaintiff should be a distributional factor in the amount of \$64,158.21.

Conclusion of law 10(c), *supra*, was erroneous in that the Equitable Distribution Act requires that "marital property shall be valued as of the date of the separation of the parties." G.S. 50-21(b). The expert at trial testified that the "before tax" value of the pension plans was \$157,242.81 as of the date of separation. Accordingly, the trial court erred in concluding that the net present value of the pensions as of the date of separation was \$93,084.60. See *Stiller v. Stiller*, 98 N.C. App. 80, 83, 389 S.E.2d 619, 621 (1990) (holding that trial court erred in using the "withdrawal value" to determine the respective values of the parties' vested retirement benefits). *Accord*, *Orgler v. Orgler*, 237 N.J. Super. 342, 354-55, 568 A.2d 67, 73 (App.Div. 1989); *Hovis v. Hovis*, 518 Pa. 137, 143, 541 A.2d 1378, 1380-81 (1988); *In Re Marriage of Marx*, 97 Cal.App.3d 552, 159 Cal.Rptr. 215 (1979). *Contra*, *In Re Marriage of Mulvihill*, 471 N.E.2d 10 (Ind.App. 1984).

We note the trial court's reliance on *Mishler v. Mishler*, 90 N.C. App. 72, 78, 367 S.E.2d 385, 389 (1988) in determining the value of the retirement benefits on the date of separation. We find *Mishler* to be readily distinguishable. Unlike here, in *Mishler*

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the defendant had already paid the taxes before the equitable distribution hearing was held. In *Mishler*, the defendant participated in her employer's "contribution pension plan" which was to vest in 1990. The defendant's employer dissolved its business in 1983 and a plan was adopted terminating the "contribution pension plan" in 1984. Approximately two years before the equitable distribution hearing was held, the defendant received a lump sum award according to the plan of termination and paid the appropriate taxes. Accordingly, in *Mishler* this Court held that "[t]he trial court was also correct to value the pension by subtracting from the lump sum award, the taxes which defendant paid upon receiving the benefits before the [equitable distribution] hearing was held. It would not have been equitable for defendant to have paid all of the taxes on the benefits while plaintiff received half of the proceeds." *Id.* Unlike *Mishler*, here the tax consequences considered by the trial court are merely hypothetical assertions; the funds have not been withdrawn and, of course, no taxes have been paid on the retirement benefits.

B. Consideration of Hypothetical Tax Consequences as a Distributive Factor Pursuant to G.S. 50-20(c)(11)

[2] Next, we address conclusion of law 10(d), in which the trial court stated that the estimated amount of the taxes (\$64,158.21) would be considered as a distributive factor in favor of plaintiff if the retirement plans' net present value (as of the date of separation) could not be discounted by the amount of the tax consequences. Defendant argues that the trial court's consideration of these hypothetical tax consequences as a distributive factor pursuant to G.S. 50-20(c)(11) was error. We agree.

Here, Keith Hiatt, the court appointed expert, testified as follows regarding the hypothetical tax consequences:

Q: Now, based on your computations, I believe, the gross value of the plan is what, the gross value of the total proceeds?

A: \$157,242.81.

Q: And the taxes that Mr. Wilkins would pay upon withdrawal of all those monies in 1989 was—

A: \$64,000. Well, the additional tax or the total tax?

Q: Just that tax attributable to the retirement monies.

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A: \$64,158.21.

Q: And that amount you have determined is the sum of what, \$93,000?

A: \$93,084.60 is the net—in other words, that is the amount that he would have in his pocket after tax, and he would be able to take and use.

Q: Mr. Hiatt, is it correct that pursuant to the plans and provisions of these plans, not all these monies can be withdrawn in the year 1989?

A: That's right. And even within the plans themselves, there are different provisions on when he can take the funds out. . . .

* * *

Q: How do you determine what the value of that is as of that date, in terms of that present value, to take into account the restrictions that you have just testified to?

A: You know, that posed a substantial problem for us in terms of analyzing what is the present value of an account balance that can't be withdrawn today, and can be withdrawn at various times throughout the next several years. And of course, some of those variables are dependent upon his decision as to whether early retire.

But if we assumed that he took them out at the earliest possible point, and present valued that back, we looked at the different variables on that and determined that really, the present value—in other words, taking today's dollar amounts less the tax cost—we felt that that was the most reasonable estimate, maximum value—present value—of his account balances in those different retirement plans.

* * *

I believe, based on the analyses we've looked at, that the \$93,084.60 fairly represents the maximum present value of those retirement plan balances as of that date.

Q: In your letter, the next sentence, would you read that for the record?

A: "A lower discounted amount for the present value of funds which cannot be withdrawn today is also supportable."

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Q: What do you mean by that?

A: Well, the fact that you can't get those funds today is a limiting factor. Anytime you can't get a dollar today, you have to wait a year, five years, ten years, it presupposes—I mean, you assume necessarily that dollar is not worth a dollar today. If you have to wait a year to get it, maybe it's worth eighty cents today, or sixty cents today. If you have to wait ten years, it's even worth less.

So we didn't get into the analysis of making assumptions about, well, how much should it be discounted back? That makes us assume a certain interest rate and forecast that, and I'm not in a position to do that, unless someone wants to say, "Well, let's assume that it's this discount rate for this period of time." So that's why we concluded and looked at the different variables, and concluded the \$93,000 number more fairly represented the present value of those retirement plan balances.

In support of her argument, defendant contends that this Court "recently dismissed as 'purely speculative' a similar claim of tax consequences in the absence of any claim of actual withdrawal of retirement benefits. *Smith v. Smith*, 104 N.C. App. 788, 789-90, 411 S.E.2d 197 (1991)." As in *Smith*, here plaintiff "does not argue that he was or would be forced to withdraw all or any part of the fund to comply with any distribution ordered by the court; thus, the fact of withdrawal and the possible tax consequences are purely speculative. See *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985)." *Smith* at 790, 411 S.E.2d at 198. In *Weaver*, this Court stated:

The trial court is not required to consider possible taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property. *In re Marriage of Fonstein*, 131 Cal. Rptr. 873, 552 P.2d 1169 (1976); *accord Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975). We construe Section 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders.

Weaver, 72 N.C. App. at 416, 324 S.E.2d at 920 (emphasis in original). Here, funds could be withdrawn from plaintiff's retirement plans

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only upon the occurrence of certain events, none of which had occurred on or before the date of separation or the date of the hearing, and many of which could not occur until at least several years after the date on which the judgment was entered. We conclude that to predict variables (including *inter alia* the government's tax structure, plaintiff's financial condition, the date of plaintiff's early withdrawals, if any, and the date of plaintiff's eventual retirement) that far in the future requires the trial court to engage in impermissible speculation. Accordingly, we reaffirm the holding of *Smith*, 104 N.C. App. 788, 411 S.E.2d 197, and *Weaver*, 72 N.C. App. 409, 324 S.E.2d 915, in concluding that the trial court erred in considering the hypothetical tax consequences as a distributive factor here. *Accord*, *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988); *Helland v. Helland*, 354 N.W.2d 591 (Minn.App. 1984). *Cf. Scallon v. Hooper*, 58 N.C. App. 551, 555, 293 S.E.2d 843, 845, *disc. rev. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982) (rejecting consideration of income tax consequences in awarding damages for wrongful death because *inter alia* "the amount of a future recipient's future income tax liability is too conjectural or speculative a factor"); *Cobb v. Cobb*, 107 N.C. App. 382, 386, 420 S.E.2d 212, 214 (1992) (projection of future value of timber which would not mature until the year 2007 too speculative); *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992) (noting that "evidence of 'speculation or conjecture that a detrimental change may take place sometime in the future' will not support a change in custody"); *First National Bank of Catawba County v. Edens*, 55 N.C. App. 697, 705, 286 S.E.2d 818, 823 (1982) (striking from judgment a ruling regarding trustees' possible future abuse of discretion and noting that "[j]udicial power does not extend to abstract questions but only to concrete, justiciable, and actual controversies properly before the court; each decision of law must be based on specific determinative facts"). *Contra*, *Orgler v. Orgler*, 237 N.J. Super. 342, 357, 568 A.2d 67, 74 (App. Div. 1989); *Noll v. Noll*, 55 Ohio App.3d 160, 563 N.E.2d 44 (1989); *Selchert v. Selchert*, 90 Wis.2d 1, 280 N.W.2d 293 (1979).

II.

[3] Next, defendant contends that the trial court erred by considering the ancillary order for alimony *pendente lite* in rendering the equitable distribution award. We agree.

G.S. 50-20(f) provides:

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The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

In interpreting G.S. 50-20(f), this Court has held:

The mandate could not be clearer or less equivocal. Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered . . . if alimony or child support has already been awarded, the awards must be reconsidered upon request *after* the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it.

Capps v. Capps, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) (emphasis added).

It is apparent from findings of fact Nos. 22-29 and conclusions of law Nos. 7, 10 and 15 that the trial court, in its attempt to make an equitable distribution, improperly considered the alimony *pendente lite* awarded to defendant in an ancillary proceeding. Upon remand, the equitable distribution judgment must be rendered without regard to either the order for alimony *pendente lite* or the plaintiff's compliance with that order.

III.

[4] Next, defendant contends that the trial court improperly considered as a distributional factor "the [defendant's] use of the marital home for 28 months without paying the plaintiff ½ of the fair rental value of \$700-\$800/month." The court awarded rental value of the marital residence for the post-separation period as a part of the equitable distribution proceeding. Such an award is prohibited. *Black v. Black*, 94 N.C. App. 220[, 222], 379 S.E.2d 879, 880 (1989).

Our inquiry proceeds with an examination of *Black* and the decision it relies upon, *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

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In *Black*, 94 N.C. App. at 221-22, 379 S.E.2d at 880, this Court stated that:

The sole issue presented by defendant's appeal is whether "the trial court erred in denying the application by the defendant for judgment against the plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation of the parties through the date of the hearing." . . .

In *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988), this Court held that a trial court may not award rental value of the marital residence for the post-separation period as a part of the equitable distribution proceeding. Therefore, we find that defendant's claim is without merit.

However, the holding in *Black, supra*, did not determine whether the rental value of a marital residence could be considered as a *distributional factor* pursuant to G.S. 50-20(c). In *Becker*, the decision upon which *Black* relies, this Court stated:

The trial court found that the marital residence had a rental value during the post-separation period when it was occupied by defendant. Defendant does not take issue with the value component found by the trial court, but argues that the trial court was without authority to include any such value in the marital estate. We agree with defendant. N.C. Gen. Stat. § 50-20(b)(1) provides:

(1) "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 the separation of the parties. . . .

Thus, the statute makes it clear that for the purpose of *classification* of property (as either marital or separate) the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution, *see e.g. Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986), no new property may be added to the marital estate after the date of separation.

Our decision does not mean that a trial court is foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution

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is equitable. G.S. § 50-20(c) contains provisions pertinent to this issue as follows:

(c) There shall be an equal division . . . unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

* * *

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

The evidence and findings in the present case show that during the period of separation, for about three years, defendant had the exclusive use of the marital residence, but maintained it and paid taxes and insurance on it. All of these are factors the trial court may consider on remand in making its determination as to whether an equal distribution is equitable; or, if not, what unequal but equitable distribution should be made.

Becker, 88 N.C. App. at 607-08, 364 S.E.2d at 176-77. Here, the record is unclear as to whether the ancillary order awarded defendant possession of the marital residence as part of the award of alimony *pendente lite*. The ancillary order is not included in the record on appeal. The order is mentioned in finding of fact No. 22, where the trial court stated

That the Plaintiff and Defendant entered into a Consent Order in an ancillary proceeding in the General Courts of Justice, Guilford County, styled "Shirley Evans Wilkins vs. Homer Gene Wilkins" 89 CVD 6646, wherein Mr. Wilkins was obligated to pay to Mrs. Wilkins the sum of \$600/month, for alimony, *pendente lite*, as well as being responsible for any reasonable and necessary uninsured medical and dental expenses. Said order also obligated Mr. Wilkins to be financially responsible

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for all reasonable and necessary routine maintenance and repairs of the residence of the parties provided that an equitable distribution adjustment at the time of the equitable distribution hearing would be preserved.

However, this finding of fact fails to disclose whether the ancillary order awarded defendant possession of the marital residence as part of the award of alimony *pendente lite*.

Accordingly, upon remand the trial court shall inquire as to whether the marital residence was awarded to defendant as part of the ancillary order for alimony *pendente lite*. If use of the marital residence was *not* awarded to defendant as part of the ancillary order for alimony *pendente lite*, the trial court *may* consider defendant's share of the rental value of the marital residence as a distributional factor pursuant to G.S. 50-20(c). *Becker*, 88 N.C. App. at 607-08, 364 S.E.2d at 176-77. If use of the marital residence *was* awarded to defendant as part of the ancillary order for alimony *pendente lite*, the trial court shall *not* consider the rental value of the residence as a distributional factor. G.S. 50-20(f) ("The court shall provide for an equitable distribution without regard to alimony for either party.").

IV.

Finally, defendant argues that the trial court erred when it denied her motion for a new trial. Based on the errors of law discussed *supra*, we conclude that defendant is entitled to a new trial. Accordingly, we reverse the 12 December 1991 equitable distribution order and remand for a new trial.

Reversed and remanded for a new trial.

Judges MARTIN and JOHN concur.

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[111 N.C. App. 558 (1993)]

STATE OF NORTH CAROLINA v. ROBERT EARL BROOKS

No. 924SC342

(Filed 17 August 1993)

1. Searches and Seizures § 12 (NCI3d)— officer's approach of defendant's vehicle— questions about holster— conduct amounting to investigatory stop or seizure

An SBI agent's conduct amounted to an investigatory stop or seizure where the agent and other law enforcement officers drove into the parking lot of a nightclub with a valid warrant to search the club; the agent observed defendant sitting in his car with the door open talking to a person who was standing outside the car; wearing a utility uniform, bullet proof vest marked "raid," a badge, and an SBI baseball cap, the agent walked toward the vehicle to speak with defendant; and the agent approached the vehicle, shined his flashlight in on defendant, immediately asked questions regarding an empty gun holster, and subsequently asked whether illegal drugs were present in the car.

Am Jur 2d, Searches and Seizures §§ 28, 57, 187, 190.**2. Searches and Seizures § 12 (NCI3d)— agent's approaching and detaining defendant— no reasonable suspicion of criminal activity**

An SBI agent was not entitled to approach and detain defendant for investigative purposes and his conduct in doing so was not based on a reasonable suspicion based on articulable facts and rational inferences to be drawn therefrom where the agent and other officers went to a nightclub with a valid search warrant; there was no warrant to search the exterior premises nor was there evidence that police had a reason to suspect that drug sales were taking place in the parking lot; the agent stated that he thought it suspicious that defendant was backed into the parking lot with his door open talking to a person who was standing beside the car; the agent saw nothing pass between defendant and the person standing outside the car; and the actions the agent observed were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct.

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Am Jur 2d, Searches and Seizures §§ 28, 57, 187, 190.

Judge GREENE dissenting.

Appeal by defendant from order entered 24 October 1991 by Judge Henry L. Stevens, III in Duplin County Superior Court. Heard in the Court of Appeals 1 April 1993.

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

Nora Henry Hargrove for defendant-appellant.

WYNN, Judge.

Defendant was initially indicted by a Federal Grand Jury on 11 December 1990 for Possession With Intent to Distribute Crack Cocaine in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(B) and Possession of a Firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. Section 924(c). Defendant made a Motion to Suppress Evidence. Following a hearing on the matter, the Honorable James C. Fox, United States District Court Judge for the Eastern District of North Carolina, granted defendant's motion, finding that the defendant was unlawfully arrested and detained and that both he and his vehicle were searched without probable cause and thus, the "fruits" of the search as well as any incriminating statements that defendant allegedly made should be suppressed. The charges against the defendant in United States District Court were subsequently dismissed voluntarily by the United States Attorney's office.

On 1 April 1991, defendant was indicted by the Grand Jury of Duplin County for possession of cocaine with the intent to manufacture, sell and deliver, trafficking in cocaine by possession, carrying a concealed weapon, and maintaining a vehicle for sale of controlled substances. Defendant again moved to suppress the physical evidence and his statements to the police. The State and the defendant offered evidence at the suppression hearing. From that evidence the trial court made the following pertinent findings of fact in its Order:

1. That on July 27, 1991, SBI Agent Bruce Kennedy accompanied members of the Duplin County Sheriff's Department to a place called Hezekiah Carter's Nightclub, located outside

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of the city limits of Magnolia, Duplin County to execute a search warrant for the purposes of locating illegal controlled substances.

2. That Special Agent Kennedy wore a marked "raid" jacket with a badge on the front, and "POLICE" written in big letters across the back. Moreover, Special Agent Kennedy was wearing a baseball cap with the letters SBI across the top of the cap. That three law enforcement vehicles arrived at the same time and that one or more of the vehicles were marked police cars.

3. That upon arriving at the location to be searched, S/A Kennedy observed a green Volkswagon car backed in the parking lot with a man in it sitting on the driver's seat. Also S/A Kennedy saw another black male standing in front of the car. The time was approximately 9:40 p.m.

4. S/A Kennedy exited the vehicle he was riding and walked down across the ditch and over to the driver's side of the vehicle, in question, where the defendant was sitting on the driver's seat. The other black male that had been standing next to the vehicle walked away before S/A Kennedy was able to arrive at the car.

5. S/A Kennedy shined his flashlight on the defendant in the car. S/A Kennedy observed on the passenger side of the bucket seats of the Volkswagon an empty unsnapped holster within reach of the defendant who was sitting in the driver's seat.

6. S/A Kennedy asked the defendant, "where is your gun?" The defendant replied, "I'm sitting on it." S/A Kennedy was still unable to see the gun although he shined his light all about the vehicle.

7. S/A Kennedy then requested the defendant to "ease it out real slow." The defendant reached under his right thigh and handed the officer his gun by the grips. S/A Kennedy took the gun from the defendant and put it on top of the defendant's car and then received the holster from the defendant. The Defendant told S/A Kennedy, "be careful, it's got a round in the chamber; it's loaded and there is a round in the chamber." At the very moment S/A Kennedy asked the defendant to hand out his gun, S/A Kennedy put his hand on his gun, but just for a second. After retrieving the gun from the defendant,

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S/A Kennedy did not stand holding his gun or towering over him. The gun was a .32 calibre semi-automatic gun made by Davidson.

8. The defendant then volunteered that he had got the permit for said gun from the Sheriff of Lenoir County, Billy Smith.

9. The defendant then asked S/A Kennedy if he needed to see some identification. S/A Kennedy replied, "yes sir," at which time, the defendant handed his North Carolina Driver's License to S/A Kennedy along with the registration for the said Volkswagon. The defendant was permitted to exit his vehicle on several occasions including getting outside the vehicle and assisting Officer Jones to open the hood of said vehicle.

10. That S/A Kennedy did not place the defendant under arrest for carrying a concealed weapon; instead he asked the defendant, "Robert Earl, do you have any dope in this car?" The defendant replied, "no, do you want to look?" The defendant further stated that the officer could look if he wanted to.

11. The defendant then proceeded to search his own car. The defendant showed S/A Kennedy where there was a compartment in the back seat of the vehicle where the defendant had built some speakers in the car and he showed the officer how the front part would lay down. There was nothing found in said compartment.

The trial judge further found that defendant removed the board and laid it on top of two nylon bags which were in the back floor board behind the driver's seat. Agent Kennedy asked if he could see the bags and defendant placed them on the ground beside the car. When Agent Kennedy could not find the zipper on the first bag, defendant opened it for him. The first bag contained digital scales of the type frequently used for measuring narcotics. Defendant stated that he used the scales to measure his medicine. The second bag contained two small bags filled with white powder and a number of small plastic bags with zip-locks.

Agent Kennedy asked, "Robert Earl, is this your dope?" Defendant replied, "Yes." Agent Kennedy also asked, "How much you reckon you have got here" and defendant replied, "About an ounce." At that point, Agent Kennedy advised defendant that he was under arrest for possession of drugs. Defendant was not handcuffed during the search and Agent Kennedy did not have his gun drawn.

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Defendant was charged with drug possession and taken to the Sheriff's Department where he went through formal processing. At the time of the arrest, defendant had \$3,300 in cash on his person. The S.B.I. laboratory later determined the white powder to be 70 grams of cocaine.

According to defendant's testimony, he was not sitting on the firearm, rather it was in plain view. Further, he did not consent to the search of the car nor admit that the drugs found were his. Defendant testified that he did not know the drugs were in his car and he did not know who owned them. The trial judge found as fact however that "in so far as there are conflicts in the testimony of S/A Kennedy and the defendant, the Court resolves the issues of credibility in favor of S/A Kennedy."

Defendant's motion to suppress was denied as to the evidence seized from defendant's person and automobile and all statements prior to the seizure of the scales and drugs. The motion was granted as to the incriminating statements made by defendant subsequent to the discovery and seizure of the scales and drugs. Defendant was subsequently charged with perjury for allegedly false testimony given during the *voir dire* hearing on his motion to suppress. Defendant, reserving his right to appeal denial of his motions, tendered pleas of no contest to the charges of possession, trafficking, carrying a concealed weapon and perjury. The felonies were consolidated for judgment and defendant was sentenced to seven years imprisonment. From the trial court's denial of his motion to suppress, defendant appeals.

I.

By defendant-appellant's first assignment of error he contends that the trial court erred in denying his motion to suppress the physical evidence seized from the warrantless search of his vehicle and his inculpatory statements, because 1) the officer did not have a reasonable suspicion to approach defendant's car; 2) the officer did not give the proper *Miranda* warnings prior to questioning; and 3) Agent Kennedy did not have probable cause to search the vehicle.

The scope of appellate review for the denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and whether those findings of fact in turn

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support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The conclusions of law are, however, reviewable. *State v. Simpson*, 320 N.C. 313, 325, 357 S.E.2d 332, 339 (1987), *cert. denied*, 485 U.S. 963, 99 L.Ed.2d 430 (1988).

Based upon his findings of fact, the judge concluded as a matter of law:

1. That S/A Kennedy *had a reasonable suspicion of criminal activity that justified his action* in order to confirm or to dispel his suspicion *when he exited his patrol car and walked over to the defendant's vehicle to investigate*. That S/A Kennedy was authorized to shine his flashlight into the defendant's vehicle for his own protection and to conduct an initial inquiry.
2. That defendant was not under arrest or in custody when S/A Kennedy asked the defendant where the gun was.

Having thoroughly reviewed the evidence introduced at the *voir dire* hearing and the trial court's findings and conclusions, we conclude that the trial court's findings are supported by competent evidence. Defendant argues, and we agree however, that the trial court's findings of fact were insufficient to support the trial court's conclusion that Agent Kennedy had a "reasonable suspicion of criminal activity that justified his action in order to confirm or to dispel his suspicion *when he exited his patrol car and approached the defendant's car.*" In determining if this conclusion of law is supported by the findings, we must examine whether the officer's action constituted a seizure, and if so, whether that seizure was legally justified. *State v. Fleming*, 106 N.C. App. 165, 168, 415 S.E.2d 782, 784 (1992).

[1] The State argues, and we recognize that "[no] one is protected by the Constitution against the mere approach of police officers in a public place." *State v. Swift*, 105 N.C. App. 550, 554, 414 S.E.2d 65, 68 (1992) (quoting *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973)). See also *State v. Thompson*, 296 N.C. 703, 705, 252 S.E.2d 776, 778, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). Thus, "communication between the police and citizens involving no coercion or detention . . . [falls] outside the compass of the Fourth Amendment." *State v. Sugg*, 61 N.C. App. 106, 108, 300 S.E.2d 248, 250, *disc. rev. denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). Brief seizures however, must be supported by reasonable suspicion. *Id.* at 109, 300 S.E.2d at 250. Subtle differences in cir-

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cumstances however, often distinguish a “non-seizure,” which does not invoke Fourth Amendment safeguards, from a “seizure” which does. *Id.* “A person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d 497, 509 (1980).

The United States Supreme Court long ago broadened the range of encounters between the police and citizens encompassed within the term “seizure,” while at the same time lowering the standard of proof necessary to justify a “stop” for an investigative purpose. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968). In applying that principle in *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979), the Supreme Court later stated:

We have recognized that in some circumstances an officer may detain a suspect briefly for questioning, although he does not have ‘probable cause’ to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

Id. at 51, 61 L.Ed.2d at 362 (citations omitted). When a law enforcement officer “stops” a vehicle or individual for an investigative purpose, a “seizure” is accomplished. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607 (1975); *Thompson*, 296 N.C. 703, 252 S.E.2d 776; *State v. McDaniels*, 103 N.C. App. 175, 405 S.E.2d 358 (1991).

In this case, the undisputed evidence indicates that upon arrival and seeing defendant sitting in his car talking to another individual, Agent Kennedy “told the guys [he] was riding with to just let [him] out . . . and [he] would go check this Volkswagon.” Wearing a utility uniform, bullet proof vest marked “raid,” a badge and an S.B.I. baseball cap, Agent Kennedy walked toward the vehicle to speak with defendant. He approached the vehicle, shined his flashlight in on defendant, immediately asked questions regarding the empty holster and subsequently asked whether illegal drugs were present in the car. This conduct amounted to an investigatory stop or “seizure.” As a result, we examine whether the officer was entitled to approach and detain the defendant for investigative purposes and the reasonableness of his conduct in doing so.

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[2] The standard established in *Terry* was adopted by our North Carolina Supreme Court and requires “that an officer have a ‘reasonable’ or ‘founded’ suspicion as justification for a limited investigative seizure.” *Thompson*, 296 N.C. at 706, 252 S.E.2d at 779. To constitute a valid and constitutional investigative stop, the officers’ actions must be both “justified at the inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* The standard of reasonable suspicion to justify an investigatory search requires the court to “examine both the articulable facts known to the officer[] at the time [he] determined to approach and investigate the activities of [a defendant], and the rational inferences which the officer[] [was] entitled to draw from those facts.” *Id.* These circumstances should be viewed as a whole “through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.” *Id.* (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976)). As a result, the stop must be based upon a reasonable and articulable suspicion that the person stopped “is, or is about to be, engaged in criminal activity.” *United States v. Cortez*, 449 U.S. 411, 66 L.Ed.2d 621 (1981); see *Swift*, 105 N.C. App. at 555, 414 S.E.2d at 68 (where officers observed defendant emerge from car in Fast Fare parking lot and place a beer can on the ground, this action constituted a misdemeanor and provided a “reasonable suspicion to believe” that the defendant committed a misdemeanor and thereby warranted an approach to investigate).

Applying the above principles to the facts in this case, we must consider both the articulable facts known to Agent Kennedy at the time he determined to approach Brooks, and the rational inference that the officer was entitled to draw from these facts. Agent Kennedy and the other officers went to the night club with a valid search warrant for the premises. There is no evidence in the record of a warrant to search the exterior premises, nor any evidence that the police had a reason to suspect that drug sales were taking place in the parking lot. In addition, the State points to no evidence which supports a finding that the agent had a reasonable suspicion that this defendant was engaged in illegal activity at the time Agent Kennedy approached the vehicle. At the *voir dire* hearing, Agent Kennedy testified on cross examination that he did not see anything pass between the defendant and the unidentified male standing outside of defendant’s car. Rather, he stated that he found suspicious the way that defendant was

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backed into the parking lot and that defendant was sitting in his car talking with the door open. Agent Kennedy simply observed the men talking in the parking lot of a night club at approximately 9:40 p.m. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious to sit in one's car, with the door open, and talk to a person standing outside the car. Agent Kennedy testified as to only a generalized suspicion based on the time, the place and the fact that drugs had been sold at this establishment. Absent more specific information that would indicate at least that drugs were being sold outside in the parking lot, the officer had no real reason to suspect that criminal activity was afoot.

These facts are similar to those in *Fleming*, 106 N.C. App. 165, 415 S.E.2d 782, in which the officer had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the fact that the defendant and a companion were standing between two apartment buildings, at midnight, in a "high drug area," and based upon the officer's knowledge that the defendant was unfamiliar to the area. This Court found these facts insufficient to support a conclusion that the officer had a reasonable and articulable suspicion that the defendant was engaged in criminal activity. To conclude otherwise, "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches which the Fourth Amendment is specifically designed to protect against." *Id.* at 171, 415 S.E.2d at 786 (citing *Terry*, 392 U.S. 1, 20 L.Ed.2d 889).

Here all of the evidence indicates that the officer approached defendant's vehicle because he thought the defendant looked suspicious sitting in his car talking to an individual outside of the car. Agent Kennedy suspected that a drug deal was underway. This suspicion was not based upon any "specific or articulable facts" to warrant the intrusion. Moreover, the trial court did not make a factual finding to support its conclusion that Agent Kennedy "had a reasonable suspicion of criminal activity that justified his action in order to confirm or dispel his suspicion." For the foregoing reasons we hold that the initial intrusion of defendant's privacy rights was invalid and in violation of his Fourth Amendment right against unreasonable searches and seizures. His observation of the empty holster flowed from this initial invalid intrusion.

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Under the Fourth Amendment, the Government may not use evidence obtained during an unreasonable search and seizure to convict a person of crime. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961); *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676 (1969). Such evidence must be suppressed. N.C. Gen. Stat. § 15A-974 (1988). Thus, the incriminating evidence seized by Agent Kennedy as a result of the unreasonable seizure should have been suppressed.

For the foregoing reasons we hold that the trial court erred in denying the defendant's motion to suppress and admitting the physical evidence seized and his inculpatory statements made prior to the seizure of the scales and drugs. This being the only evidence presented by the State in support of defendant's indictment, we hereby order that defendant's conviction be vacated.

Whereas defendant's first assignment of error is dispositive of this appeal, we decline to address the constitutionality of the subsequent search of his person and automobile for drugs, as well as his remaining assignments of error.

Judgment vacated. New trial.

Judge WELLS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that the officer's actions constitute a seizure, and that the trial court's findings of fact are insufficient to support the trial court's conclusion that the officer possessed a reasonable suspicion of criminal activity when he approached defendant, and that the intrusion was therefore invalid and a violation of defendant's Fourth Amendment right against unreasonable search and seizure. I do not agree, however, that this necessarily compels the suppression of the drugs, scales, and defendant's statements made prior to the seizure of these items.

The United States Supreme Court has consistently held that not all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police." *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963); *Brown v. Illinois*, 422 U.S. 590, 599, 45 L. Ed. 2d 416, 424 (1975); see generally 3 Wayne R. LaFave,

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Search and Seizure § 8.2(d) (2d ed. 1987). Likewise, our North Carolina Supreme Court has consistently held that not “every statement made by a person in custody as a result of an illegal arrest is . . . *ipso facto* involuntary and inadmissible.” *State v. Moore*, 275 N.C. 141, 153, 166 S.E.2d 53, 62 (1969); *see also State v. Freeman*, 307 N.C. 357, 364, 298 S.E.2d 331, 335 (1983). The question is whether the confession or the consent to search was voluntarily given, and if so, whether the “unconstitutional police conduct and the defendant’s confession [or consent to search] was nevertheless sufficiently attenuated to permit the use of the confession [or evidence obtained as a result of the consensual search] at trial.” *Freeman*, 307 N.C. at 364, 298 S.E.2d at 335. The determination of the “causal connection” between the illegality and the evidence obtained requires a consideration of the circumstances surrounding the arrest. *Moore*, 275 N.C. at 153, 166 S.E.2d at 61. Such circumstances, in the context of a consent to search, include the proximity of defendant’s consent to the illegal police conduct, *see United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985); whether the illegal police conduct led officers to observe the particular object to which the consent to search was later given, *see Commonwealth v. Boyer*, 314 A.2d 317 (Pa. 1974); whether the illegal police conduct was flagrant, *see United States v. Sanchez-Jaramillo*, 637 F.2d 1094 (7th Cir. 1980), *cert. denied*, 449 U.S. 862, 66 L. Ed. 2d 79 (1980); whether the consent was volunteered by defendant rather than requested by officers, *see State v. Kennedy*, 624 P.2d 99 (Or. 1981); and whether the underlying purpose of the illegal police activity was to obtain the evidence in question, *see Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983).

Because the trial court determined that the detention was not unlawful, it did not address the question of whether the consent to search and defendant’s statements were poisoned by the detention. Because we now hold that the detention was unlawful, and because the other assignments of error do not require reversal, I would remand this case to the trial court for a determination of (1) whether the consent to search and the statements made by defendant were voluntarily given; and if so, (2) whether the evidence was obtained by exploitation of the initial illegal police conduct or was sufficiently attenuated to escape the taint. In the event the trial court determines on remand that the consent to search and statements were involuntarily given, or that the consent and statements were obtained by exploitation of the police miscon-

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duct, the denial of the motion to suppress must be reversed. In the event the trial court determines on remand that the consent to search and statements were voluntarily given, and were not obtained by exploitation of the police misconduct, the order denying the motion to suppress must be affirmed.

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No. 9218SC78

(Filed 17 August 1993)

1. Corporations § 16.1 (NCI3d)— promise to invest victim's money—investments not made—defendant not “transacting business”—no violation of N.C.G.S. § 78A-36(a)

Defendant did not actually “transact business” so as to come within the purview of N.C.G.S. § 78A-36(a) by misrepresenting to his victims that he had invested their money in stock options where defendant never purchased the stock options; the State's evidence showed only that defendant gave the victims the false impression that he was a “broker” or “licensed broker”; and the evidence showed that defendant was not a registered dealer or salesman under the N. C. Securities Act.

Am Jur 2d, Corporations § 42.

2. False Pretenses § 37 (NCI4th)— obtaining property by false pretenses—jury instruction not specific like indictment—no variance

While the trial court's instruction on obtaining property by false pretenses failed to mention the exact misrepresentation alleged in the indictment, there was no fatal variance between the indictment, the proof presented at trial, and the instructions given to the jury where the indictment stated that the false pretense was defendant's false representation that he was a registered dealer or salesman of securities; the evidence showed that defendant obtained property (the victim's money) by false pretenses (the statements that defendant was a “broker” or “licensed broker” and that their money

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would be invested in stock options); and the instruction was a general one which stated the elements of the crime.

Am Jur 2d, Trial §§ 1120, 1124.

3. False Pretenses § 45 (NCI4th)— obtaining money by false pretenses—restitution as condition of probation—requiring defendant to sign confession of judgment—error

The trial court in a prosecution for obtaining property by false pretenses erred in ordering defendant to sign confessions of judgment in favor of the five victims as a condition of probation, since the imposition of restitution as a condition of probation, as permitted by statute, is not a legal obligation equivalent to a civil judgment.

Am Jur 2d, Criminal Law § 1051.

Appeal by defendant from judgments entered 22 August 1991 by Judge W. Russell Duke, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 10 February 1993.

Defendant was convicted of five counts of obtaining property by false pretenses in violation of G.S. 14-100 (89 CRS 50369-71, 89 CRS 56998, 90 CRS 20347) and eighteen counts of transacting business in securities without being licensed or registered with the Secretary of State in violation of G.S. 78A-36 of the North Carolina Securities Act (89 CRS 56999, 89 CRS 57000, 89 CRS 57002, 89 CRS 57013-20, 89 CRS 57031, 89 CRS 57033, 89 CRS 57040-42, 89 CRS 57044, 90 CRS 20351). The State's evidence tended to show that defendant obtained money from several individuals by telling them that he was a "broker" or "licensed broker" and that he would invest the money for them in stock options in corporations including *inter alia* Texaco, United Airlines, and RJR. There was no evidence that any stock options were actually purchased or sold by defendant.

Defendant presented no evidence at trial. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Anita LeVeaux Quigless, for the State.

McNairy, Clifford, Clendenin & Parks, by Robert O'Hale, for defendant-appellant.

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EAGLES, Judge.

Defendant argues that the trial court erred by failing to dismiss the count of the alleged violations of the North Carolina Securities Act (Chapter 78A of the General Statutes) and by failing to instruct the jury on the specific misrepresentation as alleged in the indictments on obtaining property by false pretenses (G.S. 14-100). As to the alleged Chapter 78A violations, we agree and reverse the judgments. As to the G.S. 14-100 charges, we find no error.

I.

Each verdict sheet for the alleged Chapter 78A violations appeared as follows:

We, the jury, unanimously return as our verdict that the defendant is:

1. _____ Guilty of violating the North Carolina Securities Act by transacting business in securities on [applicable date], without being licensed or registered to do so by the North Carolina Secretary of State as a dealer or salesman, or
2. _____ Not Guilty

In the North Carolina Securities Act (hereinafter "the Act"), G.S. 78A-36 (entitled "Registration requirement"), upon which these charges were based, provides:

(a) It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter. No dealer shall be eligible for registration under this Chapter, or for renewal of registration hereunder, unless such dealer is at the time registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934; any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State.

G.S. 78A-36. One "who willfully violates" G.S. 78A-36(a) "shall upon conviction be punished as a Class I felon." G.S. 78A-57(a). "That penal statutes must be construed strictly is a fundamental rule. The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and *any doubt* on this point will be resolved in favor of the defend-

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ant.” *State v. Heath*, 199 N.C. 135, 138, 153 S.E. 855, 857 (1930) (interpreting former Chapter 78, Securities Law, which was repealed by Session Laws 1973, c. 1380, which enacted Chapter 78A of the General Statutes in its place, *see* G.S. 78A-1) (emphasis added) (citations omitted). Since G.S. 78A-36(a) is a criminal statute, we must utilize a strict construction. *Heath*, 199 N.C. at 138, 153 S.E. at 857.

[1] The crux of our inquiry is whether defendant actually did “transact business” so as to come within the purview of G.S. 78A-36(a) by *misrepresenting* to the victims that he had invested their money in stock options when, in fact, defendant *never purchased* the stock options and when the State’s evidence showed only that defendant gave the victims the false impression that he was a “broker” or “licensed broker.” The State concedes that “[t]he evidence showed that the Defendant was not a registered dealer or salesman” under the North Carolina Securities Act. *See* G.S. 78A-36 through G.S. 78A-40 (Article 5—entitled “Registration of Dealers and Salesmen”; requiring registration with the Secretary of State).

The first sentence of G.S. 78A-36(a) provides that “It is unlawful for any person to *transact business* in this State as a *dealer* or *salesman* unless he is registered under this Chapter.” (Emphasis added.) The Act does not define the phrase “transact business.” However, G.S. 78A-36(a) provides that it is unlawful to “transact business . . . as a *dealer* or *salesman*” and the terms “dealer” and “salesman” are specifically defined in G.S. 78A-2 (entitled “Definitions”) as follows:

(2) “Dealer” means any person engaged in the business of effecting transactions in *securities* for the account of others or for his own account. “Dealer” does not include:

- a. A salesman,
- b. A bank, savings institution, or trust company,
- c. A person who has no place of business in this State if
 1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing

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trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees

. . . .

. . . .

(9) "Salesman" means any individual other than a dealer who represents a dealer in effecting or attempting to effect purchases or sales of *securities*.

G.S. 78A-2 (emphasis added). The definitions of "dealer" in G.S. 78A-2(2) and "salesman" in G.S. 78A-2(9) each refer to "securities." "Security" is defined under the Act as follows:

(11) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract including without limitation any investment contract taking the form of a whiskey warehouse receipt or other investment of money in whiskey or malt beverages; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

G.S. 78A-2(11).

Here, there is no evidence that defendant purchased a "security" nor is there any evidence that defendant attempted to purchase a "security." Rather, the evidence reflects that the defendant falsely told the victims that he would invest their money in stock options and subsequently falsely told the victims that he had invested their money in stock options when, in fact, defendant never actually purchased or sold a "security" as defined by G.S. 78A-2(11). In sum, the State failed to present evidence linking defendant's offer to invest money for the victims to any participation of defendant in an actual transaction involving a "security" as defined by G.S. 78A-2(11).

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G.S. 78A-36(a) states, "It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter." G.S. 78A-36(a) provides that it is a crime to "transact business" without being registered; it does *not* provide that it is a crime to *offer* to "transact business" without being registered. We base this observation on the fact that the term "offer" is specifically defined under the Act and even appears elsewhere in G.S. 78A-36(a). G.S. 78A-2(8)(b) (" 'Offer' or 'offer to sell' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value"). The term "offer" is not found in the first sentence of G.S. 78A-36(a), the statutory provision on which the State relies here. (Similarly, the term "offer" is *not* used in the definitions of "dealer" in G.S. 78A-2(2) or "salesman" in G.S. 78A-2(9).) However, G.S. 78A-36(a) *does* in fact use the term "offer," *not* in the first sentence which is at issue here, but only in the second sentence: "any dealer specializing in church securities may be registered to *offer* or sell only those securities which are issued by churches located within this State." G.S. 78A-36(a). Accordingly, we conclude from the plain language of G.S. 78A-36(a) that had the General Assembly intended to impose criminal liability for defendant's misconduct, the first sentence of G.S. 78A-36(a) would have included language dealing with "offering to transact business" in securities. However, it does not, and defendant's misconduct here does not fall within the scope of G.S. 78A-36(a) as currently written.

In contrast to Chapter 78A, other licensing statutes which impose criminal liability for unlicensed conduct *expressly* state that the *offering* of one's services constitutes criminal conduct. Compare G.S. 78A-36(a) ("It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter.") with *e.g.*, G.S. 90-29(a) ("No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license"); G.S. 58-18-5 ("No individual . . . as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this State of the securities of any promoting or holding corporation, or of any insurance corporation . . . without first procuring, as hereinafter provided, a certificate of authority"); G.S. 90-270.16(a) ("[N]o person shall represent himself to be a practicing psychologist, or psychological associate, or engage in, or offer to engage in, the practice of psychology without a valid

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license"); G.S. 89E-18(2) ("It shall be unlawful for any person to publicly practice, or offer to publicly practice, geology . . . or advertise any title or description tending to convey the impression that he or she is a licensed geologist, unless such person has been duly licensed"); G.S. 90-171.43 ("No person shall practice or offer to practice as . . . a registered nurse or licensed practical nurse unless that person is currently licensed"); G.S. 83A-12 ("It shall be unlawful for any individual . . . to practice or offer to practice architecture . . . unless such person holds a current individual or corporate certificate of admission to practice architecture"); G.S. 93A-1 ("[I]t shall be unlawful for any person . . . to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license").

In utilizing a strict construction of G.S. 78A-36(a), we fully recognize that

while a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. But when a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will and the courts will interpret the language to give effect to the legislative intent

. . . Finally, it is a well settled rule of statutory construction that, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted). We conclude that defendant's misconduct is not "the evil which" G.S. 78A-36 "is intended to suppress." *Id.* at 239, 244 S.E.2d at 338. Granted, the statements made by defendant were false and it is apparent that defendant used the *lure of an*

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investment in securities to obtain the victims' money. However, this is quite different from a factual situation in which an individual actually purchases or sells a "security" for another's supposed benefit without being registered to do so. G.S. 78A-2(11). It is against this latter type of unregistered conduct which we believe that G.S. 78A-36 was designed to protect. Given the strict construction required in dealing with penal statutes, we conclude that G.S. 78A-36 does not apply to defendant's acts in this case. *Cf. State v. Williams*, 98 N.C. App. 274, 278-79, 390 S.E.2d 746, 748-49, *disc. rev. denied*, 327 N.C. 144, 394 S.E.2d 184 (1990) ("mere signing of a stock certificate by a corporate officer" not included within the definition of "sale" under G.S. 78A-8(a); because "defendant did not sell the unregistered security in question, he was not a 'salesman' (or a dealer), and therefore was not subject to the requirements of § 78A-36").

Although the evidence presented by the State is insufficient to support an indictment under Chapter 78A, *supra*, we note that it is clear that there is sufficient evidence in this record to support an indictment for a violation of G.S. 78C-8 (of the North Carolina Investment Advisers Act) which provides:

(a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise,

(1) To employ any device, scheme, or artifice to defraud the other person,

(2) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person . . .

G.S. 78C-8. *See* G.S. 78C-39(a) (one who violates G.S. 78C-8 "shall upon conviction be punished as a Class I felon"). Here, the State presented evidence showing that defendant advised the victims, for a 10% commission, to invest in the securities of corporations including RJR, United Airlines, and Texaco and that defendant told the victims that the value of these securities would increase by various amounts in the future, promising extravagantly large returns on their original investment.

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While Chapter 78C could apply to the misconduct here, the General Assembly could amend Chapter 78A to make its provisions applicable to future misconduct of the type at issue here by using wording similar to the various licensing statutes listed *supra*, to the effect that G.S. 78A-36(a) is violated by one's mere offer to invest another's money in securities after creating the impression that one is a broker, dealer, or salesman. However, under the current version of G.S. 78A-36(a), we conclude defendant's acts do not "come clearly within the prohibition of the statute" and accordingly our strong "doubt" as to the applicability of G.S. 78A-36(a) here is "resolved in favor of the defendant." *Heath*, 199 N.C. at 138, 153 S.E. at 857. However, we reiterate that on this record defendant's misconduct would clearly support an indictment under G.S. 78C-8 and such an indictment would not be a violation of constitutional provisions regarding double jeopardy. Accordingly, the cause is remanded with instructions to dismiss the Chapter 78A indictments, with leave to the State to obtain Chapter 78C indictments, if it is so advised.

II.

[2] Next, defendant argues that the trial court erred by failing to instruct the jury on the specific misrepresentation as alleged in the indictment. We disagree.

The indictments stated that "[t]he false pretense consisted of the following: defendant represented he was a registered dealer or salesman of securities under [G.S.] 78A-36, when in fact he was not." Defendant contends that the trial court erred by giving the following false pretense instruction to the jury:

First, that the defendant made a representation to another. And a representation may be made by writing, words, or acts. Second, that this representation was false. Third, that this representation was calculated and intended to deceive. Fourth, that the victim was in fact deceived by this representation. And fifth, that the defendant thereby obtained or attempted to obtain property from the victim.

Defendant argues that the trial court should have instructed the jury that to find defendant guilty, they had to find that he falsely represented that he was a registered dealer or salesman of securities as provided in the indictments. Defendant contends that "[w]e have no way of knowing if the jury convicted the defendant on five

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false pretense counts because he made the misrepresentation as alleged in the indictment that he was a dealer or salesman in securities or whether the jury convicted the defendant because of other misrepresentations which they believe he had made to the witnesses who testified in the case." We disagree. G.S. 14-100 provides:

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony.

"It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment." *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed.2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed.2d 1456. Here, the State's evidence showed that defendant obtained property (the victims' money) by false pretenses (the statements that defendant was a "broker" or "licensed broker" and that their money would be invested in stock options). While the instruction on obtaining property by false pretenses failed to mention the exact misrepresentation alleged in the indictment, we conclude that there is no fatal variance between the indictment, the proof presented at trial, and the instructions given to the jury. Accordingly, this assignment of error fails.

III.

[3] Defendant's final assignment of error asserts that "[t]he trial court erred in ordering the defendant to sign confessions of judgment in favor of the five victims as a condition of probation." We agree.

For the obtaining property by false pretenses charges (G.S. 14-100), defendant received an eight-year active sentence. This sentence was suspended on the conditions that 1) defendant serve an active sentence of six months; 2) defendant pay restitution to

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the five victims in the amount of \$152,900.00; 3) defendant sign confessions of judgment in favor of each of the victims, and; 4) defendant “pay on a monthly basis 20% of his net income on restitution . . . [which] will be credited against the confession of judgment.”

A confession of judgment is a procedure in a civil action which requires *inter alia* that “[a] prospective defendant desiring to confess judgment shall file with the clerk of the superior court . . . a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated.” G.S. 1A-1, Rule 68.1(b). Here, the State concedes in its brief that

[t]he confession of judgment is repetitive and merely echoes the terms of the ordered restitution in the amount of \$152,900. We submit, any duplicated language, by way of a confession of judgment, is surplusage and *can be ignored*. . . .

We recognize that no criminal court can compel any Defendant to do something which is within the realm of a civil forum, i.e., confess judgment.

(Emphasis added.)

In *State v. Smith*, 99 N.C. App. 184, 186-87, 392 S.E.2d 625, 626-27 (1990), this Court stated:

Restitution, imposed as a condition of probation, is *not* a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence. *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380 (1983). Such an imposition of restitution “does not affect, *and is not affected by*, the victim’s right to institute a civil action against the defendant based on the same conduct[.]” *Id.* (Citations omitted and emphasis added.) “Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition.” *Id.* (Citations omitted.)

. . . .

. . . [B]y tying the amount which may be imposed as restitution to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the *measure* of recoverable damages applying in the relevant civil action—such as the measure

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of damages in a wrongful death action—for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation under G.S. § 15A-1343(d). This was implicitly recognized by this Court in our prior opinion in this case. See *State v. Smith*, 90 N.C. App. at 167-69, 368 S.E.2d at 38-39.

Since the imposition of restitution as a condition of probation “is not a legal obligation equivalent to a civil judgment,” *id.*, we conclude that the trial court erred in requiring defendant to sign the confessions of judgment as a condition of probation. Accordingly, we vacate that condition in the defendant’s sentence and that part of the judgment. All remaining portions of the judgment in 89 CRS 50370 (G.S. 14-100) are affirmed.

Defendant’s remaining arguments fall outside the scope of defendant’s assignment of error and cannot be considered on appeal. N.C. R. App. P. 10(a).

IV.

In sum, we find no error on the obtaining property by false pretenses (G.S. 14-100) charges. We reverse the trial court’s denial of defendant’s motion to dismiss the Chapter 78A charges and we remand the cause with instructions to dismiss the Chapter 78A indictments, with leave to the State to obtain Chapter 78C indictments, if it is so advised. As to the sentences imposed for the G.S. 14-100 convictions, we vacate that part of the judgment purporting to require defendant to sign confessions of judgment.

Accordingly, the results are:

As to 89 CRS 56999, 89 CRS 57000, 89 CRS 57002, 89 CRS 57013-20, 89 CRS 57031, 89 CRS 57033, 89 CRS 57040-42, 89 CRS 57044, 90 CRS 20351—reversed and remanded; and

As to 89 CRS 50369, 89 CRS 50370, 89 CRS 50371, 89 CRS 56998, 90 CRS 20347—affirmed in part; vacated in part.

Judges COZORT and WYNN concur.

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STATE OF NORTH CAROLINA v. ALBERTO DENNIS WALLACE, TROY DONALD WALLACE, JONATHAN LESLEY JOLLY, AND SEAN FRANCIS ROLLMAN

No. 9221SC145

(Filed 17 August 1993)

1. Searches and Seizures § 21 (NCI3d) — informant's tip — no probable cause sufficient to issue search warrant

An informant's tip that marijuana was being grown in the basement of a residence, standing alone, was insufficient to constitute probable cause to issue a search warrant.

Am Jur 2d, Searches and Seizures § 73.

2. Searches and Seizures § 3 (NCI3d) — officers' justifiable basis to approach home — informant's tip — officers' right to ask questions

The trial court erred in concluding that officers did not have a justifiable basis to approach defendants' residence where an informant told them that marijuana was being grown in the basement of a residence, and the officers felt that they did not have sufficient probable cause to obtain a search warrant, so they went to defendants' residence to inquire further into the matter, since law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions.

Am Jur 2d, Searches and Seizures § 83.

3. Searches and Seizures § 10 (NCI3d) — probable cause to search house — no belief evidence about to be destroyed — no necessity for protective sweep

Officers had sufficient probable cause to believe criminal activity was taking place in a house because of information originally provided by an informant and a statement made by an occupant of the house that there might be some marijuana or marijuana seeds and drug paraphernalia that he would like to dispose of before he consented to the search; however, the exigent circumstances would not justify a warrantless entry into the residence where the record was devoid of any evidence that the officers entered the residence with a reasonably objective belief that evidence was about to be removed or destroyed, and the officers' five-minute search of

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the residence on the basis of a protective sweep was an unreasonable inspection of the residence on the basis that the officers candidly admitted they did not feel they were in danger at any time.

Am Jur 2d, Searches and Seizures § 76.**4. Searches and Seizures § 25 (NCI3d)— search pursuant to warrant—warrant based on observations from prior unlawful entry**

Any search pursuant to a warrant is not a genuinely independent source of information sufficient to remove the taint of an earlier unlawful entry if the warrant was either prompted by what officers saw in the initial unlawful entry, or if the information obtained during the entry was presented to the Magistrate and affected his decision to issue the search warrant.

Am Jur 2d, Evidence § 415; Searches and Seizures § 108.

Appeal by the State from order entered 4 December 1991 by Judge Thomas W. Seay, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 4 March 1993.

Mr. Alberto Wallace, Mr. Troy Donald Wallace, Mr. Jonathan Lesley Jolly, and Mr. Sean Francis Rollman were each indicted for possession with the intent to manufacture, sell and distribute marijuana, conspiracy with others to commit the felony of manufacturing marijuana, maintaining a dwelling for the purpose of violating the Controlled Substance Act, and possession of drug paraphernalia. In addition, defendant Jolly was indicted for possession of cocaine. All four defendants made motions to suppress the evidence in the indictments.

A suppression hearing was held on 6 November 1991 in Forsyth County Superior Court before Judge Thomas W. Seay, Jr. After the presentation of evidence by counsel, Judge Seay granted the four motions to suppress the evidence. On 4 December 1991, the trial court entered an order to this effect *nunc pro tunc* 6 November 1991. The State appealed.

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

Donald Tisdale for defendant-appellee Sean Francis Rollman.

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Darwin Littlejohn for defendant-appellee Jonathan Lesley Jolly.

Carl Parrish for defendants-appellees Alberto Dennis Wallace and Troy Donald Wallace.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: On or about 20 July 1991, Detective K. E. Powers of the Winston-Salem Police Department, along with Sergeant Homer Craig, received information from an informant that marijuana was being grown in the basement of a residence located at 2016 Colonial Place, Winston-Salem, North Carolina. At the time the officers received the information, the information could not be confirmed and the officers had no way of corroborating the informant's information. Therefore, on 20 July 1991, the officers went to Colonial Place residence in an attempt to confirm or deny the information.

When the officers knocked on the door, a man who identified himself as Jonathan Jolly answered. The officers identified themselves and explained that they had received some information that marijuana plants were being grown in the residence. Mr. Jolly exited the residence and closed the door to the residence behind him. The officers then questioned Mr. Jolly about the presence of other individuals in the residence. Mr. Jolly told the officers that one of his roommates was there asleep. At that point, the officers asked Mr. Jolly for consent to search the residence. Before Mr. Jolly could answer, one of Mr. Jolly's roommates, Mr. Troy Wallace, exited the residence. The officers again asked for consent to search the residence, which they denied. Mr. Jolly then stated that "there might be some drug paraphernalia and marijuana seeds in the house," and that he would not consent to a search until he had time to get rid of the contraband.

After the officers were denied consent to search, they heard footsteps in the residence and a door shut on the inside. The officers asked the roommates who was in the residence and the roommates said they did not know because they had just arrived.

The officers then informed the two men that they were going to apply for a search warrant due to Mr. Jolly's deception concerning the persons in the residence. They executed a protective sweep before leaving the residence to obtain a search warrant. During the protective sweep, the officers observed what appeared to be

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marijuana plants. Detective Powers also confirmed the presence of another individual in the residence. Upon opening a bathroom door, he observed Mr. Alberto Wallace, who was also an occupant of the residence, flushing something down the toilet.

After the protective sweep of the residence, defendants were detained in the residence. Detective Powers and Sergeant Craig went to apply for a search warrant. In the application for the search warrant, Detective Powers referenced, as grounds for probable cause, the fact that he had observed what appeared to be marijuana during a "protective sweep" of the residence.

The State contends that the trial court erred in granting defendants' motions to suppress evidence seized during a warrantless search of the residence at 2016 Colonial Place. The State enumerates a series of arguments to support its contention.

Upon a voir dire hearing pursuant to a motion to suppress evidence, the trial court's findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. The conclusions drawn from the facts found are, however, reviewable. *State v. Tripp*, 52 N.C. App. 244, 278 S.E.2d 592 (1981). The State does not dispute the sufficiency of the evidence to support any particular finding of fact. Rather, the State challenges the legal conclusions that flow from the evidence and the findings.

[1] First, the State contends that the trial court erred when it concluded that the information initially given to Detective Powers and Sergeant Craig was insufficient to constitute probable cause for the issuance of a search warrant. We find the trial court's conclusion is supported by the law.

Probable cause is a "common sense, practical question" based on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231, 76 L.Ed.2d 527, 544, *reh'g denied*, 463 U.S. 1237, 77 L.Ed.2d 1453 (1983). The standard to be met when considering whether probable cause exists is the totality of the circumstances. *Id.*

In the case *sub judice*, the evidence is not sufficient to constitute probable cause. Detective Powers and Sergeant Craig received information from an informant that marijuana plants were being grown in the basement of a residence located on 2016 Colonial Place. The officers attempted to corroborate the information given

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to them by the informant but were unable to do so. The testimony at the hearing indicates that although the informant had been reliable on a previous occasion, the officers did not consider the information given to them in the case *sub judice* to be sufficient to constitute probable cause. Nothing in the record indicates that the informant was present in the residence to observe the contraband he described. Based on a totality of the circumstances, we find the informant's tip alone was insufficient to constitute probable cause to issue a search warrant.

[2] Next, the State contends that the trial court erred when it concluded that without corroboration the officers had no justifiable basis to approach the defendants' residence. We agree.

Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions. *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), *appeal dismissed and disc. review denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 64 L.Ed.2d 855 (1980). The testimony at trial clearly reveals the intentions of Detective Powers and Sergeant Craig. They both testified that their informant told them that marijuana was being grown in the basement of the residence located on 2016 Colonial Place. The officers, however, did not feel they had sufficient probable cause to obtain a search warrant so they went to the defendants' residence to inquire further into the matter. The officers' approach of the defendants' residence was justifiable, and therefore, we find that the trial court erred in concluding that the officers did not have a justifiable basis to approach the defendants' residence.

[3] The State further contends that the trial court erred when it concluded that the statement made by defendant Jolly concerning marijuana seeds and drug paraphernalia was insufficient to constitute probable cause to enter the residence.

"In dealing with probable cause, . . . we deal with probabilities. . . . Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same and so are law enforcement officials." *Illinois*, 462 U.S. at 231, 76 L.Ed.2d at 544.

The statement made by Mr. Jolly that there might be some marijuana or marijuana seeds and drug paraphernalia that he would

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like to dispose of before he consented to the search clearly indicates that defendant did not want the officers to search his home before he could dispose of evidence of criminal activity. The fact that the statement was equivocal does not detract from the formulation of a common-sense conclusion that some criminal activity was or had taken place in the home. The officers had sufficient probable cause to believe criminal activity was taking place in the home because of the information originally provided by the informant and the statement made by Mr. Jolly.

However, probable cause alone is not enough to justify a warrantless entry into a home. In *Agnello v. United States*, 269 U.S. 20, 70 L.Ed. 145 (1925), the Court held that:

[t]he search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. . . . Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. Any such searches are held unlawful notwithstanding facts unquestionably showing probable cause.

Id. at 32-33, 70 L.Ed. at 149. In order to justify a warrantless entry of a residence, there must be probable cause and exigent circumstances which would warrant an exception to the warrant requirement.

In *United States v. Turner*, 650 F.2d 526 (4th Cir. 1981), the Court grappled with the issue of whether exigent circumstances justified the warrantless entry into a defendant's apartment where the officers had arrested a defendant in front of his apartment and believed that a third party in the home had witnessed the arrest. The officers then entered the apartment because of their belief that the third party could destroy the readily destructible evidence. The Court catalogued some of the factors courts have considered relevant in determining whether exigent circumstances existed to support a warrantless search. These include: (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband. *Id.* at 528. The Court in *Turner* found that the facts of the case sat-

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ified pertinent factors and concluded the warrantless entry was justified.

First, the court found a high degree of urgency. . . . Second, it found that there was a rational basis for their belief that Kelly could have seen Turner's arrest. . . . Third, the court found that there was a rational basis for the officers' belief that Kelly might destroy the evidence. Fourth, while the court made no specific finding on the destructibility of the contraband, . . . the cocaine seized at the apartment was readily destructible.

Id.

The State contends that in the instant case exigent circumstances existed warranting the warrantless entry into the residence. First, the State argues that the officers had a reasonably objective belief that the contraband in the residence was about to be removed or destroyed. We find no support for this contention.

In the case *sub judice*, we find that the record is devoid of any evidence that the officers entered the residence with a reasonably objective belief that evidence was about to be removed or destroyed. The only evidence of record stating or inferring the purpose of the officers' entry into the residence without a warrant was based upon the officers' intent to effectuate a protective sweep until a search warrant could be obtained. This is set forth in the officers' testimony at trial and the affidavit the officers used to obtain a search warrant. Therefore, we find no support for the State's contention that the officers entered the residence to prevent the removal or destruction of evidence.

Next, the State argues that the elements necessary to support a protective sweep of the residence were present warranting the officers warrantless entry into the residence. We also find no support for this contention.

The Supreme Court recently considered whether the fourth amendment permits properly limited protective sweeps by law enforcement officers in conjunction with in-home arrests in *Maryland v. Buie*, 494 U.S. 325, 108 L.Ed.2d 276 (1990). In regard to the officer's protective sweep in *Buie*, the Supreme Court held that "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors

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an individual posing a danger to those on the arrest scene.” *Id.* at 334, 108 L.Ed.2d at 286. The Court also emphasized, however, that the protective sweep must be aimed at protecting the officers and must extend only to a cursory inspection of places where a person may hide. In addition, the Court required that the search last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises. *Id.* at 335-36, 108 L.Ed.2d at 287.

In *United States v. Akrawi*, 920 F.2d 418 (6th Cir. 1990), officers approached a residence with a warrant for an occupant's arrest. The officers gained entry and effectuated the arrest of the suspect. The officers then initiated a protective sweep of the premises which revealed a 9mm pistol.

The Court, in striking down the protective sweep, noted first that the officers articulated no specific basis for believing that the second floor of the suspect's residence harbored any individual posing a threat to agents. The agents encountered no resistance upon entering the house and had no difficulty in arresting the suspect. The agents heard no noises or voices that indicated anyone might have been in hiding on the second floor. Lastly, the agents remained in the house searching for forty-five minutes.

In the case *sub judice*, the officers were not at the property with an arrest warrant. According to their testimony, they were merely on the premises to gain more information after receiving a tip about alleged criminal activity in the residence.

When the officers appeared on the premises, the officers encountered no resistance. Defendants Jolly and Troy Wallace at all times talked to the officers in a calm manner and up until the time the officers heard footsteps in the residence, the interview with defendants Jolly and Wallace had been non-threatening. Although the officers did hear footsteps in the residence, the officers admitted in their testimony at trial that they were not afraid nor did they feel they were in a dangerous situation. The five minute search of the residence on the basis of a protective sweep was an unreasonable inspection of the residence on the basis that the officers candidly admitted they did not feel they were in danger at any time. Based on the law and the facts of the case *sub judice*, we agree with the trial court's conclusion.

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[4] Lastly, the State argues that the trial court erred when it concluded that the affidavit for the search warrant was tainted on its face because it was based on what the officers themselves observed in the residence. We disagree.

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search. *Murray v. United States*, 487 U.S. 533, 101 L.Ed.2d 472 (1988). However, evidence is not to be excluded if the connection between the illegal police conduct, the unlawful entry, the discovery and seizure of the evidence is so attenuated as to dissipate the taint, as where police had an independent source for discovery of the evidence. *Id.* The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. *Id.*

For instance, the Court in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599 (1984) held that a search warrant was valid where the information used to obtain the search warrant was not derived from the initial unlawful entry and where the information came from sources wholly unconnected with the unlawful entry and was known to the agents well before the initial entry.

The ultimate question then becomes whether the search warrant in the case *sub judice* was in fact based upon information obtained by exploitation of the initial illegality or instead by means independently distinguishable so as to purge the search warrant of the primary taint. *Segura*, 468 U.S. 796, 82 L.Ed.2d 599.

In the instant case, officers had acquired information from an informant and decided to investigate further. Upon talking to the occupants of the residence, the officers obtained information which caused them to believe criminal activity was taking place in the home. The officers initiated a protective sweep and then went to apply for a search warrant. In the application for the search warrant, the officers referenced as grounds for probable cause (1) the informant's information, (2) the defendant Jolly's statement concerning drug paraphernalia, and (3) information concerning what the officers had observed during the protective sweep.

We determined earlier that the protective sweep initiated by the officers was unlawful and because information from that unlawful entry was used in the affidavit to obtain the search warrant, the

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search warrant was not based upon information wholly unconnected with the unlawful entry so as to purge the taint. As such, the search warrant was invalid and any evidence obtained pursuant to that search warrant must be suppressed. Any search pursuant to a warrant is not a genuinely independent source of information sufficient to remove the taint of an earlier unlawful entry if the warrant was either prompted by what officers saw in the initial unlawful entry, or if the information obtained during the entry was presented to the Magistrate and affected his decision to issue the search warrant. *Murray*, 487 U.S. 533, 101 L.Ed.2d 472. Accordingly, the trial court did not err in its conclusion to suppress the challenged evidence.

Although we determined earlier that the trial court was erroneous in concluding that the officers had no justifiable basis for approaching the residence, this conclusion of law is not the dispositive issue on appeal and is not prejudicial to a fair outcome of the case.

The decision of the trial court is affirmed.

Judges LEWIS and JOHN concur.

STATE OF NORTH CAROLINA v. TIMOTHY AUSTIN

No. 9211SC105

(Filed 17 August 1993)

1. Jury § 248 (NCI4th)— peremptory challenge of only black juror—no violation of constitutional right to trial by jury of peers—showing of race neutral grounds for exclusion

The trial court did not err by failing to find that the State's peremptory challenge of one black juror from an otherwise white venire violated defendant's constitutional right to a trial by a jury of his peers, since, even if defendant made out a *prima facie* case of schematic exclusion, no constitutional violation was present due to the State's rebuttal of the presumption by articulating race-neutral grounds for excusing the potential juror, including the juror's acquaintance with defense

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counsel, friendship with defendant, and desire not to serve on the jury.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

- 2. Jury § 248 (NCI4th)— black defendant's exclusion of white jurors— showing of race-neutral grounds required by court— no error**

The trial court did not place an unfair burden on defendant by requiring him to articulate race-neutral grounds for excusing white jurors from the jury, since the court apparently requested specific reasons as an exercise in caution due to a prior deadlocked jury which resulted in a mistrial in the same case; the trial court has authority to conduct such an inquiry when the State has established a *prima facie* case of discrimination; and, in any event, the trial court's inquiry did not result in any prejudice to defendant, as the court sustained all six of defendant's peremptory challenges, and the jury's composition was thus unaffected.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

- 3. Evidence and Witnesses § 621 (NCI4th)— jacket linked to defendant— untimeliness of motion to suppress**

In a prosecution of defendant for robbery with a dangerous weapon, the trial court did not err in denying, on the basis of untimeliness, defendant's motion to suppress an in-court identification and the use of a jacket recovered from defendant's god-sister's home as evidence, since defendant did not make his motion to suppress prior to trial; defendant had sufficient time to make the motion prior to trial and ample notice of the State's intention to use both the jacket and the in-court identification as evidence; and the same evidence was introduced at defendant's first trial. N.C.G.S. § 15A-975.

Am Jur 2d, Trial § 165.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

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4. Criminal Law § 1226 (NCI4th) — sentence — failure to find intoxication as mitigating factor — no error

The trial court did not err in failing to find as a mitigating factor for armed robbery that defendant was suffering from intoxication, a condition that was insufficient to constitute a defense but significantly reduced his culpability, since the evidence of defendant's intoxication showed him to be under the influence of alcohol after the time of the crime but not at the time of the crime.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 8 November 1991 by Judge Anthony M. Brannon in Johnston County Superior Court. Heard in the Court of Appeals 3 March 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General William W. Finlator, Jr., for the State.

James R. Levinson for defendant appellant.

COZORT, Judge.

Defendant Timothy Austin was found guilty of robbery with a dangerous weapon and sentenced to serve twenty years in prison. Defendant asserts the following as error on appeal: (1) the trial court's failure to find that the State's peremptory challenge of one black juror violated his constitutional right to a trial by a jury of his peers; (2) the trial court's requirement that defendant explain his peremptory jury challenges; (3) the trial court's denial of defendant's motions to suppress the use of certain evidence, and of an in-court identification made by a State's witness; and (4) the trial court's finding that the aggravating factor outweighed the mitigating factor, thereby justifying a sentence greater than the presumptive. We conclude the defendant received a fair trial free from prejudicial error.

The State's evidence presented at trial included the testimony of Nancy Alford, a clerk at the "Dash In," a convenience store located on Route 301 near Smithfield, North Carolina. Ms. Alford testified that on 16 November 1990, at approximately 8:00 p.m., she was working behind the counter at the convenience store, when a black male entered the premises. Ms. Alford described the man as being approximately thirty years old, at least six feet tall, and

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nearly 220 pounds in weight. He had a "flat-top" haircut, and wore white high-top tennis shoes, stone-washed blue jeans, and a loose blue Champion jacket with grey sleeves. The man brandished a knife in his right hand, and said, "If you don't give me the money, I'll come across this counter and cut your throat." Ms. Alford indicated the knife had a short wooden handle and a little curved blade. She handed the robber approximately \$500.00 in cash. The perpetrator fled the scene, and Ms. Alford telephoned the police.

Based on a description given to him by Ms. Alford, Lieutenant Timothy E. Holmes of the Smithfield Police Department began questioning residents of the nearby Johnson Court Apartments to identify possible suspects. Lieutenant Holmes spoke with Ms. Annie Brockington, who said she had talked with the defendant earlier in the day, and he had been wearing clothes similar to what the robber had been wearing. Ms. Brockington accompanied Holmes to the police station, where she viewed the videotape taken from the convenience store's surveillance monitor. After watching the videotape, Ms. Brockington identified defendant as being the robber.

Lieutenant Holmes, with the assistance of other officers, located the defendant watching television in the apartment of Ms. Deborah Russell, his god-sister. Defendant was wearing khaki pants, a blue shirt, and white deck shoes. Each officer testified he could smell alcohol on the defendant's breath. The officers discovered a medium-sized Champion jacket, similar to the one worn by the robber, hanging in Ms. Russell's upstairs closet.

The police officers escorted defendant to the police station, where he was held in a squad room and told he would be photographed for a photo line-up. No photographic line-up was ever conducted. Ms. Alford, the store clerk, went to the station to view a possible suspect who was being detained. Ms. Alford initially viewed the defendant through a window, but at the defendant's request, she was permitted to go into the room to get a closer look. Ms. Alford then indicated to police that defendant was the man who had robbed her. At the time of his arrest, defendant had on his person \$226.00 in cash. He explained to police he had cashed his paycheck for \$56.80 earlier in the day, and then gambled with the money to win \$185.00 in cash.

Defendant's evidence consisted of testimony by defendant's mother, god-sister, other relatives and several friends. The testimony

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tended to show that defendant was at a friend's home until after the time of the robbery, and then went to his god-sister's apartment to watch a ball game. Defendant's evidence also indicated that he had a reputation in the community for honesty and good character.

The jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced him to twenty years in prison, a sentence greater than the presumptive.

[1] Defendant first argues on appeal that the trial court erred by failing to find that the State's peremptory challenge of one black juror from an otherwise white venire violated defendant's constitutional right to a trial by a jury of his peers. Both our federal and state constitutions prohibit the State from peremptorily challenging prospective jurors solely on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986) and *State v. Smith*, 328 N.C. 99, 119, 400 S.E.2d 712, 723 (1991). To prove a *prima facie* case of purposeful discrimination under *Batson*, a defendant must show (1) he or she is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of defendant's race from the venire; (2) he or she is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate"; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used such a practice to exclude veniremen from the jury on account of race. *Batson*, 476 U.S. at 96, 90 L.Ed.2d at 87-88. If the defendant meets a *prima facie* case of purposeful discrimination, then the State must rebut the presumption by articulating a "clear and reasonably specific" race-neutral explanation for the basis of the peremptory challenge. *Smith*, 328 N.C. at 120, 400 S.E.2d at 723.

In the present case, only one black venireman was selected for potential jury service, Mr. Errol S. Chisholm. When the State sought to exercise a peremptory challenge to excuse Mr. Chisholm, the defendant objected on *Batson* grounds. This case is similar to *State v. McNeill*, 326 N.C. 712, 719, 392 S.E.2d 78, 82 (1990), where the defendant argued "that the exclusion of the only black juror from the jury in this case was a violation of the defendant's right to equal protection as recognized in *Batson* . . ." Our Supreme Court in *McNeill* stated:

Assuming without deciding that the defendant established a *prima facie* case of discrimination based solely on the fact

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that the prosecutor's use of a peremptory challenge resulted in the removal of the only black person in an otherwise all white jury, the facts before the trial court provide plenary support for the conclusion that the challenge was for legitimate, racially neutral reasons. . . . However, there being no showing of a history of discriminatory practice on behalf of the district attorney, the trial court had no reason to suspect the genuineness of the state's explanation supporting the dismissal of this juror. We hold that even if the defendant can be said to have established a prima facie showing of discrimination in the challenge of this juror, the state properly rebutted the presumption created by that showing in accord with the standard set forth in *Batson*.

Id. As in *McNeill*, we decline to decide whether the exclusion of one black juror constitutes a schematic exclusion which would trigger the protections of *Batson*. Assuming, however, that such exclusion establishes a pattern of discrimination, we agree with the trial court in finding no *Batson* violation. The trial court noted in part:

And the Court further finds that all of the facts and circumstances in this case including, but not limited to, the voir dire examination of Mr. Chisolm, [*sic*] shows that the peremptory excusal of Mr. Chisolm [*sic*] is not based at all on race, but rather on what has been acknowledged here was Mr. Chisolm's [*sic*] set of responses to the questions asked, namely that he knew of the defense attorney, knew the defense attorney's family, that he knew the defendant, regarded him as a friend, in fact I recall the phrase, "good friend" for six or seven years. He indicated that he knew personally, my recollection is that he'd been in the home of some of the defendant's blood kin relatives, who according to what the defendant's lawyer apparently told the solicitor before trial would be witnesses in this case. And further, it was most obvious to the Court in the interest of Mr. Chisolm, [*sic*] that when he said he did not desire to serve on the jury, he meant clearly that he did not desire to serve on this particular jury because of his acquaintanceship with the defendant's family. And while to be sure that that would be a basis of excusal for cause, it is a factor, a neutral factor, that any trial order may consider in formulating their decision of whether or not to peremptorily excuse a given person or not.

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. . . The State independently from the law in *Batson* has shown from Mr. Chisolm's [*sic*] own responses absolutely neutral explanations for their peremptory excusal of Mr. Chisolm [*sic*] as a juror in this case and therefore the State is allowed that particular peremptory excusal.

We therefore hold that, assuming the defendant made out a prima facie case of schematic exclusion, no *Batson* violation was present due to the State's rebuttal of the presumption by articulating race-neutral grounds for excusing Mr. Chisholm.

[2] Defendant's second issue also deals with jury selection. Defendant claims the trial court placed an unfair burden on him by requiring him to articulate race-neutral grounds for excusing white jurors from the jury. During jury selection, the defendant peremptorily challenged six white members of the venire. In the jury's absence, the trial court asked defense counsel to state the reason for excusing the white jurors, stating, "It's my job to protect jurors under the law. They have rights separate and apart from the other folks involved in the case." The defendant claims this procedure caused him to suffer undue prejudice which warrants the order of a new trial. We disagree.

Recently, the United States Supreme Court addressed the question of whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. See *Georgia v. McCollum*, 505 U.S. ---, 120 L.Ed.2d 33 (1992). In resolving this issue, also known as "*reverse Batson*," the Court explained:

Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.

* * * *

Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it. Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.

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McCullum, 505 U.S. at ---, 120 L.Ed.2d at 44-45. With respect to whether the interests of *Batson* must give way to the rights of criminal defendants, the *McCullum* Court stated:

[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.

* * * *

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, "if race stereotypes are the price for acceptance of a jury panel as fair," we reaffirm today that such a "price is too high to meet the standard of the Constitution."

Id. at ---, 120 L.Ed.2d at 50 (citations omitted). The Court went on to hold that "[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges." *Id.* at ---, 120 L.Ed.2d at 51.

In the present case, the record indicates that the State did not initiate the "reverse-*Batson*" issue concerning the defendant's peremptory challenges. Rather, the trial judge raised the issue. The trial court apparently requested specific race-neutral reasons for the defendant's peremptory challenges of the white veniremen as an exercise in caution due to a prior deadlocked jury which resulted in a mistrial in the same case. Under these circumstances, it is unclear whether *McCullum* applies directly to this case, where the judge, not the State, raises the issue. The reasoning in *McCullum* is instructive nonetheless. Clearly, after *McCullum*, a trial court is now vested with the authority to conduct such an inquiry when the State has established a prima facie case of discrimination. The burden would then shift to the defendant to articulate race-neutral grounds for peremptory excusals. We cannot say that the State presented a prima facie case of discrimination in the case at hand.

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However, even without the trial court's being able to rely on *McCollum* at the time of trial, we find the trial court's inquiry did not result in any prejudice to the defendant. The trial court sustained all six of the defendant's peremptory challenges, and the jury's composition was thus unaffected. Accordingly, defendant's second assignment of error is overruled.

[3] Next, defendant contends the trial court erred by denying his motion to suppress the use of the Champion jacket recovered at defendant's god-sister's home as evidence. Defendant also disputes the denial of his motion to suppress the in-court identification of Ms. Alford, the store clerk. Originally, the trial court denied the motions by indicating that he interpreted N.C. Gen. Stat. § 15A-975(b) (1988) to require a written motion to suppress. Later, the trial court denied the defendant's motions because of untimeliness.

Generally, motions to suppress must be made "prior to trial." N.C. Gen. Stat. § 15A-975(a) (1988); *State v. Tate*, 300 N.C. 180, 182-83, 265 S.E.2d 223, 225 (1980). A defendant may move to suppress evidence once trial proceedings have commenced (1) if he did not have a "reasonable opportunity to make the motion before trial," or (2) if the State has not given the defendant "sufficient advance notice of its intention to use the evidence," or (3) "when additional facts are discovered after a pre-trial motion has been denied that could not have been discovered with reasonable diligence before." *State v. Simmons*, 59 N.C. App. 287, 289, 296 S.E.2d 805, 807 (1982), *cert. denied*, 307 N.C. 701, 301 S.E.2d 395 (1983).

The record reflects that the defendant had both sufficient time to make his motions prior to trial and ample notice of the State's intention to use both the jacket and the in-court identification as evidence. Especially in light of defendant's first trial where the same evidence was introduced, we find the trial court did not err in denying defendant's motions to suppress.

[4] Finally, defendant argues the trial court abused its discretion in imposing a sentence greater than the presumptive sentence for robbery with a dangerous weapon. At sentencing, the trial court found as a mitigating factor that the defendant was a person of good character. As an aggravating factor, the trial court found that the defendant had a prior conviction punishable by more than 60 days' confinement. Defendant argues that the trial court erred by failing to find as a mitigating factor that he was suffering from intoxication, a condition that was insufficient to constitute a defense

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but significantly reduced his culpability. Defendant therefore submits that the trial court erred by finding the factor in aggravation outweighed the factor in mitigation.

We have reviewed the evidence presented and conclude the trial court did not err in failing to find the additional factor in mitigation. The evidence of defendant's intoxication showed him to be under the influence of alcohol after the time of the crime. Ms. Alford testified she did not detect the odor of alcohol on defendant at the time of the robbery, despite being close enough to touch him. Defendant's intoxication was not proved by such manifestly credible and uncontroverted evidence that no reasonable inferences to the contrary could be drawn. *See State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985). Furthermore, the trial court did not err in imposing a sentence greater than the presumptive. It is well-settled that the weight given to aggravating and mitigating factors is within the sound discretion of the trial judge, whose decision will not be disturbed absent an abuse of discretion. *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804, *disc. review denied and appeal dismissed*, 320 N.C. 175, 358 S.E.2d 67 (1987). We do not discern an abuse of discretion in the present case.

No error.

Judges EAGLES and WYNN concur.

GEORGE B. CLAY, APPELLEE/PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT/RESPONDENT

No. 9210SC435

(Filed 17 August 1993)

State § 12 (NCI3d) — applicant for State job — grievance based on age discrimination — time for filing petition for contested case hearing

Petitioner, an applicant for State employment who was over 40 years of age and whose grievance against the State alleged discrimination based on his age and veteran's preference, had thirty days after he received notice that another applicant

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had been placed in the position to file his petition for a contested case hearing with the Office of Administrative Hearings.

Am Jur 2d, Job Discrimination §§ 1241, 1289.

Appeal by respondent from order signed 5 February 1992 and filed 11 February 1992 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 1 April 1993.

In the fall of 1985, petitioner, who is over forty years of age, applied for the position of Disabled Veterans' Outreach Specialist (DVOS) with respondent Employment Security Commission ("ESC"). On 22 November 1985, petitioner was advised that he had not been selected for the position. Petitioner now alleges in this action that he was not hired for this position as a result of illegal discrimination, including age discrimination and discrimination on the basis of veteran's preference.

Subsequently, the parties concede that petitioner filed a grievance with the Chairman of the ESC dated 1 February 1986, which the Chairman received on 10 February 1986. After an investigation, the Chairman informed petitioner by letter dated 24 March 1986 of the final agency decision that there had been no discrimination in the selection process and advised petitioner of his right to appeal to the State Personnel Commission (the "Commission"). On 3 April 1986, petitioner filed an appeal with the Office of State Personnel to receive a contested case hearing in the Office of Administrative Hearings ("OAH").

The ESC subsequently moved that the matter be dismissed for lack of jurisdiction as it was untimely filed, and on 3 November 1986, the administrative law judge assigned to the case in the OAH denied ESC's motion. On 17 November 1989, the administrative law judge filed her recommended decision that petitioner be placed into the DVOS position, effective 1 December 1985, with back and prospective pay, attorney's fees and all the benefits of continued permanent employment with the State as of that date. Additionally, the judge again denied ESC's motion to dismiss and recommended that the ESC promulgate a rule concerning disabled veterans.

On 8 March 1990, the ESC entered exceptions to the recommended decision and another motion to dismiss. On 18 April 1990, the Commission entered a decision and order dismissing petitioner's

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appeal with prejudice for lack of jurisdiction as it was untimely filed. In May 1990, petitioner filed a petition for judicial review. On 30 April 1991, this case was heard in Wake County Superior Court. On 5 February 1992, Judge Coy E. Brewer, Jr. signed an order out of session reversing the decision of the Commission and remanding the case to the Commission with instructions that the Commission adopt the recommended decision of the administrative law judge, including all relief provided for in that decision. From this order, respondent appeals.

David P. Voerman for appellee/petitioner.

Employment Security Commission of North Carolina, by Chief Counsel T. S. Whitaker and Staff Attorney C. Coleman Billingsley, Jr., for appellant/respondent.

ORR, Judge.

The issue on appeal is whether the trial court erred in reversing the decision of the State Personnel Commission and remanding the case to the Commission with the instructions that the Commission adopt the recommended decision of the administrative law judge. We agree with the respondent and reverse the trial court's order for the reasons stated below.

Petitioner has been employed by ESC as a temporary employee in the position of Intermittent Interviewer I since 1979. Since June 1982, petitioner has been considered and not hired for four permanent positions, the last of which was the position of DVOS that was available in October, 1985, which position is the subject of this case.

In the fall of 1985, an advertisement was made for the position of DVOS in the New Bern office of the ESC for which petitioner applied. The parties stipulated that petitioner met the minimum requirements for this position and that petitioner was entitled to veteran's preference in terms of selection. Subsequently, three individuals were eventually chosen to be interviewed for the position: the petitioner, Franklin Arnath, and Oliver Blue. Managers from the New Bern office of the ESC interviewed all three individuals. Subsequently, Arnath was recommended for and placed in the position. On 22 November 1985, petitioner was informed orally that someone else had been hired for the DVOS position.

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As previously stated, the parties acknowledge that on 10 February 1986, the Chairman of the ESC received a grievance from petitioner dated 1 February 1986. This grievance apparently alleged that petitioner had not been hired for the position of DVOS as a result of illegal discrimination. After an investigation, the Chairman informed petitioner of the final agency decision by letter dated 24 March 1986, that there was no supportable evidence of discrimination and that the agency would take no further action in regard to petitioner's grievance. Additionally, the letter advised petitioner of his right to appeal to the Commission "within thirty (30) calendar days after receipt of this letter" Relying on this letter, petitioner filed his appeal with the Office of State Personnel on 3 April 1986.

I.

The North Carolina Administrative Procedure Act which is codified at Chapter 150B of the General Statutes, governs judicial review of administrative agency decisions. Our standard of review in the present case is governed by N.C. Gen. Stat. § 150B-51(b) (1991), the same scope of review utilized by superior courts. *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). Under N.C.G.S. § 150B-51(b) (1991), a court may "reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced" Petitioner's rights may have been prejudiced under the statute if the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991).

"Our review is further limited to the exceptions and assignments of error set forth to the order of the superior court." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498,

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502, 397 S.E.2d 350, 353 (1990), *disc. review denied, writ of supersedeas denied*, 328 N.C. 98, 402 S.E.2d 430 (1991) (citation omitted). "The proper standard to be applied depends on the issues presented on appeal. If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required." *Id.* at 502, 397 S.E.2d at 354. "Incorrect statutory interpretation by an agency constitutes an error of law under G.S. 150B-51(b) and allows this [C]ourt to apply a *de novo* review." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

II.

First, respondent ESC contends that the trial court erred by not affirming the decision and order of the Commission dismissing the petitioner's appeal for lack of jurisdiction as it was untimely filed. We agree.

"The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal." *Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989). Although Chapter 150B of the North Carolina General Statutes governs our review of the Commission's decision, the jurisdiction of the administrative law judge, and thus the jurisdiction of the Commission over this action must be granted pursuant to Chapter 126. *Batten v. North Carolina Dep't of Correction*, 326 N.C. 338, 342, 389 S.E.2d 35, 38 (1990).

In the case *sub judice*, petitioner is an applicant for state employment who is over 40 years of age and whose grievance against the state alleges discrimination based on his age and veteran's preference. Under Chapter 126, petitioner's only avenue for appeal is to the State Personnel Commission under N.C. Gen. Stat. § 126-36.1 (1991).

G.S. § 126-36.1 (1991) provides, "Any applicant for State employment who has reason to believe that employment was denied in violation of G.S. 126-16 shall have the right to appeal directly to the State Personnel Commission." G.S. § 126-16 (1991) provides:

All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition . . . to all persons otherwise qualified, except where

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specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age.

Thus, under G.S. §§ 126-36.1 and 126-16, petitioner had a right of direct appeal to the Commission in the present case. The issue is not, however, whether petitioner had the right to appeal to the Commission, but it is whether petitioner filed his appeal with the Commission in a timely fashion.

Under Chapter 126, “[a]ppeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B” N.C. Gen. Stat. § 126-37 (1991). Under Article 3 of Chapter 150B, “[a] contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office.” N.C. Gen. Stat. § 150B-23(a) (1991). Further, an applicant for employment to whom Chapter 126 applies “may commence a contested case under [Article 3 of Chapter 150B] in the same manner as any other petitioner. The case shall be conducted in the Office of Administrative Hearings in the same manner as other contested cases under [Article 3 of Chapter 150B]. . . .” G.S. § 150B-23(a). Thus, as a procedural matter, petitioner’s appeal in the present case would commence by filing a petition for a contested case hearing with the OAH. In order to determine whether petitioner timely filed this action with the Commission, therefore, we must determine the applicable time limit in which petitioner would have to appeal to the OAH.

In our review of the statutory framework establishing time limits for appeals under Chapter 126, we have not found a section that specifically establishes the time limit for an appeal to the OAH by an individual who is not currently an employee of the state. The applicable time limit set for filing an appeal by an employee, however, is found in N.C. Gen. Stat. § 126-38 (1991) which states, “Any employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after

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receipt of notice of the decision or action which triggers the right of appeal.”

When an individual commences an action for a liability created by statute and no time limit for commencing the action is mentioned in the statute creating the liability, the applicable statute of limitations is three years. N.C. Gen. Stat. § 1-52 (1983 & Supp. 1992). If this Court were to apply this three-year statute of limitations to the present action, however, an applicant for state employment would receive more favorable treatment than a state employee. We do not believe that the Legislature intended to treat prospective state employees more favorably than present state employees. For this reason, we conclude that legislative intent requires the application of the statute of limitations that is applicable to state employees found in G.S. § 126-38 to the present action.

Our analysis is bolstered by Sec. 9, p. 13 of the Model Procedure contained in the Personnel Manual of the North Carolina Office of State Personnel. This section states, in pertinent part, that an applicant for employment who has reason to believe that employment was denied because of age “must appeal an alleged act of discrimination to the department grievance procedure or the State Personnel Commission within thirty calendar days of the alleged discriminatory action.” Thus, petitioner had thirty days after he received notice of the decision or action which triggered his right of appeal to file his petition for a contested case hearing with the OAH.

Petitioner was informed orally on 22 November 1985 that someone else had been hired for the DVOS position. Under N.C. Gen. Stat. § 126-36.1 (1991) petitioner had the right of direct appeal to the Commission at this time. Thus, this was the act that triggered petitioner’s right to appeal, and he had thirty days from this date in which to file his petition for a contested case hearing with the OAH. Petitioner took no action in this case before this thirty days expired.

Then by letter dated 1 February 1986, petitioner filed a grievance with the Chairman of the ESC apparently alleging that he had been discriminated against based on his age and veteran’s preference. After an investigation, the Chairman informed petitioner by a letter dated 24 March 1986 of the agency’s decision that no discrimination had occurred in the hiring of another person for the DVOS position and that the agency would take no further

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action in regard to petitioner's grievance. Then on 3 April 1986, petitioner filed his appeal with the Office of State Personnel for the OAH to conduct a contested case hearing. This appeal was filed more than thirty days after the act which triggered petitioner's right to appeal. Thus petitioner's appeal was untimely, and the Commission correctly dismissed this action.

Petitioner argues, however, that his appeal was timely filed as he filed it within thirty days after he had exhausted the internal grievance procedure. We do not agree. Even if the internal grievance procedure, which does not appear to be statutorily authorized under the facts of this case, would toll the applicable statute of limitations, petitioner failed to attempt to seek redress before the thirty days had expired after he had been informed that he had not been hired.

Accordingly, we reverse the decision of the trial court and remand this case for entry of judgment in accordance with this opinion, affirming the State Personnel Commission's dismissal of petitioner's action.

Reversed and Remanded.

Judges JOHNSON and MCCRODDEN concur.

FORREST SAM ROGERS, PLAINTIFF v. DELAYNE DEYOUNG ROGERS,
DEFENDANT

No. 9225DC488

(Filed 17 August 1993)

**Divorce and Separation § 27 (NC14th)— separation agreement—
support and property division—provisions reciprocal—
agreement not modifiable by court**

The trial court did not err in denying defendant's motion in the cause requesting a modification of the parties' separation agreement, though the court had jurisdiction over the parties because the consent judgment in this case was a court order enforceable by the court's contempt power, since the provisions of the separation agreement indicated that it was an integrated property settlement with support provisions and

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other provisions for property division constituting reciprocal consideration for each other.

Am Jur 2d, Divorce and Separation § 843 et seq.

Appeal by defendant from order entered on 26 February 1990 by Judge Timothy Kincaid in Burke County District Court and order entered on 11 February 1992 by Judge Robert E. Hodges in Burke County District Court. Heard in the Court of Appeals 15 April 1993.

At the 26 February 1990 Session of Burke County District Court, Judge Timothy Kincaid heard defendant's motion to compel discovery. In ruling on this motion, the court found that the separation agreement between the parties was not subject to modification by the court, and entered a conclusion of law to that effect. Defendant's motion to compel discovery related to the issue of modification was therefore denied. At the 11 February 1992 Session of Burke County District Court, Judge Robert E. Hodges heard the defendant's underlying motion in the cause. Relying upon Judge Kincaid's conclusion of law, Judge Hodges denied that part of the defendant's motion in the cause requesting a modification of the separation agreement. On 9 March 1992, the defendant filed a notice of appeal.

Simpson, Aycock, Beyer & Simpson, by Louis E. Vinay, Jr. and Dan R. Simpson, for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Allan P. Root, for defendant-appellant.

JOHNSON, Judge.

Plaintiff and defendant separated in December of 1974. At the time of the separation of the parties, plaintiff-husband was a fifty percent (50%) owner of and employed by Romarco Ltd., a corporation engaged in the manufacture of imitation marble. Defendant-wife was a part-time employee of the company. Plaintiff and defendant owned jointly a home and its furnishings in Morganton. Plaintiff had a substantial separate estate. All children of the marriage were of age at the time of separation.

Upon separation, the parties entered into a deed of separation agreement on 6 December 1974. On 9 May 1980, a judgment of divorce was entered between Mr. and Mrs. Rogers. The divorce judgment stated in pertinent part:

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

1. That the plaintiff is entitled to a judgment of absolute divorce from the defendant.

2. That the parties have entered into a deed of separation on December 6, 1974, which settled all property and other rights as between the parties and should be incorporated herein and a copy attached.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. The bonds of matrimony heretofore existing between the plaintiff and defendant be and they are hereby dissolved and the plaintiff and defendant are hereby granted an absolute divorce from each other.

2. That plaintiff and defendant fully perform and comply with the terms and provisions of the separation agreement attached hereto as Exhibit A and incorporated herein by reference as if fully set out.

3. That this cause be retained by this Court, should either party wilfully fail to comply with and perform the terms and conditions of the separation agreement attached hereto as Exhibit A. This Court may, be [sic] appropriate Order, enforce the said Agreement by holding the breaching party in contempt of this Court and to punish the said party as by law provided.

The divorce judgment entered by the court did not set out an award of alimony nor did it specifically set out any property rights of the parties. Instead, the court incorporated the deed of separation agreement entered into between the parties as their settlement of all property and other rights.

On 23 June 1989, defendant filed a motion before the district court to show cause why the plaintiff should not be held in contempt of court for alleged failure to comply with the terms of the deed of separation, and in the alternative to have the terms of the deed of separation modified.

On 26 February 1990, Judge Timothy Kincaid heard the defendant's motion to compel discovery, and entered an order on that

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date denying the motion. The order included a conclusion of law that the separation agreement between the parties was not modifiable by the court because the alimony provisions and property divisions were reciprocal considerations. A further conclusion of law determined that defendant had requested discovery far beyond that information necessary to determine if plaintiff had complied with the terms of the separation agreement and judgment, and therefore the court sustained plaintiff's objection to such discovery.

On 16 December 1991, Judge Robert E. Hodges heard the underlying motion in the cause of the defendant. Judge Hodges subsequently entered an order on 11 February 1992 denying that part of the defendant's motion in the cause which requested a modification of the separation agreement. Defendant filed a notice of appeal from the denial of the motion in the cause and the interlocutory order denying the motion to compel discovery. The two issues presented for appeal are (1) whether the separation agreement was subject to modification by the court, and (2) whether the court properly denied certain discovery requests made by defendant.

By the first assignment of error, defendant contends that the trial court erred when it denied defendant's motion in the cause. We disagree.

North Carolina General Statutes § 50-16.9(a) provides:

§ 50-16.9 *Modification of order.*

(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon a motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

North Carolina General Statutes § 50-16.9(a) (1987). In order to satisfy the statutory provision three elements must be met:

- (1) The court has jurisdiction over the parties and the agreement sought to be modified. Jurisdiction is attained over the agreement when the support provisions of the agreement constitute an order of the court.
- (2) The support provisions ordered by the court constitute true "alimony or alimony pendente lite" and are not in fact

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merely part of an integrated property settlement. The support provisions of the agreement must be separable from the property settlement provisions.

(3) The party seeking modification meets his or her burden of demonstrating such a change in circumstances as would warrant a modification of the alimony or alimony pendente lite obligations imposed by court order.

White v. White, 296 N.C. 661, 666-67, 252 S.E.2d 698, 701 (1979).

In examining the relevant case law, we note at the outset that the instant case is governed by the law as it existed prior to the decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). The holding in *Walters* was expressly made prospective only and applies to judgments entered on or after 11 January 1983. The divorce judgment in the case *sub judice* was entered on 9 May 1980 and as such *Walters* is not applicable. Thus, the following discussion will involve pre-*Walters* law.

The first requirement before this Court is whether the court has jurisdiction over the parties. The court has jurisdiction over a consent judgment only if it is an order of the court. *White*, 296 N.C. 661, 252 S.E.2d 698. Therefore, we must determine whether the consent judgment in question is an order of the court.

Prior to *Walters*, 307 N.C. 381, 298 S.E.2d 38, the courts categorized separation agreements in consent judgments either as Type I or Type II. The first type is considered merely a contract where the court does nothing more than approve payments and set them out in a judgment. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). Traditionally, this type of consent judgment was not held to be a court order, and was enforceable only as an ordinary contract. *Id.* In the second type of consent judgment, the court adopts the agreement of the parties as its own determination of the parties' respective rights. The second type of consent judgment, "being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper." *Id.* In *Walters*, the Supreme Court abolished the two-type approach by decreeing that all consent judgments approving separation agreements are judgments of the court modifiable and enforceable by contempt. We have determined earlier that *Walters* does not apply to this case; therefore, we consider whether the first element has been met.

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In the case *sub judice*, the consent judgment clearly states that "plaintiff and defendant fully perform and comply with the terms and provisions of the separation agreement attached hereto as Exhibit A and incorporated herein by reference as if fully set out." "When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree, which then ceases to exist as an independent enforceable contract." *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967). The consent judgment, in the instant case, is a court order enforceable by the court's contempt power. The trial court does have jurisdiction over the consent judgment pursuant to North Carolina General Statutes § 50-16.9(a).

The second statutory requirement for modification pursuant to North Carolina General Statutes § 50-16.9(a) is that the support provisions ordered by the court constitute "alimony or alimony pendente lite." North Carolina General Statutes § 50-16.1(1) and North Carolina General Statutes § 50-16.1(2) (1987). Even though denominated as such, periodic support payments to a dependent spouse may not be true alimony within the meaning of the North Carolina General Statutes § 50-16.9(a) if they are actually part of an integrated property settlement. *Marks v. Marks*, 316 N.C. 447, 454, 342 S.E.2d 859, 864 (1986). "The test for determining if an agreement is an integrated property settlement is whether the support provisions for the dependent spouse 'and other provisions for a property division between the parties constitute reciprocal consideration for each other.'" *Id.* If support provisions are found to be consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, are not alimony but instead are merely a part of an integrated property settlement which is not modifiable by the courts. *Bunn*, 262 N.C. at 70, 136 S.E.2d at 243.

In determining whether a provision in a consent judgment is for alimony alone and thus severable from the remaining provisions and terminable upon the wife's remarriage, or whether the provisions for alimony and the provisions for division of property constitute reciprocal consideration so that they are not separable and may not be changed without the consent of both parties, a consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. *Allison v. Allison*, 51 N.C. App. 622, 277 S.E.2d 551, *appeal dismissed and cert. denied*, 303 N.C. 543, 281 S.E.2d 660 (1981).

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Several factors indicate that the parties intended the deed of separation to be a complete property settlement, and its provisions reciprocal consideration of them, as the court below concluded, rather than separate alimony and property division provisions.

The separation agreement, in the case *sub judice*, states that "Now, Therefore, for and in consideration of the agreements, stipulations and covenants herein contained, the wife does hereby stipulate, agree and covenant with the husband, and the husband does hereby stipulate, agree and covenant with the wife as follows[.]" The agreement then goes on to set out a property settlement and a schedule of alimony payments for the wife. From a reading of the agreement, it is our understanding that the agreements, stipulations and covenants concerning the property settlement and alimony payments were used as reciprocal consideration.

Secondly, defendant conveyed her interest in certain personal property to plaintiff, while plaintiff transferred his interest in certain other real and personal property, together with "alimony payment" to defendant. These provisions constitute reciprocal consideration, one for the other. Thus, the provisions of the deed of separation are related, evincing a complete property settlement between the parties. *Barr v. Barr*, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Lastly, the "alimony payments" in the agreement were not true alimony payments in that they do not end upon the remarriage of defendant. This is evidence, albeit inconclusive, that the parties did not intend for the payments to be true alimony payments. North Carolina General Statutes § 50-16.9(b) (1987). Also, there is no language in the agreement finding defendant to be a "dependent" spouse and plaintiff to be a "supporting" spouse; such designations are usually indicative of the payment and receipt of alimony. North Carolina General Statutes § 50-16.1 (1987) and North Carolina General Statutes § 50-16.2 (1987). This Court has considered the absence of such findings as supportive of an interpretation that the payment provisions are not alimony. *Barr*, 55 N.C. App. 217, 284 S.E.2d 762.

When the foregoing factors are weighed together, we find that the court below was correct in concluding that the provisions of the deed of separation constitute reciprocal consideration, and therefore are not separable and modifiable without the parties' consent.

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By defendant's second assignment of error, defendant contends that the trial court erred when it denied defendant's motion to compel discovery. We disagree.

As we have determined that the support and property provisions of the deed of separation exist reciprocally, and are thus not modifiable by this Court, we find it would be pointless to compel discovery on the issue of modification of the separation agreement.

The decision of the trial court is affirmed.

Judges ORR and MCCRODDEN concur.

BETTY JO (ISRAEL) GOWING, PLAINTIFF v. RONALD BENJAMIN GOWING,
DEFENDANT

No. 9228DC727

(Filed 17 August 1993)

1. Divorce and Separation § 392.1 (NCI4th) — deviation from child support guidelines — notice of request of court to take evidence — waiver by introduction of evidence

Though the trial court deviated from the child support guidelines by considering the child's income in its computation of support, and N.C.G.S. § 50-13.4(c) only allows deviation from the guidelines if a party requests with notice that the trial court take evidence relating to the reasonable needs of the child for support and the relative ability of each parent to provide support, both parties in this case waived their right to notice of a request and the trial court was free to deviate from the guidelines where both parties introduced without objection evidence of the child's needs and the parents' ability to pay support.

Am Jur 2d, Divorce and Separation § 1035 et seq.

2. Divorce and Separation §§ 399, 406 (NCI4th) — child support — child's insurance settlement considered — father's inability to provide support — denial of child support — error

In an action for child support where the child was the beneficiary of a structured settlement from a medical malprac-

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tice claim which was to pay the sum of \$2,000 per month for his entire life, the trial court erred in denying plaintiff mother child support, since, if a parent can support his minor child, the trial court must refuse to diminish or relieve him of this obligation to provide for his child if the sole ground for that relief is that the child has his own separate estate, and for this child's settlement money to be a factor in deviating from the guidelines and awarding no support, the trial court must also find that the defendant father is unable to provide support.

Am Jur 2d, Divorce and Separation §§ 1041, 1042.**3. Divorce and Separation § 394 (NCI4th) — child support — inadequacy of findings**

The trial court in an action for child support erred in failing to make adequate findings of fact as to the reasonable needs of the child for support, the earning capacity or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of the plaintiff.

Am Jur 2d, Divorce and Separation § 1039 et seq.**4. Divorce and Separation § 551 (NCI4th) — child support action — attorney's fees denied — inadequate findings**

In an action for child support, the trial court erred in failing to make adequate findings of fact to support its denial of attorney's fees. N.C.G.S. § 50-13.6.

Am Jur 2d, Divorce and Separation § 615.

Necessity and sufficiency of notice and hearing as to allowance of suit money or counsel fees in divorce and other marital action. 10 ALR3d 280.

Appeal by plaintiff from order entered 30 May 1991 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 7 June 1993.

Plaintiff filed this action on 5 April 1991. After a hearing on 20 May 1991, an order entered on 30 May 1991 awarded plaintiff a divorce from bed and board, custody of the parties' minor child Travis Benjamin Gowing, a writ of possession to the marital home, the monthly proceeds from an insurance settlement, and an order

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restraining both parties from disposing of any marital property. The court also granted defendant visitation rights and denied plaintiff's request for alimony pendente lite, child support and attorney's fees.

From this order, plaintiff appeals.

Gum, Hillier & Friesen, P.A., by Ingrid Friesen, for plaintiff-appellant.

DeVere Lentz & Associates, by DeVere C. Lentz, Jr., for defendant-appellee.

ORR, Judge.

The parties were married on or about 9 December 1979 and separated on 14 March 1991. One child, Travis Benjamin Gowing, was born of the marriage. The child suffers from cerebral palsy and is the beneficiary of a structured settlement from a medical malpractice claim which pays the sum of \$2,000.00 per month for his entire life. Until March 1990, defendant was the primary supporter of the family, and the parties and minor child resided in a mobile home in Buncombe County. Plaintiff had been required to stay home with the minor child until he was enrolled in the Irene Wortham Center, but it is no longer necessary for her to remain at home.

Plaintiff appeals the denial of child support on four grounds and the denial of attorney's fees on one. The determination of a child support award is governed by N.C. Gen. Stat. § 50-13.4(c), effective since 1 October 1990:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1). However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide

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

In its order, the trial court only provided two written findings regarding child support:

Finding #7) That the minor child is the beneficiary of a structured settlement which pays for the minor child's use and benefit the sum of \$2,000.00 per month, which substantially exceeds the minor child's expenses and for this reason, there is no need for child support.

Finding #8) That until recently, the Plaintiff was required to stay at home with the minor child, but that the minor child is now enrolled in Irene Wortham Center, and it is no longer necessary that the Plaintiff remain at the home with the minor child.

[1] Plaintiff first contends that the trial court erred in deviating from the child support guidelines because the defendant did not request such deviation as required by the statute. Defendant argues that the denial of child support could have been determined under the guidelines if the trial court found that defendant's monthly gross income at the time of the trial was zero. Defendant's argument is true; however, finding #7 states that no award was granted because the child's settlement exceeds his needs. Since the guidelines do not consider the child's income or property in its computation of support, the trial court deviated from the guidelines.

Plaintiff is correct in her assertion that the statute only allows deviation from the guidelines if a party requests with notice that the trial court take evidence "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." N.C.G.S. § 50-13.4(c). Our review of the record does not reveal such a request. However, both parties introduced without objection evidence of the child's needs and the parents'

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ability to pay support. In failing to object to this evidence, both parties waived their right to notice of a request and the trial court was free to deviate from the guidelines. *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 741 (1991). Thus, the trial court committed no error in deviating from the child support guidelines without a request.

[2] However, in deviating from the guidelines, the trial court was required to make findings of fact as to the criteria that justified varying from the guidelines and the basis of the amount ordered. N.C.G.S. § 50-13.4(c). Plaintiff contends that the court committed error because its findings were insufficient to meet this requirement. We agree.

The trial court may vary from the guidelines if it finds “by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.” *Id.* Finding #7 states that the trial court awarded no support because the child is the beneficiary of settlement money that exceeds his needs. Finding #8 states that the plaintiff mother is able to work and thus has potential income. If the trial court varied from the guidelines because their application would exceed the reasonable needs of the child considering the relative ability of each parent to provide support, then the court must make findings as to the abilities of each parent to provide support and the reasonable needs of the child. If the trial court varied from the guidelines because their application would be otherwise unjust or inappropriate the court must likewise make findings to support such a conclusion.

Finding #7 alone cannot relieve the defendant of support. “The supporting parent who can do so remains obligated to support his or her minor children, even though they may have property of their own.” *Browne*, 101 N.C. App. at 625, 400 S.E.2d at 741, (citing *Lee v. Coffield*, 245 N.C. 570, 573, 96 S.E.2d 726, 728-29 (1957)). If a parent can support his minor children, the trial court must refuse to diminish or relieve him of this obligation to provide for his children if the sole ground for that relief is that the children have their own separate estates. *Id.* For the child’s settlement money to be a factor in deviating from the guidelines and awarding no support, the trial court must also find that the defendant father is unable to provide support. As discussed above, such a finding

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would allow an award of no support under the child support guidelines as well. We hold that the trial court's findings fail to justify deviation from the child support guidelines or provide basis for the denial of an award.

[3] Plaintiff also argues that the trial court erred in failing to make findings regarding the reasonable needs of the child for support, the earning capacity, or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of the plaintiff. We agree.

Plaintiff's assignment of error arises from the first paragraph of N.C.G.S. § 50-13.4(c), which requires the court's award "to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." The second paragraph of N.C.G.S. § 50-13.4(c) provides that when a request to deviate is made and such evidence is taken, the court should hear the evidence and "find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." The list of factors in the first paragraph defines the general category of "facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support," and those factors should be included in the findings if the trial court is requested to deviate from the guidelines.

"Absent a timely and proper request for a variance of the guidelines, support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance." *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740, *see also Williams v. Williams*, 105 N.C. App. 615, 414 S.E.2d 80 (1992). If a deviation from the guidelines is requested, the trial court's award of support will be reviewed on an abuse of discretion standard. *See Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (computing amount of child support is an exercise of judicial discretion, filed before adoption of presumptive guidelines). Therefore, in order for this Court to determine whether the trial court abused its discretion in computing the deviating award, the trial court must make adequate findings as to the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, condi-

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tions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. If the trial court determines that the greater weight of the evidence shows that "the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate," then an amount other than the presumptive amount in the guidelines may be awarded. N.C.G.S. § 50-13.4(c). If the trial court does deviate from the guidelines, the findings of fact must show the justification for the deviation and the basis for the amount ordered. *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740.

In the case *sub judice*, the trial court erred in failing to make adequate findings of fact as to the reasonable needs of the child for support, the earning capacity, or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of the plaintiff.

Plaintiff next alleges that the trial court abused its discretion in failing to order the defendant to pay any child support. "Support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance." *Id.* A variation from the guidelines will be reviewed on an abuse of discretion standard. Absent evidence compelling a different award than that ordered, the trial court's weighing of its findings giving basis for its award will be respected so long as the record contains evidence sufficient to allow those findings. Without more adequate findings of fact as to the basis for the amount ordered, we cannot rule on this allegation of error.

[4] Plaintiff finally contends that the trial court erred in denying her request for attorneys fees and in failing to make findings of fact or conclusions of law to support the denial. The applicable statute, N.C.G.S. § 50-13.6, provides:

In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support

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which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

"In a custody and support action, once the statutory requirements of Section 50-13.6 have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion." *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-06 (1991). Where an award of attorney's fees is granted, it "must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area." *Weaver v. Weaver*, 88 N.C. App. 634, 641, 364 S.E.2d 706, 711, *cert. denied*, 322 N.C. 330, 368 S.E.2d 875 (1988). Where an award of attorney's fees is prayed for, but denied, the trial court must provide adequate findings of fact for this Court to review its decision. In the case *sub judice*, the trial court made no such findings; it only ordered that the request was denied. The trial court committed error in failing to make adequate findings of fact to support its denial of attorney's fees.

We hold that the order of the trial court denying child support is vacated and the case remanded for findings of facts consistent with this opinion.

Vacated and remanded.

Chief Judge ARNOLD and Judge MARTIN concur.

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[111 N.C. App. 621 (1993)]

STATE OF NORTH CAROLINA v. JOSEPH GUNTER

No. 9210SC746

(Filed 17 August 1993)

1. Criminal Law § 67 (NCI4th) — defendant cited for driving while impaired — action in district court — presentment in superior court — jurisdiction in superior court

There was no merit to defendant's contention that the District Court of Wake County had exclusive jurisdiction over this case and that the Wake County Superior Court therefore rendered judgment without jurisdiction, since the statute in question, N.C.G.S. § 7A-271(a)(2), should be read to grant jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court; therefore, the action was properly under the jurisdiction of the district court and not the superior court when the citation for driving while impaired was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction.

Am Jur 2d, Criminal Law §§ 352-357.**2. Evidence and Witnesses § 1823 (NCI4th) — driving while impaired — results of blood test — admissibility**

The trial court did not err in admitting into evidence results of the blood test determining blood alcohol concentration pursuant to N.C.G.S. § 20-139.1(a), since defendant was given the option to submit or refuse to submit to a breathalyzer test and his decision was made after he was advised of his rights in a manner provided by N.C.G.S. § 20-16.2; furthermore, the evidence was not rendered inadmissible based on defendant's contentions (1) that the charging officer who requested the blood test on the night of the accident was not the officer who charged him in the superior court action on which he was tried, and (2) that the district court action which arose from the citation issued by the charging officer who requested the blood test was not the superior court action on which he was tried.

Am Jur 2d, Automobiles and Highway Traffic §§ 375-380.

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[111 N.C. App. 621 (1993)]

3. Automobiles and Other Vehicles § 823 (NCI4th) — substance abuse assessment — failure to participate in treatment — no finding of mitigating factor — no error

The trial court did not err in failing to find as a statutory mitigating factor that defendant received a substance abuse assessment after being charged and prior to sentencing, since defendant did not go for assessment until the day before sentencing; he had not yet participated in his treatment; and N.C.G.S. § 20-179(e)(6) lists as a mitigating factor defendant's assessment *and* participation in recommended treatment.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Automobiles and Other Vehicles § 822 (NCI4th) — aggravating factors — sufficiency of evidence

Evidence was sufficient to support the sentencing judge's finding as aggravating factors: (1) gross impairment of defendant's faculties while driving or an alcohol concentration of .20 or more within a relevant time after the driving, since defendant had a .27 alcohol concentration and witnesses testified that defendant smelled of alcohol, had trouble standing, and had slurred speech; (2) especially reckless or dangerous driving, since there was evidence that defendant hit a pole off the road without applying his brakes while speeding; and (3) negligent driving that led to an accident causing property damage in excess of \$500, since photographs of the vehicle taken after the accident showed damage to the car sufficient to allow consideration of this factor. N.C.G.S. § 20-179(d).

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 1463 (NCI4th) — supervised probation — sufficiency of findings

The sentencing judge did not err by placing defendant on supervised probation where the judge indicated in the record on the judgment form that he received evidence and found that supervised probation was necessary. N.C.G.S. § 20-179(r).

Am Jur 2d, Criminal Law §§ 567, 568.

Appeal by defendant from judgment entered 18 December 1991 by Judge Knox Jenkins in Wake County Superior Court. Heard in the Court of Appeals 7 June 1993.

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[111 N.C. App. 621 (1993)]

On 8 March 1991, the defendant was charged with driving while impaired by citation and cited to appear in Wake County District Court on 19 March 1991. On 28 May 1991, the Grand Jury of Wake County issued a presentment to the District Attorney requesting that he investigate to determine if the defendant operated a motor vehicle while under the influence of an impairing substance.

On 24 June 1991, the grand jury returned a true bill of indictment, based on the presentment, charging the defendant with the misdemeanor of DWI. The indictment was filed in Wake County Superior Court. The District Attorney voluntarily dismissed the district court proceeding on 23 July 1991.

Defendant was tried and found guilty in superior court by a jury on 18 December 1991. Judgment was entered on the same day. Defendant was sentenced to Level Three punishment. From the judgment and sentencing, defendant appeals.

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

Mark A. Perry for defendant-appellant.

ORR, Judge.

On 8 March 1991 between 1:00 and 2:00 a.m., defendant Gunter, a Raleigh Police Officer, had a single car accident, driving into a telephone pole. Officer M.C. Ballard, also of the Raleigh Police Department, arrived at the scene of the accident and called for emergency medical services (EMS). Officer Ballard noticed a strong smell of alcohol about the defendant's person, and he noticed that defendant had trouble standing and had slurred speech. EMS took defendant to the hospital, where Officer Ballard charged him with DWI, read him his rights, and requested him to submit to a chemical analysis to determine his blood alcohol content. Defendant consented to the blood test, which yielded results indicating a blood alcohol concentration of .276.

Defendant argues two issues appealing judgment and three issues appealing sentencing. We hold no error.

I.

[1] Defendant first challenges jurisdiction, arguing that the District Court of Wake County had exclusive jurisdiction over this case,

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and therefore the Wake County Superior Court rendered judgment without jurisdiction.

The jurisdictions of the district and superior courts of North Carolina are controlled by the following statutes.

N.C.G.S. § 7A-271:

(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:

. . .

(2) When the charge is initiated by a presentment; . . .

N.C.G.S. § 7A-272:

(a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

N.C.G.S. § 7A-271(a)(2) contains the challenged language. Defendant urges us to read the statute so that the superior court only has jurisdiction over a misdemeanor action in which a presentment has occurred if the presentment was the first accusation of the offense in any court. Under defendant's interpretation, the action *sub judice* would fall under the jurisdiction of the district court and not the superior court because the 8 March 1991 citation initiated the charge of DWI against him, occurring before the presentment issued 28 May 1991. Thus, N.C.G.S. § 7A-271(a)(2) would not apply.

The State argues that the statute should be read to grant jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court. Under this interpretation, the action *sub judice* was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction. The State correctly interpreted the statute.

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When construing the words of a statute, the intent of the Legislature controls. Where the language is clear and unambiguous, there is no room for judicial construction and we must give it the plain and definite meaning. *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980).

N.C.G.S. § 7A-271(a) grants to the superior court exclusive, original jurisdiction over all criminal actions not assigned to the district court in the Article, except that misdemeanors, which are assigned to the district court in N.C.G.S. § 7A-272(a), fall under superior court jurisdiction if any of certain enumerated conditions apply. N.C.G.S. § 7A-271(a)(2) lists one of these conditions, when the charge is initiated by a presentment. This condition serves to grant jurisdiction to the superior court in cases where the charging document upon which the defendant is tried began as a presentment. The condition does not include cases where the superior court case is initiated by some other means of criminal process, such as a bill of indictment. The term "initiated" refers to how the criminal process in superior court began, not to what the first criminal process of any kind in any court was.

The superior court action against defendant in the case *sub judice* originated as a presentment. A presentment is an accusation of an offense made by a grand jury upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted to them by the public prosecuting attorney. *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952). Here, the district attorney presented information to the grand jury regarding the offense, and the grand jury issued the presentment on 28 May 1991. Afterward, the district attorney submitted a true bill of indictment which the grand jury returned on 24 June 1991. Thus, the superior court action of DWI against defendant was initiated by a presentment and was properly within the jurisdiction of the superior court pursuant to N.C.G.S. § 7A-271(a)(2).

II.

[2] The second issue defendant raises appealing judgment is whether results of the blood test determining blood alcohol concentration were properly admitted into evidence at trial. We hold that the trial court committed no error in admitting the results into evidence pursuant to N.C.G.S. § 20-139.1(a), "In any implied-

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consent offense under G.S. 20-16.2, a person's alcohol concentration as shown by a chemical analysis is admissible in evidence."

Defendant contends that the conditions of G.S. § 20-16.2 were not met for two reasons. First, the charging officer who requested the blood test on the night of the accident was not the officer who charged him in the superior court action on which he was tried. Second, the district court action that arose from the citation issued by the charging officer who requested the blood test was not the superior court action on which he was tried.

The implied-consent statute, N.C.G.S. § 20-16.2 (Supp. 1992), reads in relevant part:

Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if he is charged with an implied-consent offense. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense. N.C.G.S. 20-16.2(a).

The charging officer, in the presence of the chemical analyst who has notified the person of his rights under subsection (a), must request the person charged to submit to the type of chemical analysis designated. N.C.G.S. 20-16.2(c).

Meaning of Terms—Under this section, an "implied-consent offense" is an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section. A person is "charged" with an offense if he is arrested for it or if criminal process for the offense has been issued. A "charging officer" is a law-enforcement officer who arrests the person charged, lodges the charge, or assists the officer who arrested the person or lodged the charge by assuming custody of the person to make the request required under subsection (c) and, if necessary, to present the person to a judicial official for an initial appearance. N.C.G.S. 20-16.2(a1).

"The administrative procedures provided for in G.S. § 20-16.2 are designed to promote breathalyzer tests as a valuable tool for law enforcement officers in their enforcing the laws against driving under the influence while also protecting the rights of the State's citizens." *Rice v. Peters*, 48 N.C. App. 697, 700, 269 S.E.2d 740, 742 (1980). The purpose of the statute is fulfilled when the arrestee

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is given the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute. *Id.*

In the case *sub judice*, the officer who requested the blood test was a proper charging officer under the statute, and that officer charged defendant with an implied-consent offense. The conditions of the statute, which protect defendant's rights, were met. The specific action on which a defendant is tried need not be the same action the defendant is charged with at the time of the blood test. The defendant may later be charged with another offense or recharged for the implied-consent offense by another officer, and the blood test results will not be barred at these trials by the implied-consent statute, so long as its conditions have been met. This sequence of events is likely to occur in cases where a DWI arrestee is later indicted and charged for vehicular manslaughter. The trial court committed no error in admitting into evidence the blood test results.

III.

[3] Defendant also contends that three separate commissions of error by the trial court require resentencing. First, defendant alleges that the sentencing judge committed error by failing to find a statutory mitigating factor that the defendant received a substance abuse assessment after being charged and prior to sentencing. We disagree.

N.C.G.S. § 20-179(e)(6) (Supp. 1992) lists as a mitigating factor

The defendant's voluntary submission to a mental health facility for assessment after he was charged with the impaired driving offense for which he is being sentenced, and, if recommended by the facility, his voluntary participation in the recommended treatment.

Our review of the record shows that defendant failed to prove the second prong of the factor. Defendant did not go for assessment until the day before sentencing and had not yet participated in his treatment. Thus, the trial court committed no error in failing to find this mitigating circumstance.

IV.

[4] Next defendant argues that the sentencing judge committed error by finding aggravating factors under N.C.G.S. § 20-179(d):

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(1) gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.20 or more within a relevant time after the driving, (2) especially reckless or dangerous driving, and (3) negligent driving that led to an accident causing property damage in excess of \$500.00. We hold that no error occurred.

The same item of evidence may not be used to prove more than one aggravating factor. *State v. Mack*, 81 N.C. App. 578, 585, 345 S.E.2d 223, 227 (1986). If the evidence is sufficient to allow consideration of an aggravating factor by the finder of fact, the finder's decision is not reviewable absent evidence compelling the finding of the aggravating factor. *State v. Harrington*, 78 N.C. App. 39, 47, 336 S.E.2d 852, 856 (1985). The record shows separate, sufficient evidence to allow each aggravating factor to be considered.

The blood test showing the defendant had a 0.27 alcohol concentration and witness testimony allowed consideration of the factor of gross impairment. This evidence included testimony that the defendant smelled of alcohol, had trouble standing, had slurred speech and kept asking for the whereabouts of a woman who was not present. Evidence about the circumstances of the accident allowed consideration of the factor of especially reckless driving, including evidence that defendant hit a pole off the road without applying his brakes while speeding. Photographs of the vehicle taken after the accident show damage to the car sufficient to allow consideration of the factor of property damage in excess of \$500.00. The sentencing judge committed no error in finding the aggravating factors because sufficient evidence existed to allow consideration of each factor.

In addition, defendant argues that the sentencing judge erred by sentencing defendant to Level Three punishment. Defendant contends that the judge's incorrect findings of mitigating and aggravating factors led to incorrect weighing of these factors to determine the punishment level. Because the trial court committed no error in finding the factors, it committed no error in sentencing defendant to Level Three punishment.

V.

[5] Finally, defendant alleges that the sentencing judge committed error by placing the defendant on supervised probation without

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finding as a fact that supervised probation was necessary. We disagree.

Defendant relies on N.C.G.S. § 20-179(r) (Supp. 1992):

Unless a judge in his discretion determines that supervised probation is necessary, and includes in the record that he has received evidence and finds as a fact that supervised probation is necessary, and states in his judgment that supervised probation is necessary, a defendant convicted of an offense of impaired driving shall be placed on unsupervised probation if he meets two conditions. . . .

The sentencing judge indicated in the record on the judgment form that he received evidence and found that supervised probation was necessary. The sentencing judge also stated in open court as a part of the judgment that supervised probation was necessary. No error occurred in placing the defendant on supervised probation.

For the foregoing reasons, this Court holds that no error occurred in the judgment or sentencing of the defendant.

No error.

Chief Judge ARNOLD and Judge MARTIN concur.

SAM STOCKTON GRADING CO. v. HALL

[111 N.C. App. 630 (1993)]

SAM STOCKTON GRADING COMPANY, INC. v. WILLIAM C. HALL AND
FRANK J. HALLJOHNSON PAVING COMPANY, INC. v. WILLIAM C. HALL AND FRANK J.
HALL

No. 9229SC763

No. 9229SC765

(Filed 17 August 1993)

**1. Negotiable Instruments and Other Commercial Paper § 29
(NCI4th)— promissory note in exchange for release of judgment lien— consideration**

The execution of a promissory note is supported by consideration if given in exchange for the release of a lien on real property.

Am Jur 2d, Bills and Notes § 215 et seq.**2. Interest and Usury § 5 (NCI4th)— promissory notes in exchange for release of judgment liens—proper date for computing interest**

Where defendants executed promissory notes on 14 January 1986 in exchange for releases of judgment liens on real property which defendants wanted to sell, and they agreed to pay the face amount of the notes "with interest from date" at the rate of six percent, the trial court erred in awarding interest from 2 January 1976, the date from which the original judgments calculated interest.

Am Jur 2d, Interest and Usury §§ 87-98.

Judge WYNN dissenting.

Appeal by defendants from orders filed 23 April 1992 in McDowell County Superior Court by Judge Julia Jones. Heard in the Court of Appeals 10 June 1993.

Dameron and Burgin, by Anthony Lynch, for plaintiff-appellee Sam Stockton Grading Company, Inc.

No brief filed for plaintiff-appellee Johnson Paving Company, Inc.

Carnes and Franklin, P.A., by Everette C. Carnes, for defendant-appellants.

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[111 N.C. App. 630 (1993)]

GREENE, Judge.

William C. Hall and Frank J. Hall (the Halls), defendants in these consolidated cases, *see* N.C. R. App. P. 40 (1993) (this Court may, on its own initiative, consolidate cases which involve common issues of law), appeal from the trial court's grant of summary judgment for Sam Stockton Grading Company, Inc. (Stockton) and Johnson Paving Company, Inc. (Johnson), on their separate claims to recover on notes.

Stockton and Johnson's predecessor in interest, R.L. Johnson and Son Paving Company, obtained separate judgments against the Halls, both of which were filed 28 September 1978, in McDowell County. Stockton's judgment was in the amount of \$37,163.00 and Johnson's predecessor's judgment in the amount of \$11,476.13. Both judgments recited that the judgment amounts were to be paid "together with interest . . . from the 2nd day of January, 1976."

In early 1986, the Halls had the opportunity to sell certain real property which was subject to the liens of the judgments held by Stockton and Johnson. On 14 January 1986, the Halls entered into written agreements with Stockton and Johnson. Under the agreement with Stockton, the Halls made a \$20,000.00 payment on the judgment and Stockton released the judgment lien on the real property which the Halls wanted to sell. Under the agreement with Johnson, the Halls made a \$5,000.00 payment on the judgment and Johnson released the lien held by it on the real property. Both agreements recite that they are "secured by" promissory notes incorporated by reference into the agreement. The Stockton promissory note, dated 14 January 1986, required the Halls to pay Stockton, on demand, the sum of \$46,553.30, together with interest "from date" at the rate of six percent. The Johnson promissory note, also dated 14 January 1986, required the Halls to pay Johnson, on demand, the sum of \$15,552.00, together with interest "from date" at the rate of six percent. Both notes recite that they are "executed for the sole and limited purpose of reaffirming the balance due on the . . . outstanding judgment."

On 16 May 1991, Stockton and Johnson filed complaints seeking payment of the notes. The Halls answered, denying that they were obligated on the notes. All parties subsequently moved for summary judgment, and each filed an affidavit. The trial court granted Stockton and Johnson's motions for summary judgment in separate

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decrees on 23 April 1992, awarding each the amount of their notes, plus interest accrued from 2 January 1976.

The issues presented are whether (I) the execution of a promissory note is supported by consideration if given in exchange for the release of a lien on real property; and, if so, (II) the trial court erred in granting interest on the notes from 2 January 1976.

I

[1] In order to recover on the notes it was necessary for Stockton and Johnson to show execution, delivery, consideration, demand and nonpayment. *See Royster v. Hancock*, 235 N.C. 110, 112, 69 S.E.2d 29, 30-31 (1952). There is no dispute that the notes were properly executed and delivered, that they are not paid and that timely demands were made. The parties do dispute whether the notes were given for consideration.

The evidence reveals that on the same day the parties executed the notes, they executed agreements wherein it was agreed that upon payment of specified sums by the Halls, \$20,000.00 to Stockton and \$5,000.00 to Johnson, and upon execution of the notes, Stockton and Johnson would release, from their 1978 judgment liens, the real property owned by the Halls. The property was released and later sold by the Halls.

A new promise to perform an act the promisor is otherwise legally bound to perform is not supported by consideration. *Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 294, 326 S.E.2d 280, 282, *aff'd per curiam*, 314 N.C. 528, 334 S.E.2d 391 (1985); 17 C.J.S. *Contracts* § 111 (1963) (no consideration for promise to pay valid judgment). When, however, the new promise entails some additional benefit to be received by the party making the promise or some detriment to the promisee, the new promise is supported by consideration. *See Penn*, 73 N.C. App. at 293-94, 326 S.E.2d at 282 (consideration to support a contract "defined as some benefit or advantage to the promisor or some loss or detriment to the promisee"); *Anthony Tile and Marble Co., Inc. v. H.L. Coble Constr. Co.*, 16 N.C. App. 740, 744, 193 S.E.2d 338, 341 (1972).

In this case, although executed for the purpose of "reaffirming" a debt due on a recorded judgment, the notes were also executed on the condition that Stockton and Johnson would release from

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the liens created by their judgments certain properties owned by the Halls. The release of the liens was not only a benefit to the Halls, in that they were allowed to sell the property free of the liens, but also a detriment to Stockton and Johnson, in that their security for the debts was diminished. Therefore, there existed sufficient consideration for the execution of the notes.

Because there is no genuine issue of fact presented in these cases, and because there was consideration for the execution of the notes, Stockton and Johnson are entitled to judgment as a matter of law. See *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721, 329 S.E.2d 728, 729 (1985) (summary judgment proper for party with burden of proof where no genuine issue of fact, no inferences inconsistent with recovery, and no standard to be applied to facts by jury).

II

[2] The Halls also argue that the trial court incorrectly awarded interest on the notes. We agree.

The promissory notes recite that the Halls agreed to pay the face amount of the note, "with interest from date" at the rate of six percent. The date of the promissory notes is 14 January 1986. Therefore, under the terms of the notes, the trial court's award of interest from 2 January 1976 was error.

Accordingly, the portion of the trial court's order granting interest on the notes from 2 January 1976 is reversed, and the matter is remanded for the entry of orders reflecting interest from the date of the promissory notes.

Affirmed in part, reversed in part, and remanded.

Judge JOHNSON concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent from Part I of the majority opinion because I find that there exists a genuine issue of material fact regarding the existence of consideration for the execution of the promissory notes.

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The majority asserts that consideration for the promissory notes exists because the plaintiffs agreed to release properties from the judgment liens. The agreements regarding the release of those properties, however, specifically state that the properties were released from the judgment lien in consideration of the defendants' payment against the accrued interest of the judgment. Such an agreement is not uncommon, as it is an accepted practice in the real estate trade for the holder of a judgment to release property to the owner in consideration for the payment of a certain amount toward the judgment.

I acknowledge that the agreements regarding the release of the properties also state that "[i]t is hereby mutually agreed that no other parcel of real property which is presently owned by either of [the defendants] shall be released in any manner by this agreement, which is hereby secured by a promissory note executed by [the defendants] to [the plaintiffs], in the principle sum of the present outstanding balance of said judgment" However, I do not read this language to indicate that the release of the properties was contingent upon the execution of the promissory notes. Rather, it merely reinforces that only the properties indicated in the agreements are to be released, that the judgments otherwise stand, and that the promissory notes, as incorporated into the agreements, act to reaffirm the existence of the original judgments. In fact, such an interpretation is supported by the promissory notes themselves, which state on their faces that they were "executed for the sole and limited purpose of reaffirming the balance due on the principle and interest of [those] certain outstanding [judgments] against the [defendants]. . . ."

The majority opinion implicitly allows the defendants to be obligated to the plaintiffs twice for one debt. If the promissory notes are enforceable, the original judgment and the subsequent promissory note represent two valid legal obligations arising from a single debt, giving the appearance that the initial debt amount has doubled. Prior to the running of the statute of limitations on the judgments in the present cases, the plaintiffs appear to have had the benefit of either collecting under the promissory note or foreclosing on the judgment lien against the defendants' properties. I cannot conclude that such a result is intended by the law.

Despite my quarrel with the majority's conclusion regarding the consideration, I do not find that summary judgment should

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be granted in favor of the defendants. Rather, I conclude that a genuine issue of material fact exists regarding the existence of consideration.

It has long been established in North Carolina that the forbearance to exercise a legal right is sufficient consideration to support the execution of a promissory note. *Bumgardner v. Groover*, 245 N.C. 17, 22, 95 S.E.2d 101, 105 (1956). The plaintiffs' affidavits, submitted in support of their motions for summary judgment, stated that the promissory notes were executed in lieu of actions on their respective superior court judgments against the defendants. The defendants contradicted those statements and asserted that they received no consideration for executing the promissory notes because they received no benefit and the plaintiffs suffered no detriment. Moreover, the defendants pointed out that the judgments remained in full force and effect and the plaintiffs had every right to execute on them and attempt to collect them, and that, therefore, the judgments held were not affected in any way by the promissory notes.

Because the conflicting affidavits, together with the language of the promissory notes, create a genuine issue of material fact regarding whether the plaintiffs agreed not to take action on the judgments in consideration for the execution of the promissory notes, I conclude that this case must be remanded to the trial court for a trial on its merits.

The forbearance, if present, effectively renders the judgments unenforceable by the plaintiffs, leaving only the promissory notes as a viable means of realizing the debt owed them. I point out, however, that in the subject case the original judgments remained on record in the Clerk's office even though subsequent promissory notes had been executed. The fact that the judgments had not been canceled gives the impression to, for example, title attorneys and creditors that an enforceable judgment lien exists against the property. It appears that a more sound practice for members of the bar in this situation would be to cancel the judgment in the Clerk's office at the time the promissory note is executed. Such a procedure would avoid the appearance that the defendants owed twice for one debt and, moreover, might alleviate questions of whether adequate consideration existed. *See Little v. Steele*, 214 N.C. 343, 199 S.E. 282 (1938) (cancellation of a judgment is sufficient consideration for notes executed by judgment debtor payable to judgment holder).

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[111 N.C. App. 636 (1993)]

STATE OF NORTH CAROLINA v. WILSON GARCIA

No. 9210SC530

(Filed 17 August 1993)

1. Criminal Law § 830 (NCI4th)— codefendant's testimony— cautionary instruction—giving in final charge sufficient

If a cautionary instruction on accomplice testimony was required once defendant requested one, the inclusion of that instruction in the final charge to the jury rather than prior to a codefendant's testimony was sufficient to meet that requirement.

Am Jur 2d, Trial §§ 818-820, 866.

2. Narcotics, Controlled Substances, and Paraphernalia § 124 (NCI4th)— trafficking in cocaine—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for trafficking in cocaine by possession and by transportation where it tended to show that defendant and a woman were travelling together on a bus; defendant planned to pay the woman for carrying the cocaine; he instructed her about what to do with the bag containing the cocaine and where to carry it; and when the bus made stops, defendant called ahead to make arrangements about what to do with the cocaine when they arrived in Durham.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

3. Narcotics, Controlled Substances, and Paraphernalia § 220 (NCI4th)— trafficking in cocaine by possession and by transportation—consecutive sentences—no error

The trial court did not err in sentencing defendant to two consecutive thirty-five-year terms of imprisonment for trafficking in cocaine by possession of 400 grams or more and trafficking in cocaine by transportation of 400 grams or more, and there was no merit to defendant's contention that the sentencing objectives of protecting the public of North Carolina for an additional thirty-five years and rehabilitating and restoring him to the community as a lawful citizen were not necessary because he was likely going to be deported upon release from prison, since two of the declared sentencing purposes would be accomplished in defendant's case: general deterrence of

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trafficking in controlled substances, and punishment commensurate with the injury caused and the culpability involved in trafficking of controlled substances. Moreover, the trial court need not consider whether the goals of restraint and rehabilitation of the offender will be accomplished in relation to each offender sentenced when imposing presumptive sentences under the trafficking statute.

Am Jur 2d, Drugs, Narcotics, and Poisons § 48 et seq.

Appeal by defendant from judgment entered 25 February 1992 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 27 April 1993.

Defendant was found guilty by a jury and convicted of trafficking in cocaine by possession of more than 400 grams and trafficking in cocaine by transportation of more than 400 grams, and he received consecutive thirty-five-year terms of imprisonment. An indictment of conspiracy to traffick in cocaine was dismissed by the trial court at the close of the State's evidence. From the judgment and sentencing, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane L. Oliver, for the State.

Charles F. Caldwell for defendant-appellant.

ORR, Judge.

On 24 April 1991, defendant and Elizabeth Pena were arrested at the Raleigh bus station by two State Bureau of Investigation agents and a Wake County Sheriff's Office detective. The evidence at trial, presented only by the State, tended to show the facts as follows. The officers were conducting a drug interdiction exercise at the bus station, whereby certain southbound passengers were asked to display their tickets, state their origin and destination, and identify their luggage. Defendant and Elizabeth Pena exited the bus from New York separately. The officers questioned defendant, and he produced a one-way ticket from New York to Durham and a store-bought identification card bearing the name "John Brown." He consented to a search of his person which revealed only a sports bar membership card bearing the name "Wilson Garcia." He did not board the bus to Durham. The officers then questioned Elizabeth Pena, who had boarded the Durham-bound bus. She iden-

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tified her bag and consented to a search of the bag. The officers found a plastic bag containing 498.7 grams of eighty-percent pure cocaine in her bag. One of the officers then left the station to search for defendant and found him several blocks away. On the sidewalk nearby, he also found a torn bus ticket with sequential numbers and times as that found on Pena. Defendant denied knowing Pena or having knowledge of the cocaine.

Pena testified at trial that defendant offered to pay for her to visit her mother in the Dominican Republic if she would do something for him. She said defendant told her to pack some clothes and leave her bag at his house. Then he told her to retrieve the bag and meet him at the New York City bus station, where he gave her the bus ticket to Durham. Pena denied knowledge of the cocaine.

Defendant bases his appeal on three contentions of error by the trial court. We hold that the trial court committed no error.

I.

[1] Defendant first argues that the trial court committed reversible error in refusing to give defendant's requested cautionary instruction prior to co-defendant Pena's testimony. We disagree.

Defendant relies on the well-settled rule of law in this State that "although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. Tilley*, 239 N.C. 245, 249, 79 S.E.2d 473, 476 (1954). Defendant contends that the only way the jury can receive evidence of an accomplice with caution is if that evidence is preceded with a cautionary instruction from the court. We disagree.

"[I]nstructions on the credibility of interested witnesses concern a subordinate feature of the case; thus, the court need not instruct on this subject absent a request." *State v. Watson*, 294 N.C. 159, 168, 240 S.E.2d 440, 446 (1978). Defendant made a motion that such an instruction be given prior to Pena's testimony. The trial court denied this motion.

However, in its final charge to the jury, the trial court gave an instruction substantially the same as that requested by defendant. The trial court cautioned the jury that Pena

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has been charged with similar offenses [to defendant] in this case. And I instruct you that as such you may find that she is interested in the outcome of this trial. And . . . in deciding whether or not to believe such a witness you may take her interests into account. If after doing so you believe her testimony in whole or in part, then I instruct you that you should treat what you believe the same as any other believable evidence in this case.

In *State v. Miller*, 61 N.C. App. 1, 22, 300 S.E.2d 431, 445 (1983), the appellant contended that the court erred by not giving a requested limiting instruction that certain photograph exhibits be considered only for illustrative purposes. Although the record showed no limiting instructions were given when the photographs were received into evidence, this Court held that the assignment of error was without merit because the trial court had given appropriate instructions in its final charge to the jury. *Id.*

If a cautionary instruction was required once defendant requested one, the inclusion of that instruction in the final charge to the jury rather than prior to Pena's testimony was sufficient to meet that requirement. The trial court committed no error in not giving the instruction prior to Pena's testimony.

II.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss for insufficiency of evidence. We disagree.

[U]pon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Diaz, 317 N.C. 545, 546, 346 S.E.2d 488, 490 (1986).

The only element of the trafficking offense that defendant challenges is knowing possession of the cocaine. To prove this element, the State must prove actual possession, constructive posses-

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sion, or acting in concert with another to commit the crime. *See Diaz* at 552, 346 S.E.2d at 493 (when the State has established that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense pursuant to a common plan or purpose, it is not necessary to invoke the doctrine of constructive possession). The State argues that it presented substantial evidence for the trial court, when considering the evidence in a light most favorable to the State, to find both defendant's constructive possession and acting in concert with Pena. We agree.

Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both the power and intent to control its disposition or use even though he does not have actual possession. . . . [U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred. (Citation omitted.)

State v. Davis, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Upon review of the testimony presented at trial, we conclude that the State showed sufficient incriminating circumstances from which the trial court could have inferred constructive possession when ruling on defendant's motion to dismiss. From the testimony, the trial court could have drawn reasonable inferences that defendant caused the cocaine to be placed in Pena's bag, that he gave Pena a bus ticket to Durham where she was to take the bag in return for a ticket to visit her mother, that defendant told Pena he would be on the bus to make sure she did what she was supposed to do but she was not to speak to him or sit with him, that Pena was dependent on defendant in that he was to pay for her return trip to New York, and that defendant alone knew what they were to do with the cocaine once they arrived in Durham. Thus, the trial court could have found that defendant had the power and intent to control the disposition of the cocaine.

A defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction with another pursuant to a common criminal plan or purpose. *Diaz* at 547, 346 S.E.2d at 490. The evidence was sufficient for the trial court, when considering it in a light most favorable to the State, to find that defendant acted in concert with Pena to possess the cocaine. The

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trial court could have reasonably inferred that defendant and Pena were travelling together, that defendant planned to pay Pena for carrying the cocaine, that he instructed her about what to do with the bag and where to carry it, and that when the bus made stops defendant called ahead to make arrangements about what to do with the cocaine when they arrived in Durham. We hold that the trial court committed no error in denying defendant's motion to dismiss for insufficient evidence.

III.

[3] Defendant finally contends that the trial court erred in sentencing defendant to two consecutive thirty-five-year terms of imprisonment. We disagree.

Defendant was convicted of trafficking in cocaine by possession of 400 grams or more and trafficking in cocaine by transportation of 400 grams or more. N.C. Gen. Stat. § 90-95(h)(3)(c) (Supp. 1992), provides a person convicted of one of these crimes shall be punished as a Class D felon and sentenced to a term of at least 35 years and fined at least \$250,000. N.C.G.S. § 90-95(h)(6) provides that "[s]entences imposed pursuant to this subsection [h] shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under N.C.G.S. § 90-95(h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished. See *Diaz* at 554, 346 S.E.2d at 494 (and cases cited).

Defendant claims that his sentence is contrary to sentencing public policy as expressed in N.C.G.S. § 15A-1340.3 (1988):

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Defendant claims that he is a citizen of the Dominican Republic and his alien resident status is likely illegal, or at best questionable. Thus, he says, his conviction makes it probable that he will be deported upon release from prison. Upon these assumptions, defendant argues that the sentencing objectives of protecting the

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public of North Carolina for an additional thirty-five years, and rehabilitating and restoring him to the community as a lawful citizen are not necessary.

One purpose behind the trafficking statute is to deter distribution of controlled substances. *State v. Tyndall*, 55 N.C. App. 57, 60, 284 S.E.2d 575, 577 (1981). The Legislature has determined that certain amounts of controlled substances indicate an intent to distribute on a large scale, which increases the number of people potentially harmed by the use of drugs. *Id.* Thus, the Legislature instituted minimum sentences for trafficking offenses with strong consideration of two of its declared sentencing purposes: general deterrence of trafficking in controlled substances, and punishment commensurate with the injury caused and the culpability involved in trafficking of controlled substances.

Restraint and rehabilitation of the offender remain goals under presumptive sentences. The trial court need not consider whether these goals will be accomplished in relation to each offender sentenced when imposing presumptive sentences under the trafficking statute. Even if defendant's illegal alien argument were relevant, there would be no guarantee that defendant, as an illegal alien deported after serving a term for trafficking in cocaine in North Carolina, would not return to the United States and again traffic cocaine in our State. The Legislature set the minimum sentences in the trafficking statute with consideration of its expressed purposes of sentencing. Thus, the trial court's imposition of the prescribed sentences did not violate sentencing public policy and was not in error.

For the foregoing reasons, we hold that the trial court committed no error.

No error.

Judges JOHNSON and McCRODDEN concur.

McDONALD v. MEDFORD

[111 N.C. App. 643 (1993)]

ILEAN MEDFORD McDONALD, PLAINTIFF v. HERMAN J. MEDFORD,
DEFENDANT

No. 9230SC747

(Filed 17 August 1993)

Husband and Wife § 25 (NC14th) — post-nuptial agreement — effect on entireties property originally owned by husband — directed verdict improper

In an action to partition property owned by defendant prior to the parties' marriage and subsequently conveyed by him to himself and plaintiff, the trial court erred in directing verdict for plaintiff, defendant's former wife, where there was evidence that plaintiff had her attorney prepare a post-nuptial contract which purportedly established the respective parties' property interests owned by them prior to the marriage; pursuant to the contract, defendant was to retain sole ownership of any property he then owned; the parties separated two months after execution of the agreement; and for eleven years following execution of the contract the conduct of the parties would allow the reasonable inference that plaintiff intended to, and did in fact, disavow any ownership in the subject property which the parties had held under an estate by the entireties, and granted defendant the right to ownership and enjoyment of that property "without interference by or from the Wife."

Am Jur 2d, Husband and Wife §§ 316-319.

Appeal by respondent from judgment entered 3 February 1992 in Jackson County Superior Court by Judge Charles C. Lamm, Jr. Heard in the Court of Appeals 9 June 1993.

On 14 December 1989, plaintiff filed a special proceeding pursuant to the provisions of N.C. Gen. Stat. § 46-1, seeking a partition of property consisting of a .41 acre lot (the subject property) located in Sylva, North Carolina, in Jackson County. On 28 February 1990, defendant answered denying plaintiff's allegations, and counter-claimed seeking, *inter alia*, sole ownership of the subject property. The case was duly transferred by the clerk to the civil issue docket and came on for a jury trial in Jackson County Superior Court before Judge Charles Lamm. At the close of defendant's evidence, Judge Lamm directed a verdict in favor of plaintiff on her claim

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and against defendant on his counterclaim and ordered partition. Defendant gave timely notice of appeal.

Stephen J. Martin for plaintiff-appellee.

Mark R. Melrose for defendant-appellant.

WELLS, Judge.

On appeal, defendant challenges the trial court's granting a directed verdict, dismissing his counterclaim and ordering partition. In *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 389 S.E.2d 444 (1990), this Court set out the standard of judicial review of a trial court's granting of a directed verdict:

A motion . . . 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 [opposing party]. *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 [opposing party's] evidence must be taken as true and the evidence must be considered in the light most favorable to [him], giving [him] the benefit of every reasonable inference to be drawn therefrom. *Id.* A directed verdict for the [moving party] is not properly allowed unless it appears as a matter of law that a recovery cannot be had by [the opposing party] upon any view of the facts that the evidence reasonably tends to establish. *Id.*

Taken in the light most favorable to defendant, the evidence presented at trial tended to show the following.

On 1 June 1977, defendant purchased and became the sole owner of the real property in dispute, .41 acres of land with a house situated on it. The subject property was the first and only piece of real property which defendant owned during all times relevant to this lawsuit. On 13 October 1977, plaintiff and defendant were married in Jackson County. On 17 October 1977, defendant deeded the subject property to himself and plaintiff, creating an estate by the entireties in the property.

In March of 1978, plaintiff wanted to sell a piece of real estate consisting of a house and lot in Ohio which she had inherited from her previous husband. Plaintiff did not want defendant to have

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any interest in the proceeds of the Ohio property sale. Plaintiff contacted her attorney and he drafted a post-nuptial agreement, which reads in pertinent part as follows:

WHEREAS, the purpose of this agreement is to establish the respective parties' property interest, both real and personal, owned by the parties prior to the marriage.

NOW THEREFORE, it is mutually agreed as follows:

1. That all property owned by the Wife prior to the marriage to the Husband shall remain and continue in the name of the Wife free and clear of any and all claims of dower, curtesy, right of survivorship, elective life estate or any other claim, vested or contingent, which the said Husband may have to such properties arising by way of the marriage of the parties.

2. The said Wife shall have, keep and retain the sole ownership, control, enjoyment of, and during her life, or by Last Will and Testament, or by any other testamentary disposition, shall have the exclusive right to dispose of any and all property, real, personal, or fixed, that she now owns or is possessed of, or has acquired or may hereafter acquire or receive, or which she had acquired or received prior to the marriage of the parties as her own absolute property without interference by or from the Husband and in like manner as if the marriage had not taken place and the said Wife had remained unmarried.

3. That in the event the Wife desires to dispose of, sell [or] convey the said property owned by the Wife, the Husband agrees to and shall execute all necessary documents in order to satisfy any purchaser that he has no claim to any interest in the property owned by Wife.

4. That if . . . the Husband shall survive the Wife, then the Husband shall not make . . . any claim . . . whatsoever in or to any part of the Wife's separate estate . . . to which the Husband as surviving spouse may be or become entitled to, but for the execution and delivery of this agreement and so that all of the property of the Wife not effectively disposed of by her during her life or by testamentary disposition, shall devolve in the same manner as if the Husband had predeceased her. The Wife

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agrees that the said Husband shall have, keep and retain the sole ownership, control, enjoyment of and during his life or by Last Will and Testament or by other testamentary disposition, shall have the exclusive right to dispose of any and all property real, personal or fixed, that he now owns or is possessed of or hereafter may acquire or receive as his own absolute property without interference by or from the Wife in a like manner as if the marriage had not taken place and the Husband had remained unmarried.

5. That nothing contained in this agreement shall in any manner bar or affect the right of . . . [either party] to claim and receive any property of any nature or kind that . . . [the other party] . . . may give, devise, transfer [to him/her]. . . .

In March of 1978, while defendant was in the hospital for back problems, plaintiff informed him that she had some papers that she wanted him to sign. In an effort to induce defendant to sign the post-nuptial agreement her attorney had prepared for her, plaintiff told defendant that, if he signed the agreement, he would become the sole owner of the subject property (the .41 acres and house situated in Jackson County which the parties held at that time by estate by the entireties). Both parties knew the subject property to be the only real estate defendant had ever owned.

The next day, after defendant got out of the hospital, plaintiff had defendant accompany her to plaintiff's attorney's office where both parties signed the agreement which plaintiff's attorney had drafted. Defendant was not represented by an attorney and no negotiation over the agreement's terms ever occurred. The couple spent about five minutes at the attorney's office and plaintiff's attorney only informed defendant about parts of the agreement.

Based on plaintiff's representations, defendant was led to believe that by signing the agreement he would gain sole ownership in the subject property. Relying on plaintiff's representations, defendant executed the agreement. After the execution of the 24 March 1978 agreement, plaintiff's Ohio property was sold and defendant neither claimed nor enjoyed any interest in the proceeds from the sale. The parties were separated in May of 1978 and were divorced on 14 September 1979.

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Since May of 1978, defendant has resided in the subject property without plaintiff, believing that he was the sole owner. Since May of 1978, defendant has paid all the mortgage payments, property taxes, insurance premiums, and maintenance and upkeep costs for the subject property, without contribution from plaintiff. Defendant has also made improvements upon the subject property. Plaintiff has not resided at the property since May of 1978 nor has she ever asserted any ownership interest in the property prior to initiating these proceedings.

Between the time at which the parties entered the 24 March 1978 agreement and the time at which plaintiff initiated these proceedings, the value of the subject property increased from approximately \$24,000 to \$45,000.

In 1988, defendant sent plaintiff a quitclaim deed to remove her interest from the title of the subject property, pursuant to their 24 March 1978 written agreement. Subsequent to receipt of defendant's request for a quitclaim deed, plaintiff instituted these proceedings.

Defendant correctly contends that the trial court erred in granting plaintiff's motion for a directed verdict on the basis of its conclusion that the 24 March 1978 post-nuptial agreement "was not ambiguous and did not affect the status of the parties' title to the subject real property" created by the 17 October 1977 deed, as a matter of law.

In finding and concluding that the agreement between defendant and plaintiff was free of ambiguity and entitled plaintiff to judgment, as a matter of law, the trial court overlooked basic principles of contract construction. A contract must be construed as a whole, considering each clause with reference to all other provisions and giving effect to each whenever possible by any reasonable construction. *Robbins v. C.W. Myers Trading Post, Inc.*, 253 N.C. 474, 117 S.E.2d 438 (1960). The heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter and the situation of the parties at the time of execution. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E.2d 190 (1975).

By ruling as it did, the trial court ignored and failed to give any effect whatsoever to the following quoted portions of the con-

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tract, portions on which defendant's counterclaim is predicated. The agreement's preamble states:

WHEREAS, the purpose of this agreement is to establish the respective parties' property interest, both real and personal, owned by the parties prior to the marriage. (Emphasis supplied).

Paragraph number four of the agreement states, in pertinent part:

The Wife agrees that the said Husband shall have, keep and retain the sole ownership, control, enjoyment of and during his life or by Last Will and Testament or by other testamentary disposition, shall have the exclusive right to dispose of any and all property real, personal or fixed, that he now owns or is possessed of or hereafter may acquire or receive as his own absolute property without interference by or from the Wife in a like manner as if the marriage had not taken place and the Husband had remained unmarried.

A plain reading of the above mentioned terms would allow the jury to find that the parties intended to include the subject property in the bargain reached by the agreement.

Another principle of contract construction overlooked by the trial court is that where the parties, through their actions, have placed a practical interpretation on their contract after executing it, the courts will ordinarily give it that construction which the parties themselves have given it before the differences between them manifested themselves and such an interpretation given by the parties prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used. See *Preyer v. Park*, 257 N.C. 440, 125 S.E.2d 916 (1962); *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E.2d 113 (1962).

The foregoing language in the agreement, considered in the context of the purposes and subject matter of the agreement, the situation of the parties at the time of the agreement, and the conduct of the parties during a period of over eleven years following the execution of the contract would allow the reasonable inference that plaintiff intended to, and did in fact, disavow any ownership in the subject property which the parties thus held under an estate by the entirety, and granted defendant the right to ownership and enjoyment of that property "without interference by or from the Wife." Should a trier of fact make such a determina-

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tion, this would clearly defeat plaintiff's entitlement to partition the disputed property.

While, *prima facie*, a tenant in common is entitled, as a matter of right, to partition of the lands so that he may enjoy his share in severalty, in this State, partition proceedings have consistently been held to be equitable in nature, and partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. *Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966). "Equity will not award partition at the suit of one in violation of his own agreement. . . . The objection to partition in such cases is the nature of estoppel." *Id.*

Cf. Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983), *rev. denied*, 310 N.C. 626, 315 S.E.2d 691 (1984), where this Court recognized *Kayann Properties, Inc.* as standing for the rule that a co-tenant's right to partition may be estopped by an express or implied contract waiving such right, but finding no evidence of such contract in that case.

For the reasons stated, we hold that the trial court erred in granting directed verdict for plaintiff and against defendant.

The trial court's judgment is reversed and this case is remanded for a new trial.

New trial.

Judges COZORT and JOHN concur.

STATE OF NORTH CAROLINA v. ROGER MOORE

No. 9318SC108

(Filed 17 August 1993)

**1. Indictment, Information, and Criminal Pleadings § 56 (NC14th)—
variance between indictment and proof—any error harmless**

Any variance between the indictment charging that defendant assaulted his victim with a butcher knife and the evidence showing that defendant assaulted his victim with a hammer was harmless error, since defendant was not con-

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victed of assault with a deadly weapon with intent to kill inflicting serious injury, the offense charged in the indictment, but was instead convicted of the lesser offense of assault inflicting serious injury.

Am Jur 2d, Indictments and Informations §§ 260-262.**2. Assault and Battery § 99 (NCI4th) – self-defense – sufficiency of evidence to require jury instruction**

The trial court erred in failing to instruct on self-defense where there was evidence tending to show that defendant and his wife were attempting to leave the victim's home when the victim charged at defendant with a hammer in his hand; during the ensuing altercation defendant was able to obtain control of the hammer and to use it to resist the victim's attack; and there was competent evidence in the record from which the jury could find that defendant was not the aggressor and that he used only the amount of force necessary, or that which appeared reasonably necessary, to repel the victim's attack.

Am Jur 2d, Trial § 726 et seq.**Duty of trial court to instruct on self-defense, in absence of request by accused. 56 ALR2d 1170.**

Appeal by defendant from judgment entered 23 September 1992 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 9 July 1993.

The State's evidence tended to show the following: Jerry Buchanan and Letha Hart were not living together on 2 February 1992 but had lived together on two previous occasions. On 2 February 1992 Mr. Buchanan visited Ms. Hart's home, where Ms. Hart, Mary Moore (Ms. Hart's sister), and defendant (Mary Moore's husband) were present. Mr. Buchanan and Ms. Hart had a brief argument, after which Mr. Buchanan returned to his apartment several blocks away. Shortly after arriving at his apartment, Mr. Buchanan received a call from Ms. Hart, who accused him of "seeing another woman."

Mr. Buchanan testified that later that evening Ms. Hart and Mrs. Moore came to his apartment. Willie Bridges, Mr. Buchanan's cousin, was present at Mr. Buchanan's home when Ms. Hart and Mrs. Moore arrived. Mr. Buchanan and Ms. Hart began arguing

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again. During this confrontation, Ms. Hart threw a pot at Mr. Buchanan and then attacked him. At the same time Mrs. Moore attempted to "jump on" Mr. Bridges. Defendant arrived while the fight was in progress. After freeing himself from Ms. Hart's initial attack, Mr. Buchanan picked up a hammer, told his visitors to leave, and asked Mr. Bridges to call the police. As they left the house, Ms. Hart was in front of Mr. Buchanan and Mrs. Moore was behind Mr. Buchanan. As Mr. Buchanan walked out of the house, he felt a stinging sensation in his back. After he got outside, Mr. Buchanan placed the hammer on the ground beside his leg and accused Mrs. Moore of stabbing him. Defendant then grabbed the hammer and Mrs. Moore began hitting Mr. Buchanan in the face, back and head. Defendant then kicked Mr. Buchanan in the back and "beat" him with the hammer. After defendant struck him with the hammer, Mr. Buchanan was "completely out" for a few seconds. When Mr. Buchanan "came around," he went into his apartment and asked Mr. Bridges why he had not come outside to help.

Mr. Bridges testified that he was present when Ms. Hart and Mrs. Moore arrived at Mr. Buchanan's apartment. When Ms. Hart attacked Mr. Buchanan, Mr. Bridges picked up the phone to call the police, but Mrs. Moore prevented him from completing the call. When Mr. Buchanan, Ms. Hart, Mrs. Moore, and defendant went outside, Mr. Bridges then called the police. After calling the police, Mr. Bridges went to the front door, where he met Mr. Buchanan coming back inside. Mr. Bridges noticed that there was blood all over Mr. Buchanan and called an ambulance.

Defendant's evidence tended to show the following: On the evening of 2 February 1992 defendant was at Ms. Hart's home when Mr. Buchanan arrived. Defendant testified that approximately twenty-five minutes after Mr. Buchanan left, Ms. Hart and Mrs. Moore left together to take Mr. Buchanan's belongings to his apartment. Later, after being urged to do so by other guests, defendant went to Mr. Buchanan's apartment. When defendant arrived at Mr. Buchanan's apartment, he heard Mr. Buchanan arguing with Ms. Hart and Mrs. Moore. Defendant walked inside the apartment, shoved Mr. Buchanan and his wife (Mrs. Moore) into a chair, grabbed his wife by the hand, and pulled her outside. Defendant was almost at his car when Ms. Hart yelled, "Look out, Rog." Defendant turned around and saw Mr. Buchanan with a hammer in his hand. When Mr. Buchanan was not looking, defendant snatched the hammer

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out of Mr. Buchanan's hand. Mr. Buchanan then grabbed defendant by the shirt and pulled defendant's head down. Defendant testified that he (defendant) began swinging the hammer in an attempt to get away from Mr. Buchanan. When defendant got loose, he and his wife got into his car and left. Defendant took the hammer with him. Ms. Hart got in her car and also left. Upon leaving, defendant saw Mr. Buchanan and Mr. Bridges "scuffling" in the front yard.

Mrs. Moore and Ms. Hart testified to substantially the same facts.

Defendant was convicted of assault inflicting serious injury and sentenced to two years imprisonment. The sentence was suspended and the defendant was placed on supervised probation for five years. As a special condition of probation, defendant was ordered to serve an active term of six months in the custody of the Sheriff of Guilford County. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lars F. Nance, for the State.

Assistant Public Defender Stanley Hammer for defendant-appellant.

EAGLES, Judge.

Defendant brings forward six assignments of error. Assignment of error No. 5 is not brought forward and is deemed abandoned pursuant to N.C.R. App. P. 28(b)(5). After careful review, we reverse and remand for a new trial.

I.

[1] In his first assignment of error defendant argues that "the trial court erred in denying defendant's motions to dismiss as there was insufficient evidence that Roger Moore [defendant] stabbed Jerry Buchanan with a knife, as alleged in the indictment." We find no error.

The Guilford County grand jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. § 14-32(a). The indictment reads, ". . . the defendant named above unlawfully, willfully and feloniously did assault Jerry Buchanon [sic] with a butcher knife . . ." The evidence at trial tended to show that defendant assaulted Mr. Buchanan with

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a hammer, not a butcher knife. Defendant contends that there was a fatal variance between the indictment and the proof requiring the trial court to grant defendant's motion to dismiss for insufficient evidence at the close of the State's evidence.

Here, the jury did not convict defendant of assault with a deadly weapon with intent to kill inflicting serious injury. Rather, the jury returned a verdict of guilty of the lesser offense of assault inflicting serious injury. G.S. § 14-33(b)(1). Accordingly, any error in the indictment charging the more serious offense is harmless.

II.

[2] In his third assignment of error, defendant argues "the trial court erred in refusing to instruct on defendant Roger Moore's right of self-defense." We agree.

Defendant timely requested the trial court to instruct the jury on defendant's right of self-defense. The trial court denied defendant's request.

The theory of self-defense entitles an individual to use "such force as is necessary or apparently necessary to save himself from death or great bodily harm. . . . A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). Whether or not the belief was reasonable is a matter to be determined by the jury "from the facts and circumstances as they appeared to the accused at the time." *Id.* If an assault does not threaten death or great bodily harm, the victim of the assault may not use deadly force to protect himself from the assault. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986). "The use of deadly force to prevent harm other than death or great bodily harm is therefore excessive as a matter of law." *Id.* at 373-74, 338 S.E.2d at 102. However, "[i]n the absence of an intent to kill, a person may fight in his own self-defense to protect himself from bodily harm or offensive physical contact, even though he is not put in actual or apparent danger of death or great bodily harm." *State v. Beaver*, 14 N.C. App. 459, 463, 188 S.E.2d 576, 579 (1972).

Our Supreme Court has held "when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court." *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747. Therefore, we must determine if there is competent

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evidence in this record from which it may be inferred that the defendant acted in self-defense.

In determining whether the self-defense instruction should have been given, "the facts are to be interpreted in the light most favorable to [the] defendant." *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973). See also *State v. Blackmon*, 38 N.C. App. 620, 622, 248 S.E.2d 456, 457 (1978); *disc. rev. denied*, 296 N.C. 412, 251 S.E.2d 471 (1979) ("When the defendant's evidence, even though contradicted by the State, raises an issue of self-defense, the failure of the trial court to charge on self-defense is error (citation omitted) . . . Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge."). Here, the defendant testified as follows:

A. [Defendant] As I was getting to the car, I was going to leave, and as I got to the car, then that's when my sister-in-law Letha, she said, "Look out, Rog." And when she did, I turned around.

Q. [Defense counsel] And what did you see?

A. I saw Mr. Buchanan with a hammer in his hand.

Q. And what, if anything, did he do?

A. Excuse me?

Q. What did he do?

A. He just kept coming. He didn't say anything. He just kept coming toward me with the hammer, so I had to back up. But all the time, I just kept my eyes on him and the hammer, 'cause I figured he'd hurt me, you know, if I let him get too close to me.

Mrs. Moore testified on direct examination as follows:

A. [Mrs. Moore] Me and Roger was already out of the house, going to the car. We were going to leave, and then that's when his cousin, Mr. Bridges, he yelled, "Jerry, don't do that. Jerry, don't do that." We was already out close towards the car.

Q. [Defense counsel] Did you hear him yell this?

A. Yes.

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Q. Where was Mr. Buchanan when he [Mr. Bridges] yelled that; do you know?

A. He was coming out the door.

Q. Was he out the door before you heard Mr. Bridges yell?

A. Buchanan was on the front porch.

Q. Then what did he do next?

A. That's when he got out there, and he was charging at Roger with the hammer. . .

Ms. Hart testified on direct examination as follows:

A. [Ms. Hart] . . . We [Ms. Hart and Mr. Buchanan] stood there and we started talking. As Mary and Baldy [Defendant] was going outside towards the car, Jerry charged in the kitchen, up in his cabinet, and he came out with the hammer. That's when his cousin [Mr. Bridges] was shouting in the kitchen, "Please don't do it, please don't do it."

. . .

Q. [Defense counsel] Who was Willie [Mr. Bridges] talking to?

A. Willie was telling Jerry not to do it.

Q. Then what did Jerry do?

A. Jerry went up in there and got it anyway, and charged past me. He pushed me back. I tried to stop him. I told him to leave them alone, they was not bothering him, they were going on about their business. That was just what I told him.

Q. And what happened after that?

A. After then, that's when the fight connected out there. That's when everybody came close—I went out there and tried to stop it, but I couldn't get it stopped.

Additionally, during cross examination by the State, Ms. Hart testified that she "tried to stop Jerry [Mr. Buchanan] from charging after them."

This testimony, interpreted in the light most favorable to the defendant, *Watkins*, 283 N.C. at 509, 196 S.E.2d at 754, tends to show that defendant and his wife were attempting to leave Mr. Buchanan's home when Mr. Buchanan charged at defendant with

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a hammer in his hand. During the ensuing altercation, defendant was able to obtain control of the hammer and to use it to resist Mr. Buchanan's attack. We conclude that there is competent evidence in this record from which the jury could find that defendant was not the aggressor, *Marsh*, 293 N.C. at 355, 237 S.E.2d at 747, and that defendant used only the amount of force necessary, or that which appeared reasonably necessary, to repel Mr. Buchanan's attack. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982). Accordingly, the trial court's failure to instruct the jury on self-defense constitutes prejudicial error to defendant and requires a new trial.

III.

Since the case is being remanded for a new trial, we need not address defendant's remaining assignments of error.

For the reasons cited above, we find that the defendant did not receive a fair trial. Accordingly, the judgment of the trial court is reversed and this case is remanded for a new trial.

New trial.

Judges GREENE and LEWIS concur.

JOHNNY ALLEN BRITTAIN AND PAULETTE K. BRITTAIN, PLAINTIFFS v.
RONALD J. CINNOCA, M.D. AND FRYE REGIONAL MEDICAL CENTER,
DEFENDANTS

No. 9225SC166

(Filed 17 August 1993)

1. Limitations, Repose, and Laches § 22 (NCI4th)— medical malpractice claim — filing not timely — claim barred by statute of limitations

The trial court properly dismissed plaintiffs' medical malpractice claim on the ground that it was barred by the three-year statute of limitations where the last act or omission by defendant which could have given rise to this cause of action was 17 March 1988; plaintiff's discovery of the alleged malpractice of defendants was not later than 13 April 1988; plaintiffs filed an application for an extension of time to file

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a complaint on 20 March 1991; plaintiffs then filed a complaint and summons on 9 April 1991; and because the last act or omission by defendants was 17 March 1988 and because the discovery of the injury was made within two years of the last act or omission by defendants, the appropriate time for initiating an action was three years from 17 March 1988. N.C.G.S. § 1-15(c).

Am Jur 2d, Physicians, Surgeons, and Other Healers § 316 et seq.

2. Costs § 36 (NCI4th)— good faith claim for extension or modification of existing law — claim dismissed — denial of attorney's fees proper

Even though plaintiffs were barred from bringing a medical malpractice action by the three-year statute of limitation pursuant to N.C.G.S. § 1-15(c) and N.C.G.S. § 1-52(16) was inapplicable, plaintiffs nevertheless advanced their claim in good faith for an extension or modification of the existing law, and the trial court was therefore correct in denying defendants' motions for attorney's fees pursuant to N.C.G.S. § 6-21.5.

Am Jur 2d, Costs §§ 72-86.

Appeal by plaintiff from order entered 12 August 1991 by Judge Charles C. Lamm, Jr., in Catawba County Superior Court. Heard in the Court of Appeals on 13 January 1993.

On 20 March 1991, plaintiffs Johnny Allen Brittain and Paulette K. Brittain filed an application and order extending time to file a complaint. The complaint was filed on 9 April 1991 by the plaintiffs alleging negligence on the part of both Dr. Cinnoca and Frye Regional Medical Center, based on "Dr. Cinnoca's and Frye Regional Medical Center's negligent and insufficient emergency intervention on 17 March 1988." Defendants filed motions to dismiss and answers in a timely manner.

On 12 August 1991, Judge Charles C. Lamm, Jr. heard the motions to dismiss and motions for attorney's fees. Judge Lamm ruled that the summons and complaint were not filed within the three (3) years of the occurrence of the last act of either defendant giving rise to plaintiffs' cause of action, that discovery provisions of North Carolina General Statutes § 1-15(c) (1983) do not apply, and that the causes of action alleged in the complaint were therefore

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barred by the applicable statute of limitations and ordered that the complaint be dismissed. The court further found that plaintiffs made a good faith argument for the extension of existing law and that there was not a complete absence of a justiciable issue of either law or fact raised by the complaint, and therefore, denied defendants' motion for attorney's fees.

Plaintiffs, in open court, gave timely notice of appeal on the statute of limitations issue. Defendant, Ronald J. Cinnoca, M.D. gave timely notice of appeal on the denial of the attorney's fees issue on 26 August 1991. Defendant, Frye Regional Medical Center, gave timely notice of appeal on the denial of attorney's fees issue on 5 September 1991.

C. Gary Triggs for plaintiffs-appellants.

Dameron and Burgin, by E. Penn Dameron, Jr., for defendant-appellee, Ronald J. Cinnoca, M.D.

Silverstein and Hodgdon, by Thaddeus B. Hodgdon, for defendant-appellee, Frye Regional Medical Center.

JOHNSON, Judge.

On 17 March 1988, Johnny Brittain sustained injuries arising out of an automobile accident and sought treatment at Frye Regional Medical Center. The medical center's attending emergency room physician, Ronald J. Cinnoca M.D., provided emergency room treatment to Mr. Brittain, to wit: application of sutures to Mr. Brittain's facial lacerations with instructions that they be removed in five days.

On 22 March 1988, Mr. Brittain, pursuant to the emergency room physician's instructions, consulted his family physician in order to have the sutures removed. At that time, he complained of continuing pain in the area of his facial lacerations.

On 1 April 1988, Mr. Brittain again consulted his family physician, who at that time, noticed asymmetry about Mr. Brittain's face and associated said asymmetry and Mr. Brittain's persistent coughing up blood with a possible facial fracture or other theretofore non-apparent injury. On 13 April 1988, Mr. Brittain underwent surgery for the correction of a facial tripod fracture which had been diagnosed subsequent to Mr. Brittain's initial consultation with defendants. On 20 March 1991, plaintiffs, Johnny Brittain and Paulette Brittain, filed an application for an extension of time to

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file a complaint. On 9 April 1991, plaintiffs filed a complaint and summons.

[1] Plaintiffs contend that the trial court erred when it granted defendants' motions to dismiss based upon a bar of their claim by a three year statute of limitation. We disagree.

Upon review of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the question for the Court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief could be granted under some legal theory. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). "A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim or the disclosure of some fact which will necessarily defeat the claim." *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986).

The trial court, in granting the motion to dismiss, held that plaintiffs failed to bring their claim within the applicable time limit provided by the statutes, and as a result, plaintiffs failed to state a claim upon which relief could be granted.

The statute applicable to a medical malpractice action is North Carolina General Statutes § 1-15(c) which states in pertinent part:

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. . . .

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The statute establishes that medical malpractice may occur out of (1) the performance of professional service, or (2) the failure to perform professional services. *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). Additionally, the statute provides a standard three year statute of limitation for causes of actions arising out of such acts. *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307 (1980), *disc. review denied*, 301 N.C. 720, 274 S.E.2d 229 (1981). However, North Carolina General Statutes § 1-15(c) also creates an exception to the standard three year statute of limitation for discovery of a non-apparent personal injury when a non-apparent injury resulting from professional malpractice is discovered more than two years after a defendant's last act. *Thorpe v. DeMent*, 69 N.C. App. 355, 317 S.E.2d 692, *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984).

In the instant case, the applicable statute of limitation is the three year statute of limitation. The last act or omission by the defendant which could have given rise to this cause of action was 17 March 1988. Mr. Brittain's discovery of the alleged malpractice of defendants was not later than 13 April 1988, to wit: on 22 March 1988, Mr. Brittain consulted his family physician complaining of facial pain; on 1 April 1988, Mr. Brittain returned to his family physician who noted asymmetry and persistent coughing and associated the symptoms with possible facial fracture or another non-apparent injury; and on 13 April 1988, Mr. Brittain underwent corrective surgery for a facial tripod fracture.

Plaintiffs filed an application for an extension of time to file a complaint on 20 March 1991. Plaintiffs then filed a complaint and summons on 9 April 1991. Because the last act or omission by the defendants was 17 March 1988 and because the discovery of the injury was made within two years of the last act or omission by the defendants, the appropriate time for initiating an action was three years from the date of that incident or 17 March 1991. Plaintiffs failed to commence their action within the appropriate time limitation. Plaintiffs' claim is therefore barred by the three year statute of limitation as found in North Carolina General Statutes § 1-15(c). A statute of limitation can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is indeed time barred. *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

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In addition, plaintiffs argue that the trial court failed to harmonize North Carolina General Statutes § 1-15(c) and § 1-52(16) (1983) which would extend their time to file a claim until plaintiff discovers, or in the exercise of reasonable care should discover, that he was injured as a result of defendants' wrongdoing. However, North Carolina General Statutes § 1-52(16) clearly states that it does not govern actions that arise under North Carolina General Statutes § 1-15(c).

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

North Carolina General Statutes § 1-52(16). As such, we are not at liberty to attempt to harmonize these statutes. We find that the trial judge's decision to grant the motion to dismiss was proper.

[2] Next, defendants cross-assign as error the trial court's ruling that the defendants were not entitled to attorney's fees because plaintiffs made a good faith claim for extension of the existing law and because there was not a complete absence of a justiciable issue of either law or fact raised by plaintiffs' complaint. We agree with the decision of the trial court.

North Carolina General Statutes § 6-21.5 (1986) 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. The filing of a general denial or the granting of any preliminary motion, . . . is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. **A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees.** The court shall make

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findings of fact and conclusions of law to support its award of attorney's fees under this section. (Emphasis added.)

In the instant case, plaintiffs filed an application for an extension of time to file a complaint on 20 March 1991. Plaintiffs commenced the action by filing a complaint and summons on 9 April 1991, approximately three years and three weeks after defendants' last act or omission. In their complaint, plaintiffs argued that the statute of limitation, based upon a reading and harmonization of North Carolina General Statutes § 1-15(c) and § 1-52(16), should not begin until plaintiff discovers, or in the exercise of reasonable care should discover, that he was injured as a result of defendants' wrongdoing.

Although we have determined that plaintiffs are barred from bringing the action by the three year statute of limitation pursuant to North Carolina General Statutes § 1-15(c) and that North Carolina General Statutes § 1-52(16) is inapplicable to the case *sub judice*, we do find that plaintiffs advanced their claim in good faith for an extension or modification of the existing law. As such, the trial judge was correct in denying defendants' motions for attorney's fees.

The decision of the trial court is affirmed.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER MORGAN

No. 924SC725

(Filed 17 August 1993)

1. Narcotics, Controlled Substances, and Paraphernalia § 144 (NCI4th)— constructive possession of cocaine—sufficiency of evidence

Evidence was sufficient for a jury to find that defendant had constructive possession of crack cocaine where it tended to show that officers searched an apartment pursuant to a search warrant; defendant was not present at the time of the search; in a bedroom officers found a bag containing items of clothing, a zippered wallet containing over \$2,600 and several

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documents bearing defendant's name, including a warrant for the arrest of defendant upon the charge of possession of cocaine with intent to manufacture, sell, or deliver, dated a week and a half prior to the search; several days before the search defendant had sold cocaine to a confidential informant; during this transaction defendant was seen riding in a vehicle with the informant, getting out of the car and running into the apartment, and then returning quickly to the car; officers found the proceeds of this sale, consisting of marked bills, within the zippered wallet found in the apartment; defendant had a key to the apartment and often used the back bathroom where the cocaine was found to shower and change clothes; defendant was the only one to use the bedroom where officers found the bag and the bathroom where they found the cocaine; and the cocaine did not belong to occupants of the house.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.**2. Evidence and Witnesses § 346 (NCI4th)— evidence showing other offenses—no character evidence—admissibility to show intent, plan, or knowledge**

In a prosecution of defendant for trafficking in cocaine, the trial court did not err in admitting evidence that defendant had sold cocaine to a confidential informant, evidence that law enforcement officers found an arrest warrant bearing defendant's name with a wallet containing a large amount of cash, and testimonial evidence given by a State's witness that he had seen defendant sell drugs, since the evidence was not offered as character evidence but was instead admissible to prove intent, plan, or knowledge, and the evidence was not unfairly prejudicial to defendant. N.C.G.S. § 8C-1, Rules 403, 404(b).

Am Jur 2d, Evidence § 324.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales. 93 ALR2d 1097.

3. Evidence and Witnesses § 263 (NCI4th)— evidence of reputation—admission harmless error

Though the trial court erred in admitting evidence of defendant's reputation in the community as a drug dealer when defendant had not offered character evidence, such evidence was not prejudicial since there was plenty of other evidence

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from which the jury could have concluded that defendant was a drug dealer and that he had constructive possession of cocaine, and there was no reasonable possibility that the jury would have reached a different result if the evidence of defendant's reputation had been excluded.

Am Jur 2d, Evidence § 336 et seq.

Appeal by defendant from judgment entered 3 April 1992 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 26 May 1993.

Defendant was indicted on 28 January 1992, for possession of drug paraphernalia, trafficking in cocaine by manufacturing, maintaining a place to keep controlled substances, conspiracy to traffic in cocaine, trafficking in cocaine by possession and failure to pay excise tax on controlled substances. At the close of the State's evidence, the trial court dismissed the charges of possession of drug paraphernalia, trafficking in cocaine by manufacture, maintaining a place to keep controlled substances, and conspiracy to traffic in cocaine by possession. The jury found defendant guilty of trafficking in cocaine by possession and failure to pay excise tax on controlled substances. From a judgment imposing active sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Mitchell, Ratliff & Best, by David L. Best, for defendant.

McCRODDEN, Judge.

[1] Defendant presents three questions for review. First, he argues that there was no evidence that he possessed cocaine and that the trial court, therefore, erred in failing to dismiss the charges of trafficking in cocaine by possession and failure to pay excise tax on a controlled substance.

The long-standing test of the sufficiency of the evidence to withstand a motion to dismiss in a criminal case is whether there is substantial evidence to support a finding of each element of the offense charged and a finding that defendant committed the offense. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the

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State the benefit of every reasonable inference to be drawn from that evidence. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Substantial evidence is such relevant evidence that 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).

“An accused’s possession of narcotics may be actual or constructive.” *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). In this case, since defendant was not present when law enforcement officers discovered the cocaine, the State had to rely on the doctrine of constructive possession to prove that the cocaine belonged to defendant. A person has constructive possession of a controlled substance when “he has both the power and intent to control its disposition or use.” *Id.* However, if, as here, the defendant does not have exclusive control of the premises in which the controlled substances were found, “there must be evidence of other incriminating circumstances to support constructive possession.” *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

At trial, the State’s evidence showed that on 2 August 1991, law enforcement officers searched an apartment in Jacksonville, North Carolina, pursuant to a search warrant. Defendant was not present at the apartment when the search was conducted. In the back bedroom of the residence, the officers found a bag containing items of clothing, a zippered wallet containing over \$2,600.00 in cash and several documents. Among the documents were a speeding citation issued to the defendant in Maryland, a warrant for the arrest of the defendant upon the charge of possession of cocaine with the intent to manufacture, sell or deliver, dated about a week and a half prior to the search, a release order and bond, each dated the same day as the arrest warrant, and some personal papers also bearing defendant’s name. In the back bathroom of the apartment were found more than 100 grams of crack cocaine.

The State’s witnesses also testified that several days before the search, the defendant had sold cocaine to a confidential informant who was working with law enforcement officers. During this transaction, the defendant was seen riding in a vehicle with the informant, getting out of the car and running into the apartment, and then returning quickly to the car. Law enforcement officers found the proceeds of this controlled sale, consisting of marked bills, within the zippered wallet found in the apartment. There

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was testimony to the effect that defendant had a key to the apartment and would often use the back bathroom to shower and change clothes; that defendant kept clothes at the apartment; that defendant was the only one to use the back bedroom, where law enforcement officers found the bag, and the back bathroom where they found the cocaine; that defendant would often go into the back bathroom and come out a short while later; and that the cocaine did not belong to the occupants of the house, but belonged to defendant. We find this to be ample evidence of other incriminating circumstances from which a jury could infer that defendant had constructive possession of the cocaine, and we therefore overrule this assignment of error.

[2] Defendant next assigns error to the trial court's admission of evidence that he had sold cocaine to a confidential informant; evidence that law enforcement officers found the arrest warrant bearing defendant's name with a wallet containing a large amount of cash; and testimonial evidence given by a State's witness that he had seen the defendant sell drugs. Defendant contends that this evidence was inadmissible under Rule 404(b) as character evidence offered to show action in conformity therewith, and, in the alternative, that it was unduly prejudicial under Rule 403.

Rule 404 of the North Carolina Rules of Evidence provides that:

(a) *Character Evidence Generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except;

(1) *Character of Accused.*—Evidence of a pertinent trait of his character *offered by an accused, or by the prosecution to rebut the same.*

. . . .

(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.

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The State argues that the evidence was offered to show a scheme to deal in cocaine and was not unfairly prejudicial to defendant. We agree. In *State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989), the State introduced evidence that a State's witness had previously sold cocaine for the defendant. As in the case at hand, the defendant in *Rosario* argued that the evidence was inadmissible character evidence. The Court relied on cases decided prior to the enactment of the Rules of Evidence and held that the evidence was admissible under Rule 404(b) to prove intent, plan, or knowledge, because the evidence was probative on those issues.

We believe that *Rosario* is so analogous that it must control our decision on this issue. We find that the evidence in this case was not offered to show action in conformity. The evidence that defendant had been seen selling drugs showed intent or knowledge of the possession. The State offered the evidence of the arrest warrant and the release bond to show that the bag was defendant's, and thereby to show that he had possession of the cocaine. The significant feature of those papers was that they bore defendant's name, not that they represented another arrest for a controlled substance offense. Finally, the evidence of the controlled sale showed an ongoing plan to distribute cocaine. We conclude that the State had legitimate reasons to offer all of this evidence of defendant's prior misdeeds, and that the evidence demonstrated a plan to distribute cocaine and was probative of that issue.

Rule 403 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Whether or not to exclude evidence under this rule is a matter soundly in the discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). However, defendant offers no support for his contention that the trial court abused its discretion under Rule 403. Absent a showing of unfair prejudice, we are unable to find any abuse of discretion with respect to this evidence. Thus, we hold that the trial court's admission of the evidence of defendant's prior bad acts was not in error under Rule 404(b) or Rule 403.

[3] Defendant's final argument is that the trial court erred in admitting evidence of defendant's reputation in the community as a drug dealer. In the State's case in chief, three of its witnesses,

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Onslow County Deputy Sheriff Anton Fickey, Shawn Franklin, and Derman Murchison, testified that defendant had a reputation in the community as a drug dealer.

Again, Rule 404 prohibits the admission of character evidence for the purpose of showing that a person acted in conformity with that character trait, except that a criminal defendant may offer evidence of a pertinent character trait and the prosecution may offer evidence to rebut such a showing by a defendant. When evidence of that person's character is admissible, character may be shown by testimony as to the reputation of a person. N.C. Gen. Stat. § 8C-1, Rule 405 (1992). However, until a defendant offers such evidence of his character, the State may not introduce evidence of his bad character. *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965). In this case, the State offered evidence as to defendant's reputation before defendant had put on any evidence, before he had "opened the door." Thus the State could not have offered the evidence of defendant's reputation as a drug dealer to rebut any claim of the defendant, and such evidence was clearly inadmissible. The trial court's overruling of defendant's objection to this evidence was in error.

However, defendant must also show that the admission of this evidence prejudiced him. *State v. White*, 82 N.C. App. 358, 365, 346 S.E.2d 243, 248 (1986), *cert. denied*, 323 N.C. 179, 373 S.E.2d 124 (1988). Defendant asserts that he was convicted solely on the basis of this improperly admitted character evidence. After a careful consideration of the record as a whole, we reject this argument. As stated above, there was plenty of evidence, aside from the reputation evidence, from which the jury could have concluded that defendant was a drug dealer and that he had constructive possession of the cocaine. Moreover, given the great weight of the other evidence against defendant, we do not believe that there was a reasonable possibility that the jury would have reached a different result if the evidence of defendant's reputation had been excluded. We find that the defendant was not prejudiced by the introduction of evidence that he had a reputation in the community as a drug dealer. Accordingly, we find that defendant received a fair trial, free of reversible error.

No error.

Judges EAGLES and LEWIS concur.

BRANTLEY v. STARLING

[111 N.C. App. 669 (1993)]

PAUL BRANTLEY AND WIFE, TAMMY LYNN BRANTLEY, PLAINTIFFS v.
JOHNNY RAY STARLING AND S.K. BOWLING, INC., DEFENDANTS

No. 927SC354

(Filed 17 August 1993)

Insurance § 530 (NCI4th)— underinsured motorist carrier— reduction of coverage by amount of workers' compensation benefits

The trial court erred in finding that defendant insurance company, the underinsured motorist coverage carrier, was not entitled to reduce its coverage by the amount of workers' compensation benefits which the same company paid to plaintiff.

Am Jur 2d, Automobile Insurance § 322.

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

Appeal by unnamed defendant North Carolina Farm Bureau Mutual Insurance Company from order entered 1 October 1991 by Judge Robert H. Hobgood, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 10 March 1993.

Michael R. Birzon for plaintiff appellees.

Broughton, Wilkins, Webb & Jernigan, P.A., by Charles P. Wilkins, for defendant appellant.

COZORT, Judge.

The question presented by the case below is whether the trial court erred in finding that defendant insurance company, the underinsured motorist coverage carrier, was not entitled to reduce its coverage by the amount of workers' compensation benefits which the same company paid to plaintiff. Defendant insurance company, as an unnamed defendant, appeals. We reverse.

On 5 October 1989, plaintiff Paul Brantley, an employee of S.K. Bowling, Inc., (S.K. Bowling) was injured while riding as a passenger in a truck titled individually in the name of Mr. Samuel King Bowling. Plaintiffs initiated this action against defendants on 20 March 1991, to recover damages for the injuries Mr. Brantley sustained from the accident and for loss of consortium. Plaintiffs amended their complaint on two different occasions to include a

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[111 N.C. App. 669 (1993)]

claim for workers' compensation benefits and a prayer for a declaratory judgment with respect to the construction of certain provisions contained in defendant Bowling's business automobile policy.

Pursuant to N.C. Gen. Stat. § 20-279.21(b) (Cum. Supp. 1992), North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) answered plaintiffs' complaint as an unnamed defendant. Farm Bureau was the only insurance company involved in the matter, carrying the workers' compensation insurance policy for S.K. Bowling, a general limit liability policy for defendant Johnny Ray Starling, and the underinsured motorist insurance policy covering the truck in which plaintiff was riding.

After the plaintiffs filed their cause of action, the parties agreed to settle plaintiffs' claims for a total sum of \$100,000.00. On behalf of defendant Johnny Ray Starling, Farm Bureau paid plaintiffs the limit of the \$25,000.00 general liability policy, plus interest and costs. Pursuant to the underinsured motorist (UIM) provision contained in the business automobile policy of Samuel King Bowling, Farm Bureau was entitled to reduce the \$100,000.00 underinsured motorist limit by the \$25,000.00 already paid under the general liability policy. Additionally, Farm Bureau was to pay plaintiffs the sum of \$69,763.44 in workers' compensation as part of the settlement agreement.

Defendant Farm Bureau contends the company is entitled to offset its UIM coverage amount of \$100,000.00 by the amount of workers' compensation benefits paid to Mr. Brantley, in addition to the \$25,000.00 paid on behalf of defendant Starling. Defendant's contention is based on a provision in S.K. Bowling's UIM policy limiting the coverage. The policy provision reads as follows:

2. Any amount payable under this coverage shall be reduced by:
 - a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits.

In its written order filed 1 October 1991, the trial court made the following conclusions of law:

1. The vehicle in which Plaintiff [sic] was riding at the time of this collision was titled in the name of Samuel K. Bowling.

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2. The underinsured motorist coverage available pursuant to policy number BAP 2025063, issued by North Carolina Farm Bureau Mutual Insurance Company is available to Plaintiff pursuant to a policy issued in the name of Samuel K. Bowling as an individual.

3. The language of that policy does exclude the underinsured motorist coverage from any workers' compensation lien asserted as the result of workers' compensation benefits paid to Plaintiff through a policy issued to S.K. Bowling, Inc., Plaintiff's corporate employer.

4. The underinsured motorist carrier is not entitled to reduce the underinsured motorist coverage available to Plaintiff [sic] by workers' compensation benefits paid to Plaintiff [sic] by S.K. Bowling, Inc., the corporate employer.

The trial court thereupon ordered that Farm Bureau was not permitted to reduce the \$75,000.00 in underinsured motorist coverage available to plaintiffs by the workers' compensation benefits paid to Mr. Brantley.

The present case is controlled by *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989). In *Manning*, Mr. Manning was injured in an automobile accident during the course and scope of his employment. He and his wife brought suit against defendant Fletcher. Mr. Fletcher had a liability insurance policy with State Farm Insurance Company (State Farm) in the amount of \$25,000.00, and plaintiff's employer had a business automobile policy with defendant Farm Bureau which insured against liability in the amount of \$100,000.00 per person. The business auto policy included UIM coverage in an amount of \$100,000.00. The policy contained a limit of liability provision virtually identical to that which was operable in the case at bar. *See id.* at 515, 379 S.E.2d at 855. In addition, Farm Bureau provided plaintiff's employer with workers' compensation insurance on employees including plaintiff. Plaintiff received \$59,000.00 in workers' compensation benefits from Farm Bureau.

The trial court in *Manning* refused to allow Farm Bureau to reduce its UIM obligation by the \$59,000.00 that Farm Bureau paid to plaintiff in workers' compensation benefits. This Court agreed with the trial court in determining that a further reduction in the amount of UIM coverage, by deducting workers' compensation

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benefits paid to the employee, was not sanctioned by any applicable statutory provision. See *Manning v. Fletcher*, 91 N.C. App. 393, 398, 371 S.E.2d 770, 773 (1988). Our Supreme Court reversed, holding that "N.C.G.S. § 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits." *Manning*, 324 N.C. at 518, 379 S.E.2d at 857. The Court based its decision on two basic public policies inherent in N.C. Gen. Stat. § 20-279.21(e).

First, the section relieves the employer of the burden of paying double premiums (one to its workers' compensation carrier and one to its automobile liability policy carrier), and second, the section denies the windfall of a double recovery to the employee.

Id. at 517, 379 S.E.2d at 856. In the appeal after remand, *Manning v. Fletcher*, 102 N.C. App. 392, 402 S.E.2d 648 (1991), this Court established that the UIM coverage was entitled to be reduced by the net workers' compensation benefit. The net amount is determined by subtracting the amount paid by the primary liability carrier from the workers' compensation total. *Id.* at 399, 402 S.E.2d at 652.

Plaintiffs argue that the present case is distinguishable from *Manning* because the vehicle in which Mr. Brantley was riding at the time of the accident was a non-business vehicle. It is undisputed that the 1973 Ford flatbed truck at issue was titled in the individual name of Samuel K. Bowling, and not the corporate employer, S.K. Bowling. Despite the fact that the truck was titled in the name of Samuel K. Bowling individually, rather than S.K. Bowling, we find the evidence indicates that the truck was a business vehicle covered by the UIM policy. The record reflects that Mr. Bowling's welding business began as a sole proprietorship called S.K. Bowling Company, and was later incorporated into S.K. Bowling, Inc., with Mr. Bowling as the sole shareholder. The sole proprietorship originally procured the business auto policy for the Ford truck and three other trucks used in the business. After the company was incorporated, the business continued to pay premiums to Farm Bureau for the trucks' insurance, but did not change the vehicles' titles to the corporate name. Mr. Bowling's personal non-commercial vehicles were insured under a separate policy. Mr. Bowling testified that the truck had always been used for business

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purposes and was leased to S.K. Bowling under a tacit lease agreement, in exchange for which the corporation paid the premiums, upkeep and maintenance.

We find that under these circumstances, the title of the vehicle is not dispositive of the question of whether the truck was a business vehicle. The evidence, rather, tends to show that the truck in question was used solely for the welding business before and after the incorporation, was insured specifically under business policy #BAP 2025063 with three other business vehicles, and was intended to be financed by Mr. Bowling's business. Consequently, we find that the 1973 Ford truck, in which plaintiff was riding at the time of the accident, was a business vehicle covered by the terms of the business auto policy with respect to UIM coverage.

For the reasons and policy considerations stated in *Manning*, we therefore find the trial court erred by not allowing Farm Bureau to reduce the amount of UIM coverage by the net workers' compensation benefit. The case is remanded for the trial court to reduce the UIM coverage by the net workers' compensation amount.

Reversed and remanded.

Judges EAGLES and WYNN concur.

L. P. "BUCK" ALLMAN, D/B/A BUCK ALLMAN REALTORS v. ALICE CHARLES

No. 9226DC583

(Filed 17 August 1993)

Brokers and Factors § 31 (NCI4th) — sale of home — refusal of seller to make repairs — buyers' termination of conditional contract — broker not entitled to commission

Plaintiff real estate broker could not collect a commission where he procured a buyer at a price acceptable to the seller, the seller refused to make repairs after the buyer's inspection, and the buyer terminated the agreement, since the contract between defendant and the buyer was conditional and, until the issue of repairs was resolved, it was not binding on the parties; defendant made no implied promise to make a good

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faith effort to negotiate as to repairs; and defendant did not breach her duty to cooperate as contained in her exclusive listing contract with plaintiff where she reduced the asking price by more than \$10,000, opened her house to buyers and later to their inspectors, signed the contract, and, when she realized she was bound by it, placed her belongings in storage and took an apartment.

Am Jur 2d, Brokers § 199 et seq.

Appeal by defendant from judgment entered 14 January 1992 by Judge L. Stanley Brown in Mecklenburg County District Court. Heard in the Court of Appeals 27 April 1993.

Blair, Conaway, Bograd & Martin, by Bentford E. Martin and Brien D. Stockman, for plaintiff.

Glover & Petersen, P.A., by James R. Glover, for defendant.

MCCRODDEN, Judge.

Plaintiff brought this action to recover a real estate commission fee of six percent of the \$182,500.00 contract price defendant agreed to accept for the sale of her home. Defendant appeals from the judgment finding that plaintiff had found a buyer ready, willing and able to purchase defendant's house and ordering defendant to pay a real estate broker's commission as required by the Exclusive Listing Contract. The issue we determine is whether a real estate broker may collect a commission when he procures a buyer at a price acceptable to the seller, the seller refuses to do any repairs after the buyer's inspection, and the buyer terminates the agreement.

The facts of the case are as follows. On 15 May 1990, defendant engaged plaintiff as her exclusive agent to sell her home. Plaintiff and defendant signed an Exclusive Listing Contract which provided that the house was to be listed at a price of \$194,900.00 and that defendant would pay plaintiff six percent of the gross sales price if plaintiff produced a purchaser within the exclusive listing period. The listing contract also contained a provision requiring defendant to cooperate with plaintiff to facilitate the sale of the house. About this time, plaintiff informed defendant that it was quite possible that she would have to make some repairs to the house in order to sell it. Defendant stated that the only defects of which she

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was aware were a faulty element in the stove, the garbage disposal, and the chimney flue.

On 28 May 1990, plaintiff procured an offer to purchase in the amount of \$170,000.00 by Mr. and Mrs. Thomas Koechlin. Plaintiff and defendant formulated a counter-proposal and presented the Koechlins with a written offer to sell and contract (the Contract) for a sale price of \$182,500.00, with the closing to be held before 20 June 1990. The Koechlins accepted the offer and executed the Contract.

Soon after the Contract was executed, defendant decided that she no longer wished to sell the house. She offered to pay plaintiff his commission and to pay the Koechlins \$10,000.00 to be released from her obligation. The Koechlins, however, wanted to go through with the sale. Defendant then consulted an attorney who advised her that the Contract was binding.

Subsequently, defendant and the Koechlins entered into a written agreement modifying the Contract, but these modifications do not directly bear on the issues presented by this case.

Paragraph 8 of the Contract provided that the electrical, plumbing, heating, and cooling systems were to be in good working order at the time of closing and that the buyer had the right to have these systems inspected, at the buyer's expense, and that:

[I]f any repairs are necessary, Seller shall have the option of (a) completing them, (b) providing for their completion, or (c) refusing to complete them. If Seller elects not to complete or provide for the completion of the repairs, then Buyer shall have the option of (d) accepting the property in its present condition, or (e) terminating this contract.

Pursuant to this provision of the Contract, the Koechlins had professional inspections made of the plumbing, electrical, structural and heating systems of the house. These inspections indicated that some repairs needed to be made to the house. The combined total of the estimated costs for the repairs was approximately \$4,900.00.

After receiving these inspection reports, defendant informed plaintiff that she would not make any repairs, insisting that she would "not pay one dime" toward repairs. Instead of accepting the property as it was or making a compromise offer to share the cost of repairs, the Koechlins exercised their right to terminate

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the Contract. The sale did not close and defendant released the Koechlins' earnest money.

Defendant first argues that the trial court erred in finding that the Koechlins were ready, willing and able purchasers. She contends that Paragraph 8 rendered the Contract conditional and neither the buyer nor the seller was willing to meet the condition.

The general rule is that when a broker produces a buyer who is ready, willing and able to buy the principal's land upon the terms offered by the principal, the broker is entitled to his commission. *Carver v. Britt*, 241 N.C. 538, 85 S.E.2d 888 (1955). Merely negotiating a conditional agreement, however, does not entitle a broker to a commission. 12 C.J.S. *Brokers* § 149 (1980); 12 Am. Jur. 2d *Brokers* § 188 (1964).

In *Carver v. Britt*, the defendant claimed that the plaintiff broker was not entitled to a commission because the acceptance message sent by the defendant had stated, "your telegram relative sale my property is accepted subject to details to be worked out . . ." 241 N.C. at 540, 85 S.E.2d at 889. In finding that the acceptance was not conditional, the Court distinguished between conditions going to the making of the contract and those which merely affect the execution of the contract. "Where an offer is squarely accepted in positive terms, the addition of a statement relating to the ultimate performance of the contract does not make the acceptance conditional and prevent the formation of the contract." *Id.* at 540, 85 S.E.2d at 890. On the other hand, a qualification "imposed as a part of the acceptance itself" would invalidate the contract. *Id.* at 541, 85 S.E.2d at 890.

In the instant case, the continuing validity of the Contract was conditioned on defendant's making any necessary repairs or the Koechlins' acceptance of the property as it was. We believe that a provision such as that contained in Paragraph 8 of the Contract, allowing a seller to refuse to make repairs to the property and the purchaser then to terminate the contract, was not a mere detail of execution, but went to the making of the contract. When a buyer and seller cannot work out these conditions of the contract, as the Koechlins and defendant were unable to do in this case, they invalidate the contract. Hence, we find that this contract was conditional and that, until the issue of repairs was resolved, it was not binding on the parties.

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Defendant also disputes the trial court's other ground for awarding fees to the plaintiff. In its second conclusion of law, the court found that

[I]n refusing to even consider bargaining or negotiating with the Koechlings over the issue of repairs to the property and in adamantly refusing to spend "even one dime" on any repairs to the property after earlier acknowledging that at least some repairs would be required, *the Defendant did not comply with her duty of good faith and fair dealing in attempting to resolve the issue of repairs*. The sale of Defendant's house to the Koechlings was not closed as a consequence of the Defendant's failure to act in good faith or to make reasonable efforts to resolve the issue of repairs. The Defendant's failure to act in good faith also constituted a violation of her duties to the Plaintiff under the Exclusive Listing Contract.

In support of the trial court's conclusion, plaintiff contends that the condition in Paragraph 8, like a condition of obtaining financing, carries with it an implied duty of good faith, citing *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973). In *Mezzanotte*, the sales agreement contained a provision stating that the agreement was contingent upon the buyer's obtaining satisfactory financing. The court found that even though the buyer had discretionary power affecting the seller's rights, the buyer's promise to purchase was not illusory because he had impliedly promised to make reasonable efforts to obtain financing. *Mezzanotte*, however, is distinguishable.

In this case, defendant made no promise, implicit or explicit, to make repairs, and the Contract imposed no such duty. Further, she did not have discretionary power to affect unilaterally the Koechlings' rights. The Contract gave defendant the right to refuse to make repairs, but the Koechlings could still have enforced the contract against her had they been willing to accept the property as it was. Neither party could unilaterally terminate the Contract. There was no implied promise to make a good faith effort to negotiate as to repairs.

Plaintiff, mindful of defendant's earlier attempt to terminate the Contract, believes that defendant's refusal to negotiate on the issue of repairs was her way of getting out of the Contract. It matters not what defendant's intentions were. *Thompson-McLean*,

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Inc. v. Campbell, 261 N.C. 310, 134 S.E.2d 671 (1964). Defendant was not legally bound to pay for repairs or to negotiate that condition.

Plaintiff finally argues that, by refusing to make repairs or negotiate the repairs, defendant breached her duty to cooperate, as contained in the Exclusive Listing Contract and that this fact alone is sufficient to support the judgment. However, once defendant signed the Contract, her duties under the Contract delimited her duty to cooperate under the Exclusive Listing Contract, *i.e.*, her duty to cooperate was no more expansive than her general duty to abide by the terms of the Contract. The trial court, misunderstanding the nature of the Contract, erroneously found that there was a general duty of good faith with respect to repairs. As stated above, there was no such duty.

Without that erroneously imposed duty, we find the evidence that defendant breached her duty to cooperate insufficient. In fact, the evidence tends to show the opposite: that defendant reduced the asking price of the house by more than \$10,000.00, opened her house to the Koechlin's and, later, to their inspectors, signed the contract, and, when she realized she was bound by it, placed her belongings in storage and took an apartment. The only evidence of any failure to cooperate was her refusal to make repairs or negotiate as to repairs. Since she had no duty in this regard, there was no evidence to support a finding that appellant breached her duty to cooperate under the Exclusive Listing Contract.

Based upon the foregoing, it is clear that defendant was well within her contractual rights to refuse to pay for the repairs demanded by the prospective buyers and that the Koechlin's were not ready or willing to purchase the property until that condition was fulfilled. Having so determined, we reverse the trial court's judgment awarding commission fees to plaintiff.

Reverse.

Judges JOHNSON and ORR concur.

MOREAU v. HILL

[111 N.C. App. 679 (1993)]

ROBERT H. MOREAU, JR. v. RUSSELL B. HILL

No. 9212SC563

(Filed 17 August 1993)

1. Automobiles and Other Vehicles §§ 488, 528 (NCI4th)— personal injury action—denial of directed verdict and judgment n.o.v.—no error

In an action to recover for personal injuries sustained by plaintiff when he was a passenger in a truck driven by defendant, the trial court properly denied plaintiff's motion for a directed verdict and motion for judgment n.o.v. where plaintiff argued that defendant was exceeding a safe speed under the existing hazardous road conditions but the evidence was such that a jury could reasonably conclude that defendant was not driving at an excessive speed, or if he was, that his negligence was not a proximate cause of plaintiff's injuries because a small crest in the road prevented defendant from seeing a puddle in the road in sufficient time to react to avoid the puddle and thus avoid skidding out of control. N.C.G.S. § 20-141(a).

Am Jur 2d, Automobiles and Highway Traffic §§ 769, 798.

2. Automobiles and Other Vehicles § 765 (NCI4th)— sudden emergency—instructions harmless error

Since there was no allegation or any evidence that, *after* defendant's vehicle hit a puddle of water in the road, defendant acted in a negligent manner, the trial court erred in instructing on sudden emergency; however, such error was harmless since the court informed the jury that, in order to apply the doctrine, it had to find that defendant's actions did not bring about the emergency, or, in other words, in order to consider the doctrine, the jury had to rule out the only theory for recovery advanced by plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 1117, 1119.

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

MOREAU v. HILL

[111 N.C. App. 679 (1993)]

Appeal by plaintiff from judgment entered 5 March 1992 by Judge Jack Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 29 April 1993.

On 14 February 1991, plaintiff filed a negligence action against defendant, seeking to recover for the personal injuries he received while riding as a passenger in defendant's vehicle on 15 June 1989. At trial, plaintiff filed a motion for directed verdict, and after the jury rendered a verdict against the plaintiff, plaintiff filed a motion for judgment notwithstanding the verdict. The trial judge denied both motions.

Smith, Dickey & Smith, P.A., by W. Ritchie Smith, Jr., for plaintiff-appellant.

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

MCCRODDEN, Judge.

[1] Plaintiff first assigns as error the trial court's denial of plaintiff's motion for a directed verdict on the issue of defendant's negligence, and the denial of plaintiff's motion for judgment notwithstanding the verdict. Plaintiff argues that the evidence showed that the defendant was exceeding a safe speed under the existing hazardous road conditions, failed to exercise a proper lookout, and failed to keep his vehicle under proper control, and that, therefore, a directed verdict was proper. Upon review of the evidence, we hold that the trial court properly denied plaintiff's motions.

In ruling on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the non-moving party, here the defendant, and give the non-moving party the benefit of all inferences reasonably drawn, with any conflict in the evidence being resolved in the non-movant's favor. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985). In ruling on a motion for judgment notwithstanding the verdict, the court should grant the motion only cautiously and sparingly. *Id.* at 369, 329 S.E.2d at 338. The motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict, and the court should allow it only if the earlier directed verdict could have properly been granted. *Id.* at 368-69, 329 S.E.2d at 338.

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Plaintiff contends that defendant was guilty of negligence *per se* because defendant drove at a speed greater than what was reasonable and prudent under the existing circumstances, in violation of N.C. Gen. Stat. § 20-141(a) (1989), and thus a directed verdict should have been granted. We disagree. In order for the defendant to be found liable for the plaintiff's injuries, the defendant's violation of the statute must also have been the proximate cause of the accident. *Watts v. Watts*, 252 N.C. 352, 355, 113 S.E.2d 720, 722 (1960). We find that the evidence raised a factual question of whether the defendant's negligence was the proximate cause of plaintiff's injuries, and thus, the trial court properly reserved this question for determination by the jury.

The evidence tended to show that plaintiff and defendant were driving in defendant's truck on Law Road, which was wet due to an earlier rain. There was still daylight. Defendant, who was driving the truck, encountered a large puddle in the road, slowed down to about thirty-five miles per hour, and switched traffic lanes to avoid the puddle. Defendant testified that after passing the puddle, he accelerated to forty to forty-five miles per hour and came upon a "little crest" in the road, which prevented him from seeing a large water puddle that jutted onto his lane of traffic until he was "right on it." As the truck hit the puddle, it skidded out of control, struck a ditch, bounced into the air, and landed in a ditch. Plaintiff sustained injuries as a result of the accident. Although plaintiff's motion for a directed verdict alleged that the legal speed limit was 35 m.p.h., the record reveals that neither party presented evidence concerning the speed limit on Law Road.

Considering the evidence in the light most favorable to the defendant, the jury could reasonably conclude that defendant was not driving at an excessive speed and was not, therefore, negligent or that, even if he were driving at an excessive speed and negligent, his negligence was not the proximate cause of the accident. The evidence was such that the jury could reasonably infer that the small crest in the road prevented the defendant from seeing the puddle in sufficient time to react to avoid the puddle. Therefore, we hold that the trial court correctly denied plaintiff's motion for a directed verdict and motion for judgment notwithstanding the verdict.

[2] In plaintiff's second assignment of error, he alleges that the trial court erred in instructing the jury on the doctrine of sudden

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emergency when the evidence tended to show that the defendant failed to keep a proper lookout and drove at an excessive speed. An "emergency situation" is defined by our courts as that which compels the defendant to act instantly to avoid a collision or injury. *Reed v. Abrahamson*, 108 N.C. App. 301, 308, 423 S.E.2d 491, 495 (1992), *cert. denied*, 333 N.C. 463, 427 S.E.2d 624 (1993) (quoting *Schaefer v. Wickstead*, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988)).

The doctrine of sudden emergency is not available to a defendant if the defendant's own negligence or wrongful act caused the emergency wholly or in material part. *Gupton By Gupton v. McCombs*, 74 N.C. App. 547, 548, 328 S.E.2d 886, 888, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 486 (1985). Furthermore, the trial court should not instruct on the doctrine of sudden emergency if defendant's action *after* the emergency did not cause the plaintiff's injury. *Murchison v. Powell*, 269 N.C. 656, 660, 153 S.E.2d 352, 355 (1967); *Gupton by Gupton*, 74 N.C. App. at 549, 328 S.E.2d at 888.

In the instant case, there was no allegation nor was there any evidence that, *after* the vehicle hit the puddle, defendant acted in a negligent manner. The testimony by the plaintiff as well as the defendant was that defendant lost control of his truck as soon as the vehicle met the water in the road. Hence, the instruction on the sudden emergency doctrine was erroneous.

We find, however, that such error was harmless. As we note in response to plaintiff's final assignment below, the trial court clearly informed the jury that, in order to apply the doctrine, it had to find that the defendant's actions did not bring about the emergency. Hence, before the jury considered the doctrine, it had to find that defendant committed no negligence that created the sudden emergency. In other words, in order to consider the doctrine, the jury had to rule out the only theory for recovery advanced by plaintiff.

The sudden emergency doctrine is a two-edged sword for a defendant. As in this case, a defendant may plead the doctrine as a defense to allegations of negligence. In so pleading and in defending with this doctrine, a defendant must show that his negligence did not create the sudden emergency. Depending upon the plaintiff's allegations and proof, this showing may, in fact, resolve the case. Defendant's use of the doctrine as a defense, however,

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[111 N.C. App. 683 (1993)]

gives the plaintiff an opportunity to show that, even if the defendant's negligence did not cause the sudden emergency, his reaction to the emergency was negligence and a basis for recovery. Since the jury received proper instructions in the instant case, plaintiff cannot complain about having another basis for recovery.

Citing *Lawson v. Walker*, 22 N.C. App. 295, 206 S.E.2d 325 (1974), plaintiff's final argument pertains to the trial court's instructions on sudden emergency, arguing that they were insufficient in explaining that, in order to consider the doctrine, the jury had to exonerate the defendant from negligence in creating the emergency. This case, however, is distinguishable from *Lawson*. The trial court's language ("person who through no negligence on his part is suddenly and unexpectedly confronted with peril," "a driver may through no negligence of his own . . . ," and "from a sudden emergency that is not of the driver's own making") sufficiently explained the doctrine's requirement that defendant's negligence not cause the emergency.

In the trial of this case, we find no error.

No error.

Judges JOHNSON and ORR concur.

IN THE MATTER OF: ROCK-OLA CAFE, T. K. TRIPPS, INC. 41-48752; ROCK-OLA CAFE, T. K. TRIPPS, INC. 92-41165; T. K. TRIPPS OF ASHEVILLE, INC. 11-26547; T. K. TRIPPS OF CHARLOTTE, INC. 60-55718; T. K. TRIPPS OF DURHAM, INC. 32-22431; T. K. TRIPPS OF GREENSBORO, INC. 41-42543; T. K. TRIPPS OF RALEIGH, INC. 92-33500; T. K. TRIPPS OF RIDGEWOOD, INC. 92-34759

No. 9218SC311

(Filed 17 August 1993)

Taxation § 31.1 (NCI3d) — free matches and food at restaurants — no use tax

Items such as matches and food offered at no charge to patrons of restaurant bars and to restaurant managers are not subject to use taxes in North Carolina.

Am Jur 2d, Sales and Use Taxes §§ 218, 219.

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[111 N.C. App. 683 (1993)]

On writ of certiorari from judgment entered 30 October 1991 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 26 February 1993.

Taxpayers, a group of affiliated companies that operate restaurants, protested assessments by the Secretary of Revenue that items such as matches and food offered at no charge to patrons of restaurant bars, as well as restaurant managers, are subject to use taxes in North Carolina. The Tax Review Board confirmed the Secretary's decision that matches, food, and beverages offered at no charge to bar patrons and managers were subject to use taxes, but upon judicial review this decision was reversed in superior court, and refunds on the assessments were granted to taxpayers. Certiorari was granted by this Court upon petition by the Secretary and the Tax Review Board.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for petitioner appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by William G. McNairy, for respondent appellees.

ARNOLD, Chief Judge.

Food, such as peanuts, pretzels, and other "munchies" are offered by the respondent restaurants to customers purchasing beverages at their bars. There is no direct charge for the food at the bar, but the cost of food is included and recovered in menu-item prices and sales taxes are collected on the sale of the menu-items. In addition, because the restaurants are busiest during meal hours it is difficult for their managers to take time to eat, so meals are offered without charge to the managers. Here again, the cost of this food and beverage is recovered in the sale of food and beverages to customers of the restaurants.

Matches are also provided free of charge to customers. But just as with the cost of bar food and food for the managers, the cost of the matches is included as a part of the menu-item prices, and recovered in sales to restaurant customers. Sales taxes are collected on all sales from the menu-items.

Petitioners argue that the matches and food provided for bar customers and managers are subject to a use tax because customers purchase only the specific meals actually ordered from the menus, and because restaurant customers acquire no possession of the

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managers' meals, or of matches and bar food consumed by others. Such items, according to petitioners, are used by the taxpayers, not sold to customers.

N.C. Gen. Stat. § 105-164.4(a) (1992) imposes a sales tax on persons engaged in the business of selling tangible personal property at retail in this State at a general percentage rate of the sales price of each item sold. *See In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 214, 322 S.E.2d 155, 158 (1984), *appeal dismissed*, 472 U.S. 1001, 86 L.E.2d 710 (1985). "The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax, is, however, designed to be passed on to the consumer." *Id.* at 214-15, 322 S.E.2d at 158 (citations omitted). N.C. Gen. Stat. § 105-164.6(a) (1992) imposes a complementary use tax "upon the storage, use, or consumption in this State of tangible personal property purchased within and without this State for storage, use, or consumption within this State" at the general percentage rate (the same rate that applies to a sale of the property) of the cost price of such property that is stored, used or consumed in this State. *See id.* at 214, 322 S.E.2d at 158.

The use tax "is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. The sales tax and the use tax may often bring about the same result but 'they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events.'" *Id.* at 215, 322 S.E.2d at 159 (*quoting Atwater-Waynick Hosiery Mills, Inc. v. Clayton, Comm'r of Revenue*, 268 N.C. 673, 675, 151 S.E.2d 574, 576 (1966)). "A sales tax is assessed on the purchase price of property and is imposed at the time of sale. A use tax is assessed on the storage, use or consumption of property and takes effect only after such use begins." *Colonial Pipeline Co. v. Clayton, Comm'r of Revenue*, 275 N.C. 215, 223, 166 S.E.2d 671, 677 (1969).

N.C. Gen. Stat. § 105-164.3(15) (1992), in pertinent part, defines a "sale" to mean "any transfer of title or possession, or both, . . . in any manner or by any means whatsoever, however effected and by whatever name called, for a consideration paid or to be paid." This definition does not specify who must pay the consideration or when that consideration must be paid.

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[111 N.C. App. 686 (1993)]

We note that “[t]ax statutes are to be strictly construed against the State and in favor of the taxpayer.” *Watson, Inc. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952).

We agree with the taxpayers’ argument that the items here involved are not subject to a use tax because the items were purchased for resale. Sales taxes due on the items are fully paid by virtue of the corresponding increase in each menu-item price for which customers are charged.

In order for the taxpayers to be liable for payment of a use tax on the various items it must be shown that such items were purchased for purposes other than resale, and that no sales tax was paid when the purchases were made.

The record reveals that the taxpayers gave their suppliers a certificate of resale, a form which excuses the seller from collecting and the purchaser from paying a sales tax. N.C. Gen. Stat. § 105-164.28 (1992). Petitioners have shown that the respondent taxpayers did not pay a sales tax at the time of purchase, but there is no showing that the items were purchased for purposes other than resale. The taxpayers included the cost of all the various items in their menu-item prices and collected sales taxes on those prices. This is certainly equivalent to reselling the items.

The decision of the trial court is affirmed.

Affirmed.

Judges GREENE and McCRODDEN concur.

GRANDFATHER VILLAGE v. CECIL WORSLEY

No. 9224SC740

(Filed 17 August 1993)

Municipal Corporations § 31 (NCI3d)— violation of zoning ordinances—assessment—no appeal to Board of Adjustment—defense improperly raised at trial

Defendant did not properly raise defenses to plaintiff’s assessment of fees for violating plaintiff’s zoning ordinance

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with regard to signs when he failed to appeal the assessment to the Board of Adjustment.

Am Jur 2d, Zoning and Planning § 1103.

Appeal by defendant from order entered 4 May 1992 by Judge Charles Lamm in Avery County Superior Court. Heard in the Court of Appeals 9 June 1993.

Plaintiff brought this action on 29 May 1991, seeking civil penalties and injunctive relief against defendant for displaying portable signs in violation of plaintiff's zoning ordinance. Defendant filed an answer which alleged that the sign was actually owned by the Worsley Companies, Inc. and which contained a counterclaim for damages due to the allegedly wrongful assessment. Plaintiff filed both a motion to dismiss defendant's counterclaim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) and a motion for summary judgment. On 4 May 1991, the trial court entered an order dismissing defendant's counterclaim and granting summary judgment in favor of the plaintiff. From this order, defendant appeals.

Paletta & Hedrick, by David R. Paletta, for plaintiff-appellee.

Hatch, Little & Bunn, by Harold W. Berry, Jr., for defendant-appellant.

MCCRODDEN, Judge.

The determinative issue in this case is whether defendant properly raised defenses to plaintiff's assessment of fees for violating plaintiff's zoning ordinance when he failed to appeal the assessment to the Board of Adjustment. The facts of the case indicate that he did not, and we consequently affirm the trial court's judgment.

On 21 November 1990, plaintiff, through its zoning administrator, requested defendant to remove two portable signs located at a Scotchman convenience store in Grandfather Village and advised him that it would assess a penalty of \$50.00 for each day of the continuing violation if he did not remove the signs within 60 days. On 19 February 1991, more than 60 days after the previous notice, the administrator issued a citation to defendant for failure to remove the sign and assessed a \$50.00 penalty. By letter dated 7 March 1991, the administrator notified defendant that the amount of the penalty had reached \$700.00 and stated that "[i]f you disagree with

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my decision that you are in violation of Section 902.16(3)(d) you may appeal to the Board of Adjustment. If you wish to do so, you must file the appeal in this office within 30 days." A return receipt indicated that the letter was delivered to defendant on 12 March 1991. On 18 April 1991, more than 30 days after he had received the violation notice, defendant sent a letter to the zoning administrator's office purporting to give notice of appeal of the assessment.

N.C. Gen. Stat. §§ 160A-381 to -394 (1987 and Supp. 1992), grant to cities the power to enact and enforce zoning ordinances, including the authority to regulate and restrict structures within its jurisdiction. N.C.G.S. § 160A-388(b) governs an appeal from a decision of a city's zoning administrator, and it provides, in pertinent part:

The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof.

Any party not satisfied by the ruling of the board may, in turn, appeal to superior court, and such appeal is in the nature of certiorari review. N.C.G.S. § 160A-388(e). On certiorari review, the superior court is not the trier of fact. The board of adjustment is the final arbiter of fact. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

Section 902.11(7) of the Grandfather Village Zoning Ordinance (the "Ordinance") prohibits portable signs within the zoning jurisdiction of the Village. The parties concede that the Scotchman convenience store is within the zoning jurisdiction of the Village. Under Section 902.16 of the Ordinance, the sign administrator has the authority to issue notices of violation. If the owner of the sign fails to comply, the sign administrator may impose a civil penalty of \$50.00 for each day of noncompliance. If the penalty is not paid within 10 days of its imposition, the Village shall enforce it as a debt.

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Consistent with N.C.G.S. § 160A-388(b), Section 1306 of Grandfather Village's Ordinance provides that its board of adjustment shall hear appeals from any order or decision of the zoning administrator and that "[n]o appeal shall be heard by the board unless notice thereof is filed within thirty (30) days after the interested party or parties receive the decision or determination by the Zoning Administrator."

Defendant offers three arguments on appeal, each of which concerns the refusal by the superior court to consider any defenses defendant might have had against the assessment and depends upon a single issue of fact, namely, whether defendant actually owned the signs. Plaintiff responds, however, that the trial court properly granted summary judgment in its favor because the defendant waived any defenses to the assessment by failing to appeal to the Board of Adjustment within the prescribed period. We agree with plaintiff.

In this case, it is uncontested that defendant failed to file any notice of appeal with the zoning administrator or the board of adjustment within the required 30 days after he received the notice of the zoning administrator's determination. Thus he waived any right to raise in superior court defenses he might have had to the assessment. Having failed to exercise his administrative remedies, defendant cannot now collaterally attack the determination of the zoning administrator. We affirm the order of the trial court.

Affirmed.

Judges EAGLES and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 17 AUGUST 1993

BARFIELD v. MAYO KNITTING MILL No. 9210IC606	Ind. Comm. (838846)	Affirmed
COBB v. ROCKY MOUNT BD. OF EDUCATION No. 927SC588	Edgecombe (89CVS1007)	Affirmed
DOVER v. DOVER No. 9229DC610	McDowell (91CVD305)	Affirmed
HATLEY v. K-MART CORP. No. 9226SC571	Mecklenburg (90CVS18184)	Affirmed in part; reversed in part
HEDRICK v. NATIONWIDE MUT. FIRE INS. CO. No. 9222SC451	Davidson (90CVS1501) (90CVS1551)	No Error
HERNDON v. ACTING CHIEF BARRETT No. 9227SC558	Cleveland (88CVS1344)	Affirmed
IN RE STINGER No. 9226DC739	Mecklenburg (90J119) (90J120) (90J121) (90J122)	Affirmed
IN RE STRANGE No. 9226DC659	Mecklenburg (91J468) (91J469)	Affirmed
McCASLIN v. DUKE POWER CO. No. 9210IC198	Ind. Comm. (039849) (705351)	Affirmed
OATES v. MOBILE HOME SALES CORP. No. 9212SC805	Cumberland (91CVS6459)	Affirmed
STATE v. ANDERSON No. 9220SC941	Union (91CRS9661)	No Error
STATE v. BIGGERS No. 9227SC618	Gaston (91CRS013283) (91CRS013284)	No Error
STATE v. BOONE No. 9218SC532	Guilford (91CRS68132)	No Error

STATE v. CHILDRESS No. 9229SC997	Rutherford (91CRS7459) (91CRS7460) (91CRS7461) (91CRS7478) (91CRS7479) (91CRS7480)	No Error
STATE v. GALLMAN No. 9222SC1067	Iredell (91CRS15810) (91CRS18055) (91CRS18056)	Affirmed
STATE v. HOOKS No. 918SC876	Lenoir (90CRS1997) (90CRS3651)	No Error
STATE v. RANDOLPH No. 923SC1255	Pitt (91CRS21157)	Affirmed
STATE v. ROBINSON No. 9212SC1285	Cumberland (90CRS11265) (90CRS13372)	New Trial
TOWN OF PITTSBORO v. PK VENTURES I LTD. PART. No. 9215SC735	Chatham (91CVS460)	Dismissed
WEEKS v. AUTRY No. 925DC688	Pender (90CVD454)	No Error
WESTER v. KUHN No. 9211SC642	Lee (91CVS715)	No Error

BERKELEY FEDERAL SAVINGS AND LOAN ASSN. v. TERRA DEL SOL

[111 N.C. App. 692 (1993)]

BERKELEY FEDERAL SAVINGS AND LOAN ASSOCIATION, A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION, PLAINTIFF-APPELLEE v. TERRA DEL SOL, INC., A KENTUCKY CORPORATION; FIRST RESORT PROPERTIES OF N.C., INC., A NORTH CAROLINA CORPORATION; FOXFIRE RESORTS, INC., A NORTH CAROLINA CORPORATION; HORIZON RESORTS, INC., A NORTH CAROLINA CORPORATION; RANCH RESORTS OF N.C., INC., A NORTH CAROLINA CORPORATION; VILLAGE MANAGEMENT, INC., A NORTH CAROLINA CORPORATION; PREMIER RESORTS, INC., A MASSACHUSETTS CORPORATION; GULF COAST LAND COMPANY, A FLORIDA CORPORATION; LINDENWOOD LAND COMPANY, LTD., A KENTUCKY LIMITED PARTNERSHIP; ILEX PROPERTY SERVICES, INC., A KENTUCKY CORPORATION; STEVEN K. SMITH, THOMAS E. NEAL, WILLIAM A. BAILEY, WILLIAM D. BAKER, L. ROBEY CROWE, E. EARL DONALDSON, LARRY L. HAMER, E. WILLIAM LANGFORD JR., JAMES LONOWSKI, MARIANNA S. SMITH, AND JERRY E. WINN, DEFENDANTS-APPELLANTS

No. 9220SC271

(Filed 7 September 1993)

1. Contracts § 148 (NCI4th)— financing of time share resort development—breach of contract—evidence sufficient

The trial court in an action arising from the financing of a time share resort appropriately granted summary judgment for plaintiff on promissory obligations evidenced by settlement notes executed by First Resort and Ranch Resorts and a Credit and Guaranty agreement executed by Horizon and Foxfire Resorts where the pleadings, depositions, documentary evidence, and affidavits before the trial court show that First Resort and Ranch Resorts agreed to compromise and settle their outstanding indebtedness to plaintiff under the original Financing Agreement by executing the promissory notes. The clear language of these agreements refutes defendants' contention that their liability under the agreements was conditioned upon an implied promise by plaintiff to foreclose on the golf courses and clubhouse.

Am Jur 2d, Compromise and Settlement § 23; Contracts §§ 337, 397.

2. Contracts § 148 (NCI4th)— financing of time share resort development—breach of contract counterclaims—summary judgment for plaintiff

The trial court did not err by granting summary judgment for plaintiff on defendants' counterclaims for breach of contract arising from the financing of a time share resort where the

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core allegation giving rise to these claims is that plaintiff obligated itself to foreclose on golf course and clubhouse properties 90 days after the execution of the workout agreements, but a review of the written workout agreements reveals no language which contractually bound plaintiff to foreclose on these properties. Although defendants contend that plaintiff “impliedly” promised to foreclose on the properties within 90 days of the execution of the workout agreements, their forecast of evidence fails to raise a genuine issue of fact concerning the “implied” promise.

Am Jur 2d, Compromise and Settlement § 23; Contracts §§ 337, 397.

3. Fraud, Deceit, and Misrepresentation § 17 (NCI4th)— financing of time share resort— fraudulent misrepresentation— intent to deceive

The trial court properly granted summary judgment for plaintiff on defendants’ counterclaim for fraudulent misrepresentation arising from the financing of a time share resort where defendants’ counterclaims were based upon an “implied” promise to foreclose but there was no evidence before the trial court indicating that at the time of the execution of the agreements plaintiff did not intend to foreclose on the properties if acquired. To the contrary, the evidence tends to show that plaintiff was prepared to institute foreclosure proceedings in early September, but the foreclosure did not take place at defendants’ request and due to defendants’ failure to perform their obligations under the program. Defendants did not meet their burden of demonstrating the presence of intent to deceive, one of the essential elements of the claim.

Am Jur 2d, Fraud and Deceit §§ 188-196.

4. Negligence § 78 (NCI4th)— financing of time share development— counterclaims— summary judgment for plaintiff

The trial court did not err by granting summary judgment for plaintiff on defendants’ counterclaims based on negligence, gross negligence, breach of fiduciary duty and vicarious liability arising from the financing of a time share resort where the allegations giving rise to these counterclaims concern plaintiff’s alleged mismanagement of the consumer installment contracts purchased from First Resort and its failure to investigate

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the financial stability of the project. At the time defendants Smith and Terra purchased a controlling interest in the resort, only First Resort had any type of relationship with plaintiff and First Resort released any claims which it may have had against plaintiff when it entered into the Settlement Agreement with plaintiff in June 1985. Furthermore, any cause of action based upon contract, fraud or any other tort which First Resort might seek to maintain against plaintiff arising out of their relationship was barred by the applicable statute of limitations; the trial court properly dismissed defendants' counterclaims grounded in negligence and gross negligence as a matter of law because there is no cause of action for negligent breach of contract; and the counterclaims for vicarious liability necessarily fail since the underlying causes of action for negligence, breach of contract and fraud fail.

Am Jur 2d, Negligence § 119.**5. Rules of Civil Procedure § 60 (NCI3d)— time share resort financing—summary judgment—motion for relief—denied**

The trial court did not abuse its discretion in denying defendants' motions for relief from partial summary judgments for plaintiff where defendants alleged the existence of genuine issues of material fact but had a full and fair opportunity to argue the existence of issues of fact at the summary judgment hearing and to argue in this appeal that the summary judgments should not have been granted. Defendants have not shown any other basis for the relief requested by their motions.

Am Jur 2d, Appeal and Error §§ 713, 716.**6. Discovery and Depositions § 8 (NCI4th)— time limit for completion—no abuse of discretion**

The trial court did not abuse its discretion in setting a time limit for completion of discovery where the original complaint was filed on 26 January 1988; no meaningful discovery was conducted by the parties in this matter until after Judge Seay entered his order; and the action taken by the parties prior to that time consisted of the filing of numerous motions for protective orders, motions for sanctions, and motions to compel.

Am Jur 2d, Depositions and Discovery § 8.

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7. Trial § 3.1 (NCI3d)— motion for continuance of hearing— denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendants' motion for a continuance of a summary judgment hearing on 12 December 1988 where plaintiff's motions were originally calendared for hearing on 24 October 1988; defendants were granted a continuance and an extended discovery period at that time; and defendants did not file any affidavits detailing the facts necessary to justify their request for a continuance as required by N.C.G.S. § 1A-1, Rule 56(f).

Am Jur 2d, Appeal and Appeal and Error § 713.

8. Evidence and Witnesses § 2593 (NCI4th)— motion to disqualify attorney as potential witness— denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendants' motion to disqualify plaintiff's attorney from further representation of plaintiff where the judge found that the evidence presented was insufficient to establish that the attorney ought to or would be called as a witness by either party and denied the motion without prejudice to defendants to renew their motion pursuant to Rule 5.2(c) of the Rules of Professional Conduct in the event defendants obtained additional information.

Am Jur 2d, Witnesses § 227.

Attorney as witness for client in civil proceedings— modern state cases. 35 ALR4th 810.

9. Pleadings § 364 (NCI4th)— amendment of pleadings— assertion of additional counterclaim— motion to amend denied—no abuse of discretion

The trial court did not abuse its discretion in an action arising from the financing of a time share resort by denying defendants' motion to amend the pleading to assert an additional counterclaim arising from the original financing agreement where defendants did not show a clear abuse of discretion, especially since a settlement agreement had effectively resolved any claims arising out of the original financing agreement.

Am Jur 2d, Pleading § 310.

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[111 N.C. App. 692 (1993)]

Appeal by defendants from orders entered 16 December 1988 and 15 October 1991 by Judges Thomas W. Seay, Jr., and D. B. Herring, Jr., respectively, in Moore County Superior Court. Heard in the Court of Appeals 9 February 1993.

In this civil action plaintiff Berkeley Federal Savings and Loan Association, a federally chartered and federally insured savings and loan association, seeks money damages from defendants based upon numerous legal theories including breach of contract, negligence, gross negligence, negligent misrepresentation, misappropriation, fraudulent conveyances, subordination of "insider loans," abuse of process, malicious prosecution, racketeering, Chapter 75 violations and common law unfair and deceptive trade practices. In sum, plaintiff alleged that defendants contrived a scheme to "bilk [plaintiff] out of millions of dollars" through time share financing arrangements. Defendants denied these allegations and alleged seventeen counterclaims for damages from plaintiff based in part upon theories of fraud, breach of contract, breach of fiduciary duty, vicarious liability, negligence, gross negligence, unfair and deceptive trade practices and racketeering.

The real property which is the basis for the dealings between plaintiff and defendants is the Foxfire Resort [hereinafter "Foxfire"], a resort development consisting of single family dwellings, condominiums, time share units, golf courses, a clubhouse, swimming pool, tennis courts and a campground located in Moore County, North Carolina, approximately seven miles from Pinehurst. In November 1983, the Carolina Bank foreclosed on the Foxfire properties and transferred the properties to a wholly-owned subsidiary, defendant Foxfire Resorts, Inc., [hereinafter "Foxfire Resorts"].

On 30 November 1983, Arthur P. Skula, a time share marketer, inspected the properties and made an offer to purchase the resort from the bank for \$2,100,000.00. Defendant Steven K. Smith allegedly entered into an agreement with Skula to finance the purchase of the Foxfire properties. As a condition of the agreement, Smith allegedly required Foxfire Resorts to purchase four condominium units at another resort development from one of Smith's subsidiaries, defendant Lindenwood Land Company, for \$1,190,000.00 to be paid in monthly installments of \$20,600.00. On 13 December 1983, the Carolina Bank sold Foxfire to Skula by delivering to him the outstanding common shares of Foxfire Resorts, Inc. The bank retained

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a purchase money deed of trust on the golf course property and other amenities.

Following the sale, Skula set out to establish a time share program at Foxfire. He incorporated defendant First Resort Properties of N.C., Inc., [hereinafter "First Resort"] and transferred his shares of Foxfire Resorts to First Resort. First Resort then began acquiring condominiums and converting them into time share units. The time share development ultimately consisted of thirty-eight condominiums owned by First Resort. Foxfire Resort continued to own and operate the golf club, clubhouse and other amenities, while a third corporation, defendant Ranch Resorts, Inc., [hereinafter "Ranch Resorts"] was made owner of the adjacent property consisting of acreage and a hunting lodge which was later developed into a campground.

In February 1984, plaintiff entered into a Financing Agreement with First Resort whereby it agreed to purchase the qualifying consumer installment contracts generated from the sale of the time share units. Plaintiff purchased approximately one thousand consumer installment contracts over the next several months for approximately \$8,500,000.00. These contracts were purchased on a "recourse" basis with First Resort bearing the burden of repurchase upon default. As collateral for the contracts, plaintiff was assigned the deeds of trust executed by each consumer obligor.

In October 1984, plaintiff entered into a second Financing Agreement with Ranch Resorts for the development of the campground. Pursuant to this agreement, Ranch Resorts agreed to undertake the obligation of First Resort pursuant to the previous Financing Agreement. Defendants alleged that plaintiff did not investigate the financial statements provided by Skula indicating his financial instability prior to entering into these Financing Agreements. Defendants further alleged that plaintiff had purchased consumer paper generated from the sale of high risk time share installment contracts in several other areas of the country without adequate investigation, preparation or ability to service the contracts in an effort to "book" a quick profit to satisfy bank examiners.

Shortly after entering into the Financing Agreement with plaintiff, First Resort embarked upon a sales campaign to sell time share units to the public. As part of the marketing program, First Resort represented to consumers that the golf course and club amenities would be available to time share owners. As a result

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of the sales practices employed, over three hundred complaints were eventually filed by consumers with the North Carolina Real Estate Commission or the North Carolina Department of Justice. Sales began to decline at Foxfire, and by the summer of 1984, Skula, Foxfire Resorts and First Resort were in serious financial trouble; allegedly due, in part, to the fact that Foxfire Resort was paying \$20,600.00 per month to Smith's subsidiary as part of the financing agreement with Skula.

Skula began searching for a buyer for Foxfire early in November 1984. On 13 November 1984, Skula entered into a Stock Purchase Agreement with Smith, whereby Skula sold 35% of the outstanding stock of First Resort and Ranch Resorts to Smith and an additional 35% to defendant Terra del Sol, Inc., [hereinafter "Terra"], a Kentucky corporation controlled by Smith. As a result of the transfer of ownership, the North Carolina Real Estate Commission revoked First Resort's registration permitting it to sell time share units to the public.

During this same time period, plaintiff encountered numerous defaults on its consumer installment contracts at Foxfire totalling approximately \$4,000,000.00. As a result, plaintiff ceased further funding under the Financing Agreements in November 1984. Plaintiff then learned that Foxfire was controlled by Smith and Terra. Smith and Terra allegedly represented to plaintiff that they were unaware of the project's financial difficulties when they purchased a controlling interest.

Beginning in December 1984, and continuing over the course of the next five months, negotiations took place between Smith and plaintiff's representatives attempting to resolve the parties' mutual problems. The negotiations focused on the large number of consumer defaults on the time share contracts experienced by plaintiff and the financial inability of First Resort to honor its repurchase obligations under the Financing Agreement.

In May 1985, Smith allegedly explained to John Robertson, plaintiff's executive vice-president, that Foxfire Resort was in substantial default on its purchase money deed of trust on the golf course and clubhouse amenities held by Branch Bank and Trust, the successor in interest to the Carolina Bank, and that foreclosure would entitle the ultimate purchaser to cut off any legal right of access by time share owners to these amenities. Smith advised Robertson that foreclosure of the golf course, clubhouse and other

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amenities was imminent and that the only way the resort development could be salvaged was for plaintiff to purchase the deed of trust on these properties. Plaintiff orally agreed to use its best efforts to purchase the defaulted deeds of trust encumbering the golf courses and clubhouse. Defendants alleged that Charles Gordon Brown, counsel for plaintiff, represented to defendant Smith that a foreclosure on these properties could and would be initiated approximately 90 days after the effective date of any "workout" agreement entered into by the parties.

A "workout program" was eventually negotiated and executed 3 June 1985, to become effective 30 May 1985. The "workout program" consisted of a series of written agreements including a Sale and Finance Agreement, an End Loan Commitment Agreement, a Credit and Guaranty Agreement and two Settlement Agreements. The objective of the "workout program" was to consolidate ownership of the time shares, amenities and adjacent property in a new corporation, defendant Horizon Resorts, Inc., [hereinafter "Horizon"], which was to be fully responsible for marketing the time share units at Foxfire.

The "Sale and Finance Agreement," which was signed by Robertson on behalf of plaintiff and by defendant Smith on behalf of Terra and Horizon, transferred to Horizon plaintiff's interest in the time share inventory pursuant to the defaulted Financing Agreement with First Resort. Terra also agreed to transfer its interest in the time share units to Horizon for the purpose of resale to the general public. Both transfers were financed by plaintiff and were secured by deeds of trust on the time share units and a promissory note executed by Horizon. As to the golf course property and other amenities, § 5.01 of the Sale and Finance Agreement entitled "Contingent Loan Agreement" provides:

(a) Existing Debt. Developer [Horizon] acknowledges that the Golf Course Project is presently encumbered by the deeds of trust . . . what shall be hereafter referred to as the "Branch Bank Debt."

(b) Foreclosure. Developer [Horizon] acknowledges that the current holder of the Branch Bank Debt has threatened to foreclose its deed of trust. The parties hereto agree and acknowledge that the foreclosure of the Golf Course Project and its sale to a third party would have a materially adverse

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impact on Developer's [Horizon's] efforts to sell Unit Weeks and on the fair market value of Berkeley's and Terra's security.

(c) Purchase and Loan Agreement. In the event any current or future holder of the Branch Bank Debt shall institute foreclosure proceedings, Berkeley and Terra agree to assist the Developer [Horizon] in acquiring the Golf Course Project out of foreclosure as follows:

(i) Bid. Berkeley shall attempt to bid in the Golf Course Project at any foreclosure sale (or through a subsequent upset bid);

(ii) Purchase and Sale of Golf Course Project. Should Berkeley be the successful bidder at foreclosure sale, Berkeley hereby agrees to sell, and Developer [Horizon] agrees to purchase, the Golf Course Project.

In the "End Loan Commitment Agreement," plaintiff agreed to purchase the consumer installment contracts generated by Horizon's sale of the time share units to the public. Section 3.11 entitled "Conditions of Funding of End Loan Commitment" states in part:

The following are conditions precedent to any obligation on the part of Berkeley to purchase End Loans under the Commitment:

(a) Purchase of Time Share Project and Golf Course Project. Developer [Horizon] shall acquire title to the Time Share Project pursuant to the terms of that certain Conditional Sale and Finance Agreement

(b) Compliance for Time Share License. On or before December 1, 1985, Developer [Horizon] and the Time Share Project shall be in compliance with all the requirements of the State of North Carolina regarding registration of the Unit Weeks for sale and the licensing of Developer [Horizon] for the selling of such Unit Weeks.

Both the Sale and Finance Agreement and the End Loan Agreement required Horizon to maintain the property and to pay all the necessary operating expenses, including taxes and insurance. In addition, pursuant to the terms of the End Loan Commitment Agreement, plaintiff was entitled to terminate the "workout pro-

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gram” upon default by defendants of the provisions of either the Sale and Finance Agreement or the End Loan Commitment Agreement.

Horizon also executed a credit agreement and promissory note whereby plaintiff agreed to extend to it a credit line of \$300,000.00 to be used as working capital to pay the ordinary and necessary expenses of the golf course and clubhouse amenities. In addition, the credit agreement provided that Foxfire Resorts would guarantee the payment of all obligations of Horizon to plaintiff. Pursuant to the agreement, plaintiff advanced Horizon \$75,000.00 in June 1985, and an additional \$159,001.00 in July 1985.

Also, as part of the “workout program,” plaintiff agreed to compromise and settle its claims against First Resort and Ranch Resorts for their breach of the Financing Agreement in exchange for First Resort and Ranch Resorts each executing promissory notes in the amounts of \$3,109,720.00 and \$3,299,850.00 respectively.

Following the execution of these agreements and relying upon defendants’ commitment to commence a marketing program by 1 December 1985, plaintiff advanced \$2,100,000.00 for the purchase of the defaulted deeds of trust on the golf course and clubhouse from the Branch Bank and Trust on 6 June 1985. The record indicates that the parties anticipated the foreclosure would take place after the 90 day preference period had elapsed which would not be until September 1985.

Immediately following plaintiff’s acquisition of the golf course property, defendant Smith notified the Terra shareholders that he was proposing a “different marketing concept” for the Foxfire properties. Smith proposed that instead of selling the unit weeks to the public as time shares, Horizon would sell vacation club memberships which could be used at various resorts including Foxfire. Smith rented office space in Louisville, Kentucky and employed a sales manager to head the marketing effort. John Robertson received a letter dated 2 July 1985 from Smith detailing his plans to sell memberships instead of time shares at Foxfire. Robertson responded on 9 July 1985, stating, “. . . the proposed membership plan may not be considered prudent lending on the part of Berkeley. The commitment to fund for Fox Fire [sic] only was based on a fee simple transaction.”

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Despite having received this letter, Smith continued to move forward with his proposal. In a letter to stockholders dated 19 July 1985, Smith states that marketing of the memberships was scheduled to begin 1 August 1985. On 13 August 1985, Robertson and David Fox, plaintiff's general counsel, met with Smith in Louisville. Following the meeting, Robertson wrote a letter to Smith asking him to provide detailed plans and financial data for the new marketing venture and explained that discussions with plaintiff's local counsel indicated the program as contemplated might not be permissible under North Carolina law. Later that month, plaintiff was notified by defendants that it could not meet payroll and that a judgment lien had been filed by the North Carolina Security Commission in the amount of \$12,589.35 for the unpaid taxes of Foxfire Resorts, Inc.

Representatives of plaintiff met again with Smith on 16 and 17 September 1985. As a result of these meetings, defendants decided to forgo their plans to market the Foxfire properties as vacation memberships and to begin the process of obtaining registration for Horizon with the North Carolina Real Estate Commission to sell time shares. Defendants continued to experience serious cash flow difficulties since no time share sales had taken place and no income was being produced from the properties.

By 1 December 1985, Horizon still had not complied with all statutory requirements regarding the registration of the unit weeks for sale, nor had Horizon become licensed to sell by the Real Estate Commission. On 4 December 1985, defendant Smith removed his personnel from the resort, and plaintiff was forced to pay the resort's numerous debts. On 15 April 1986, plaintiff exercised its right under the deeds of trust and foreclosed on the golf course and clubhouse. Plaintiff bid in the properties at the foreclosure sale and later sold them to a third party.

Plaintiff filed this action on 26 January 1988. With its complaint, plaintiff served a request for production of documents and noticed the depositions of eleven individual shareholders in defendant Terra Del Sol, Inc. Over the course of the next six months, the parties filed numerous motions to compel discovery, motions for sanctions and motions for protective orders. On 30 August 1988, Judge Seay ordered that plaintiff could file an amended complaint on or before 10 September 1988, and that defendants should file an answer on or before 10 October 1988. Plaintiff filed an

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amended complaint on 9 September 1988 alleging among other things, that defendants Horizon, Foxfire, First Resort and Ranch Resorts breached the settlement agreements and defendants Smith, Terra, Horizon and Foxfire "materially violated the terms of the workout agreements and failed to satisfy essential preconditions, thus unlawfully preventing the implementation of the workout program." Defendants answered stating, "[t]hat the Complaint of the Plaintiffs [sic] is a complete and total fiction prepared in an effort to lay a 'smoke screen' for the illegal, unlawful, fraudulent and abusive tactics and procedures utilized by the Plaintiffs [sic]." The parties continued to file additional discovery motions which were heard by Judge Seay on 24 October 1988, at which time he determined that "discovery in this case has been unreasonably delayed" and ordered that all discovery be completed by 23 November 1988.

On 2 December 1988, plaintiff filed a motion for partial summary judgment as to Counts II, III and XIII of its complaint based upon the promissory notes executed by defendants First Resort and Ranch Resorts as part of the settlement agreement and the Credit and Guaranty agreement with defendants Horizon and Foxfire for the sums advanced to Horizon. Plaintiff also moved for summary judgment as to defendants' counterclaims. Prior to the hearing on plaintiff's motions, defendants moved for a continuance which was denied. On 22 December 1988, Judge Seay entered orders granting plaintiff a partial summary judgment against defendants First Resort, Ranch Resort, Horizon and Foxfire with respect to its claims for breach of contract and dismissing each of defendants' seventeen counterclaims with prejudice. From these orders, defendants Terra, First Resort, Ranch Resort, Foxfire, Horizon and Smith appealed to this Court. We determined that the orders appealed from were interlocutory and dismissed the appeal. *See Berkeley Fed. Savings & Loan v. Terra Del Sol, Inc.*, 97 N.C. App. 665, 390 S.E.2d 184 (1990).

Following our dismissal of the appeal, defendants filed a motion to amend their answer to allege an additional counterclaim and a motion to disqualify Charles Gordon Brown from continuing to represent plaintiff in the action. Judge Herring conducted hearings and denied these motions.

Thereafter, on 11 September 1991, defendants First Resort, Ranch Resort, Horizon Resort and Foxfire moved pursuant to Rules 54 and 60 of the North Carolina Rules of Civil Procedure requesting

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that the court “vacate or modify the order dated December 22, 1988 . . . granting partial summary judgment in favor of plaintiff . . . on Counts II, III and XIII . . .” On this same date, defendants Smith, Terra, First Resort, Ranch Resorts, Horizon, Foxfire and Village Management Company also moved pursuant to Rules 54 and 60 to vacate or modify the order dated 22 December 1988 dismissing defendants’ counterclaims. On 20 September 1991, three days before the hearing of these motions, plaintiff filed a notice of voluntary dismissal without prejudice as to its remaining claims against defendants. On 23 September 1991, Judge Herring heard defendants’ motions for relief from Judge Seay’s earlier orders, and on 15 October 1991, he entered an order denying the motions. Defendants First Resort, Foxfire Resort, Horizon, Ranch Resort, Terra and Smith appeal.

Brown & Bunch, by Charles Gordon Brown, for plaintiff-appellee.

Patton, Boggs & Blow, by Eric C. Rowe and Allen Holt Gwyn, for defendant-appellees.

MARTIN, Judge.

Defendants gave notice of appeal on 11 October 1991 from (1) Judge Seay’s order dated 22 December 1988 granting plaintiff summary judgment with respect to its claims for breach of contract against defendants First Resort, Ranch Resorts, Horizon and Foxfire Resorts; (2) Judge Seay’s order dated 22 December 1988 dismissing defendants’ counterclaims; (3) Judge Herring’s order dated 15 October 1991 denying defendants’ motions for relief from Judge Seay’s earlier orders; and (4) four other rulings of the trial court.

I.

[1] Defendants First Resort, Foxfire Resorts, Ranch Resorts and Horizon assign error to the trial court’s entry of summary judgment for plaintiff on its claims for breach of contract based upon the promissory notes executed by defendants First Resort and Ranch Resorts and the Credit and Guaranty Agreement executed by defendants Horizon and Foxfire Resorts. For the reasons stated below, we hold the trial court properly entered judgment for plaintiff with respect to these claims.

We note, at the outset, that defendants previously attempted to appeal to this Court from Judge Seay’s order granting plaintiff partial summary judgment on these claims. In an unpublished opin-

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ion, we held that the order appealed from was interlocutory, adjudicating fewer than all of plaintiff's claims. *Berkeley Fed. Savings & Loan v. Terra Del Sol, Inc.*, 97 N.C. App. 665, 390 S.E.2d 184 (1990). At that time, we dismissed the appeal finding that "[t]he claims on which the trial court granted summary judgment are based on contracts which are a small part of plaintiff's case in chief . . ." and ". . . are not in danger of being lost or prejudiced if not appealed before a final determination of all claims." *Id.* While we reaffirm our belief that Judge Seay's order, as entered, was interlocutory pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure in that it adjudicated fewer than all the claims of the parties, it has now become "final" and therefore subject to appellate review by virtue of plaintiff voluntarily dismissing the remainder of its claims on 20 September 1991. *See Lloyd v. Carnation Co.*, 61 N.C. App. 381, 386, 301 S.E.2d 414, 417 (1983).

Where a motion for summary judgment is granted, the critical questions for determination upon appeal are whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E.2d 399 (1980). From our review of the record, we have determined that Judge Seay appropriately granted summary judgment in plaintiff's favor on the promissory obligations evidenced by the settlement notes executed by First Resort and Ranch Resorts and the Credit and Guaranty agreement executed by Horizon and Foxfire Resorts. The pleadings, depositions, documentary evidence, and affidavits before the trial court show that First Resort and Ranch Resorts agreed to compromise and settle their outstanding indebtedness to plaintiff under the original Financing Agreement by executing the promissory notes. Likewise, the evidence before the trial court clearly establishes Horizon and Foxfire Resorts' liability to plaintiff for the sums advanced to Horizon pursuant to the Credit and Guaranty Agreement. These agreements are *prima facie* evidence of defendants' obligations to plaintiff. *See Bank v. Woronoff*, 50 N.C. App. 160, 272 S.E.2d 618 (1980), *disc. review denied*, 302 N.C. 629, 280 S.E.2d 449 (1981). The clear language of these agreements refutes defendants' contention that their liability under the agreements was conditioned upon an implied promise by plaintiff to foreclose on the golf courses and clubhouse. Where the agreements between the parties are clear and unambiguous, no genuine issue of fact

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arises as to the intention of the parties, and summary judgment is appropriate. *Corbin v. Langdon*, 23 N.C. App. 21, 208 S.E.2d 251 (1974). The order of the trial court granting plaintiff summary judgment with respect to these claims is affirmed.

II.

[2] Defendants Terra, First Resort, Foxfire Resorts, Ranch Resorts, Horizon and Smith assign error to Judge Seay's order granting plaintiff summary judgment on each of the seventeen counterclaims contained in defendants' amended answer. In the trial court, plaintiff moved for summary judgment on each of the counterclaims stating, "[w]ith respect to the specific grounds for such motion, Berkeley shows the Court that essential elements of defendants' counterclaims are not supported by any evidence." Judge Seay concluded that plaintiff was entitled to judgment on each of the counterclaims as a matter of law. We affirm.

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Walker v. Durham Life Ins. Co.*, 90 N.C. App. 191, 368 S.E.2d 43 (1988). The majority of defendants' counterclaims, numbers 5, 6, 7, 8, 11, 16, 17, and 18, are based, for the most part, on theories of breach of contract and fraudulent misrepresentation. The core allegation giving rise to these claims is that plaintiff obligated itself to foreclose on the golf course and clubhouse properties 90 days after the execution of the workout agreements. Defendants alleged that "[a]ll parties present at the negotiations agreed that the foreclosure was a condition precedent to the performance of the other conditions and obligations contained in the workout agreements and this representation by Brown and Berkeley was material to the execution of the documents by Defendants."

Our review of the written workout agreements reveals, however, no language which contractually bound plaintiff to foreclose on these properties within 90 days or at all for that matter. Defendants acknowledge that at the time the parties entered into these agreements such a provision was specifically excluded from the language of the written contracts. However, defendants contend that plaintiff "impliedly" promised to foreclose on the properties within 90 days of the execution of the workout agreements. Defend-

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ants' forecast of evidence, however, fails to raise a genuine issue of fact concerning the "implied" promise.

First, at the time the agreements were executed, 3 June 1985, plaintiff did not own any interest in the golf course properties since it had not purchased the deed of trust from the Branch Bank & Trust. In fact, the affidavits and the language in § 5.01 of the "Sale and Finance Agreement" indicate that plaintiff did not at that time anticipate being able to obtain the deed of trust by way of negotiation with Branch Bank & Trust. Thus, at that time, plaintiff could not be bound to "foreclose" on property in which it had no interest.

Secondly, the affidavits and depositions indicate that if any enforceable promise existed at that time, it was agreed upon by both parties that foreclosure would not take place until the 90 day preference period had elapsed. Thus, the earliest date upon which foreclosure could have occurred was in early September 1985, 90 days following plaintiff's purchase of the deeds of trust on the property in June 1985. Representatives of the parties then met to discuss the future of the workout program. From these meetings, it was determined that defendants had embarked on a marketing strategy contrary to the plan adopted in the workout agreements. It was further determined that defendants had failed in several other respects to conform to the conditions of the agreements, including the payment of taxes and insurance and registration with the North Carolina Real Estate Commission. At that point, it was clear to plaintiff that defendants had not performed their obligations under the program, and pursuant to the agreements, plaintiff was entitled to terminate the program. One who fails to perform the conditions imposed upon him by the terms of a contract, and shows no excuse for such failure to perform, cannot bring an action based on the other party's refusal of failure to perform. *Peasely v. Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973). Defendants' counterclaims for breach of contract must fail.

[3] Defendants' counterclaims for fraudulent misrepresentation based upon the "implied" promise to foreclose must also fail since defendants did not meet their burden of demonstrating the presence of one of the essential elements of this claim, the intent to deceive. There was no evidence before the trial court indicating that at the time of the execution of the agreements plaintiff did not intend to foreclose on the properties if acquired. To the contrary, the

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evidence tends to show that plaintiff was prepared to institute foreclosure proceedings in early September, but at defendants' request and due to defendants' failure to perform their obligations under the program, the foreclosure did not take place. This Court has long held that summary judgment is appropriate in cases of fraud where an essential element of the claim is missing. *See Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 374 S.E.2d 135 (1988); *Uzzell v. Integon Life Ins. Corp.*, 78 N.C. App. 458, 337 S.E.2d 639 (1985), *cert. denied*, 317 N.C. 341, 346 S.E.2d 149 (1986); *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E.2d 654 (1978).

[4] Defendants' remaining counterclaims are based upon a variety of theories including negligence, gross negligence, breach of fiduciary duty and vicarious liability. Our review of the record reveals no basis in fact or in law for these counterclaims, and we affirm the order of summary judgment dismissing them.

The allegations giving rise to these counterclaims concern plaintiff's alleged mismanagement of the consumer installment contracts purchased from First Resort and its failure to investigate the financial stability of the project, all of which allegedly occurred prior to November 1984 when defendants Smith and Terra purchased a controlling interest in the resort. At that time, only First Resort had any type of relationship with plaintiff and that relationship was created by the contractual obligations stated in the Financing Agreement. First Resort, however, released any claims which it may have had against plaintiff when it entered into the Settlement Agreement with plaintiff in June 1985. Furthermore, any cause of action based upon contract, fraud or any other tort which First Resort might seek to maintain against plaintiff arising out of their relationship was barred by the applicable statute of limitations as of the date of the filing of this action. *See* N.C. Gen. Stat. §§ 1-52(1), 1-52(5) & 1-52(9) (1983). Additionally, the trial court properly dismissed defendants' counterclaims grounded in negligence and gross negligence as a matter of law in view of the rule that there is no cause of action for negligent breach of contract. *Mason v. Yontz*, 102 N.C. App. 817, 818, 403 S.E.2d 536, 538 (1991).

Defendants' counterclaims for vicarious liability necessarily fail since the underlying causes of action for negligence, breach of contract and fraud fail. Thus, the trial court was correct in its determination that there was no genuine issue of material fact as to

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any of defendants' counterclaims and in its dismissal of the claims as a matter of law.

III.

[5] The defendants also assign error to Judge Herring's denial of their motions for relief from the summary judgment orders entered by Judge Seay. Motions for relief are addressed to the sound discretion of the trial court, and appellate review is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975).

The record indicates that defendants filed motions pursuant to G.S. § 1A-1, Rules 54 and 60, to modify or vacate orders on 11 September 1991, almost three years after the summary judgment orders were entered. In their motions, defendants alleged the existence of genuine issues of material fact which justified relief from Judge Seay's entry of partial summary judgment for plaintiff. Defendants had a full and fair opportunity to argue the existence of issues of fact to Judge Seay at the summary judgment hearing, and have also had a full and fair opportunity to argue in this appeal that the summary judgments should not have been granted. We have determined that the summary judgments were correct as a matter of law. Defendants have not shown any other basis for the relief requested by their motions; therefore we find no abuse of the trial court's discretion in denying defendants' motions for relief.

IV.

Finally, defendants assign error to the following rulings of the trial court: (1) Judge Seay's order dated 8 November 1988 requiring the parties to complete discovery by 23 November 1988; (2) Judge Seay's order dated 12 December 1988 denying defendants' motion for a continuance of the hearing on plaintiff's motion for partial summary judgment and judgment on defendants' counterclaims; (3) Judge Herring's order dated 5 August 1991 denying defendants' motion to disqualify plaintiff's counsel of record, Charles Gordon Brown; and (4) Judge Herring's order dated 12 June 1991 denying defendants' motion to amend their answer to allege an additional counterclaim. Defendants also assigned error in the record to Judge Seay's refusal to consider two affidavits submitted at the summary judgment hearing. Defendants, however,

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have not argued this assignment of error in their brief, and it is deemed abandoned. N.C.R. App. P. 28(b)(5) (1993).

[6] As to Judge Seay's orders setting a time limit for the completion of discovery and denying defendants' motion to continue the summary judgment hearing, defendants correctly acknowledge that these matters are addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse. See *Hudson v. Hudson*, 34 N.C. App. 144, 237 S.E.2d 479, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 264 (1977) (discovery orders); *Shankle v. Shankle*, 289 N.C. 473, 223 S.E.2d 380 (1976) (motions to continue). Defendants contend, however, that Judge Seay abused his discretion in entering these orders. We disagree.

First, as to Judge Seay's discovery order, we note that defendants' characterization of the order as one "setting a 30 day limit on discovery" is not altogether accurate. Instead, the order entered 24 October 1988, *extended* the discovery period by thirty days allowing the parties until 23 November 1988 to complete discovery. From the record, it appears that the hearing held on 24 October 1988 was calendared for the purpose of hearing plaintiff's motions for partial summary judgment on three of its claims and as to nine of defendants' counterclaims. Defendants' motion for a continuance of the summary judgment hearing was granted. The court then extended the discovery period for thirty days and established a time schedule to guide the parties in meeting the deadline. In so doing, the court found that "discovery in this case has been unreasonably delayed" and admonished all parties "to proceed to conclude all discovery with expedition." We agree with the trial court's finding. Our review of the record indicates that the original complaint was filed on 26 January 1988; however, no meaningful discovery was conducted by the parties in this matter until after Judge Seay entered his order on 24 October 1988. Prior to this time, the action taken by the parties consisted of the filing of numerous motions for protective orders, motions for sanctions, and motions to compel. Under these circumstances, we find no abuse of discretion in Judge Seay's discovery ruling.

[7] We also find no abuse of discretion in Judge Seay's denial of defendants' motion for a continuance of the hearing on 12 December 1988. As indicated above, plaintiff's motions, in part, were originally calendared for hearing on 24 October 1988. At that time, Judge Seay granted defendants a continuance and extended the discovery

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period, allowing defendants additional time to prepare for the hearing. Moreover, defendants did not file any affidavits detailing the facts necessary to justify their request for a continuance as required by G.S. § 1A-1, Rule 56(f). *See also Glynn v. Stoneville Furniture Co.*, 85 N.C. App. 166, 354 S.E.2d 552, *disc. review denied*, 320 N.C. 512, 358 S.E.2d 518 (1987). Defendants have therefore failed to demonstrate any abuse of discretion under these circumstances.

Defendants' remaining assignments of error with respect to Judge Herring's denial of their motions to disqualify plaintiff's counsel and to amend their answer are also matters within the discretion of the trial court. *See Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, rev'd in part on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983) (motions to disqualify); *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982) (motions to amend). Again, defendants have not demonstrated any abuse of discretion on the part of the trial judge in regard to these rulings.

[8] With respect to defendants' motion to disqualify Charles Gordon Brown from further representation of plaintiff in this matter, Judge Herring found that the evidence presented at the hearing was insufficient to establish that Mr. Brown ought to or would be called as a witness by either party in the matter. Based upon this finding, Judge Herring denied the motion, but without prejudice to defendants to renew their motion pursuant to Rule 5.2(c) of the Rules of Professional Conduct in the event defendants obtained additional information justifying such renewal. It is clear that defendants failed to meet their burden before the trial court, but the trial court, instead of denying the motion outright, allowed defendants an opportunity to refile the motion if necessary. We discern no abuse of discretion in the ruling.

[9] Finally, on 7 September 1990, almost two years after Judge Seay dismissed defendants' counterclaims, defendants sought to amend their responsive pleading to allege an additional counterclaim against plaintiff, arising out of the original financing agreement. Defendants contended that the requested amendment was based on evidence unavailable to them at the prior summary judgment hearing before Judge Seay; plaintiff contended that the evidence was not "new." Judge Herring held a hearing on the motion, and determined that justice did not require that the amendment be

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allowed. Accordingly, he ruled, in his discretion, that the motion to amend should be denied. While we recognize that motions to amend pleadings should be liberally granted, *vanDooren v. vanDooren*, 37 N.C. App. 333, 246 S.E.2d 20, *disc. review denied*, 295 N.C. 653, 248 S.E.2d 258 (1978), such motions are addressed to the sound discretion of the trial judge, and a clear abuse of such discretion must be shown before the judge's ruling will be disturbed. *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982). In this case, defendants have shown no such abuse of discretion and we find none, particularly since the Settlement Agreement between plaintiff and First Resort effectively resolved any claims arising out of the original financing agreement. Defendants' assignment of error is overruled.

Affirmed.

Judges WELLS and ORR concur.

WILLIAM B. PETERSEN AND WIFE, PATRICIA T. PETERSEN, APPELLANTS v.
PAMELA A. ROGERS AND WILLIAM J. ROWE, APPELLEES

No. 9215DC400

(Filed 7 September 1993)

1. Parent and Child § 24 (NCI4th); Constitutional Law § 119 (NCI4th) — custody of child — adoption consent revoked — inquiry into religious beliefs of parents — improper

The general rule in child custody proceedings is that a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child. The limited inquiry may touch upon the religious practices of the parties as they relate to the health and safety of the child, but such inquiry may not focus on the general beliefs and doctrines of a religion.

Am Jur 2d, Divorce and Separation § 978; Parent and Child §§ 20, 26.

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Religion as factor in child custody and visitation cases.
22 ALR4th 971.

**2. Parent and Child § 24 (NCI4th)— child custody hearing—
revocation of consent to adoption— inquiry into religious
beliefs— improper**

In a proceeding to determine whether custody of a child should remain with adoptive parents or be placed with biological parents after the mother revoked consent to the adoption, the trial court violated the adoptive parents' right to freedom of religion by inquiring extensively into the theological beliefs held by members of The Way. The trial court permitted testimony which could not have related to the present or possible future effect of the adoptive parents' religious practices on the child and the trial court's findings of fact did not indicate that the adoptive parents' religious practices were having a negative effect on the child. In the absence of such evidence, parties to a child custody dispute should not be placed in a position requiring them to explain or defend their religious beliefs.

**Am Jur 2d, Divorce and Separation § 978; Parent and
Child §§ 20, 26.**

Religion as factor in child custody and visitation cases.
22 ALR4th 971.

Appeal by plaintiffs from order entered 11 December 1991 by Judge Patricia S. Hunt in Orange County District Court. Heard in the Court of Appeals 4 March 1993.

*Fisher & Hassell, by Robert A. Hassell and C. Douglas Fisher,
for plaintiffs-appellants.*

*Levine, Stewart & Davis, by Donna Ambler Davis, for
defendants-appellees.*

LEWIS, Judge.

The main issue involved in this case is the permissible extent of inquiry into religious practices and beliefs of the parties in a child custody proceeding. In this case the trial court allowed an extensive inquiry into the religion of plaintiffs, William and Patricia Petersen. The Petersens appeal from the trial court's order im-

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mediately transferring custody of Paul, the minor child in question, to defendants, Pamela Rogers and William Rowe. We now reverse, finding that the court's inquiry violated the Petersens' constitutionally guaranteed right to religious freedom.

A review of the unique background of this matter is essential to an understanding of the case. Pamela Rogers became pregnant with Paul in December 1987 while living with William Rowe in Michigan. While pregnant, Rogers became friends with a member of a religious organization known as The Way International (hereafter "The Way") and began to contemplate giving up the baby for adoption. William and Patricia Petersen, who live in North Carolina, heard about the possible adoption through their membership in The Way, and hired attorney and Way member Doug Hargrave to represent them. When Rogers was six months pregnant Hargrave and the Petersens arranged for her to move to North Carolina and live with a fellow member of The Way. The Petersens and Hargrave provided for Rogers' care and medical needs while in North Carolina. Paul was born at North Carolina Memorial Hospital on 9 September 1988. After the birth Rogers signed a release form and Paul was given to the Petersens. Soon after returning to Michigan Rogers revoked her consent to the adoption, and after extensive litigation the North Carolina Supreme Court vacated the adoption proceeding. *In the Matter of the Adoption of P.E.P.*, 329 N.C. 692, 407 S.E.2d 505 (1991). The Supreme Court remanded the case to the trial court to determine whether custody should remain with the Petersens or be transferred to Paul's biological parents, Rogers and Rowe. *Id.*

Accordingly, the Petersens filed a complaint seeking custody in September 1991. Rogers and Rowe filed responsive pleadings, and the case went to trial in Orange County District Court in November 1991. On 15 November 1991 the court denied the Petersens' request for custody and ordered Paul to be transferred immediately to his biological parents.

In their appeal the Petersens' allege, among other things, constitutional violations arising from the extensive inquiry into the practices and beliefs of their religion at trial. They claim the court impermissibly considered their religious beliefs in reaching its decision to return custody of Paul to his biological parents. They also object to the court's refusal to allow them visitation with Paul, alleging that this decision, too, rested on religious considerations.

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The Petersens claim the constitutional violations entitle them to a new trial. In the alternative, they claim they are at least entitled to remand for proper determination of their visitation rights.

I. Facts relevant to this appeal**A. Evidence admitted at trial**

At a hearing on plaintiffs' motion in limine regarding The Way, Judge Hunt refused to prohibit testimony about the general beliefs and practices of The Way, explaining that she didn't know anything about it and it would be unfair to Ms. Rogers to exclude such evidence. She also believed that it would be unfair to the Petersens "not to understand what The Way is all about." In the event of testimony regarding The Way, the judge ordered "additional testimony from the Petersens themselves as to their particularized beliefs." At trial Rogers and Rowe presented evidence about The Way through the testimony of Cynthia S. Kisser, Executive Director of the Cult Awareness Network in Chicago. In compliance with the court's order, the Petersens then presented the testimony of a Way minister, William C. Greene. The testimony of these two witnesses spans 147 pages of the transcript, and involves in-depth examination of the general beliefs, tenets, and practices of members of The Way.

Among other things, Ms. Kisser testified that the group did not follow "traditional Christian beliefs" because its members do not believe Jesus Christ is divine. Furthermore, she explained that The Way's concept of the Trinity is "heresy" and an "heretical position" from the traditional Christian perspective. She described their practice of speaking in tongues as "classic hypnosis," and an "altered state of consciousness." Ms. Kisser testified that in her expert opinion The Way International is a "destructive cult," because of its "unethical" and "deceptive" method of recruiting.

On direct examination Reverend Greene explained some of the allegedly destructive practices of The Way described earlier by Ms. Kisser. On cross examination the court permitted questions regarding his beliefs concerning Jesus Christ, his tithing practices, speaking in tongues, and his belief in devil spirits. The court permitted counsel to question Reverend Greene as to whether The Way is "recognized as a religious denomination in the United States." Counsel then pointed out that The Way is not listed in the Handbook of Denominations.

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B. The court's findings

In its order, the trial court made findings of fact regarding the religious practices of the Petersens and Rogers and Rowe. The court found that the Petersens are members of The Way International, describing this as a "Pentecostal, biblically-oriented Christian sect which encourages its members to lead an affirmative lifestyle and . . . to reflect religiosity by overtly speaking in tongues." The court found that Rogers and Rowe "were baptized and once were professing Catholics," and that Rogers believes The Way "is a network that isolated her and alienated her from her family and friends and influenced her under duress and undue prejudice causing her to make an adoption decision she almost immediately regretted." The court noted that Rogers was "extremely concerned" that Paul was being raised in The Way, and Rogers views The Way "as her enemy in her fight for her child."

The trial court also made findings regarding the home life of the Petersens and of Rogers and Rowe. The court found that the Petersens had raised Paul in a "most appropriate fashion, in a good home with great love and care and concern for his physical, his emotional and his spiritual well-being." The court found that Paul was above average in intelligence, and physically and emotionally normal for his age. The court noted that Mr. Petersen earned over \$50,000 per year working for the Environmental Protection Agency, and that Mrs. Petersen operated a small day care center in their home. The court also noted that the Petersens had been married for twelve years at the time of the order.

The court found that both Rogers and Rowe had children from previous marriages as well as another child together, and that they were good parents to these children. Other findings included the fact that Rogers and Rowe have never been and were not married at the time of the court's order. Rogers earned about \$12,000 per year working as dining room manager at a country club. Rowe expected to earn a yearly salary of \$25,000 in a new sales position, along with \$10,000 from a restaurant he owns.

The court concluded that both the Petersens and Rogers and Rowe are fit and proper persons to have custody of Paul. The court found that Paul was not eligible for adoption, his biological parents' rights had not been terminated, and his biological parents did not consent to any adoption. Due to "serious religious differences," "lengthy and strident court proceedings," and geographical distance,

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the court decided joint custody between the Petersens and Rogers and Rowe was not possible, and stated that all experts except one recommended that Paul be immediately placed with his biological parents. The court concluded that Paul's best interests require that he live with his biological parents with no visitation from the Petersens unless consented to and approved by Rogers and Rowe.

II. Constitutional issues arising from admission of extensive evidence regarding The Way International

A. Permissible extent of religious inquiry in child custody proceedings

[1] We begin by recognizing the wide discretion vested in the trial judge in child custody proceedings. *In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982). As part of the best interests analysis, our courts have considered the child's physical, mental, and spiritual welfare. *See Dean v. Dean*, 32 N.C. App. 482, 484, 232 S.E.2d 470, 472 (1977). When considering a child's spiritual welfare, however, a court must be careful not to infringe upon the religious freedom of the parties involved, a fundamental right guaranteed by our state and federal constitutions. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. Const. amend. I. Similarly, the North Carolina Constitution provides that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13. Although the trial judge has wide discretion and control in child custody cases, we believe this discretion could be abused by a religious inquiry so extensive that it would violate this most basic of our fundamental rights and thus become an inquisition.

The Petersens concede that the best interests determination may include inquiry into the spiritual well-being of a child, but argue that making a "denominational inquiry the focal point of any such trial or to rest any decisions affecting the custody of a minor child on any denominational preference" is error. In oral argument counsel for the Petersens predicted a chilling effect upon future litigants if their religious beliefs may be subject to extensive examination in court.

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Rogers, on the other hand, argues the religious practices of the Petersens are relevant because she gave up her child for adoption due to the influence of members of The Way International. Rogers emphasizes that religion is a proper area of inquiry for a court when making a determination of the best interests of a child, but agrees that a court should not make judgments based on religious preferences.

No North Carolina cases have addressed a situation involving an extensive religious inquiry in a child custody proceeding. Our courts have stated that although a court may consider a child's spiritual welfare as part of the best interests determination, *see Dean*, 32 N.C. App. at 484, 232 S.E.2d at 472, a court may not base its findings on its preference for any religion or particular faith. *Id.* at 483, 232 S.E.2d at 471.

In oral arguments before this Court, counsel for the Petersens suggested that an inquiry into the religious practices of the parties is permissible if it relates to the health and safety of the child, but that an inquiry into religious beliefs is not permissible. We agree that religious practices which may be harmful to a child require inquiry by the trial court. We find support for appellants' distinction between beliefs and practices in cases from other jurisdictions which have addressed the issue now before us. For example, in *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978), the Missouri Supreme Court stated that

there is a vast difference between concentrating on the religious choice of a parent as compared to concentrating on what is best for the child. Inquiry into religious beliefs *per se* is impermissible; inquiry into matters of child development as impinged upon by religious convictions is permissible The difference here is not superficial but fundamental: the state shall prefer no faith but must favor the best interests of those children whose parental custody it determines.

Id. at 333 (reversing order giving custody to spouse of member of Jehovah's Witnesses). The Supreme Court of Ohio stated:

To the extent that a court refuses to award custody to a parent because of her religious beliefs, the court burdens her choice of a religion in violation of the Free Exercise Clause of the United States Constitution. . . . On the other hand, a parent's actions are not insulated from the domestic relations

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court's inquiry just because they are based on religious beliefs, especially actions that will harm the child's mental or physical health.

Pater v. Pater, 588 N.E.2d 794, 798 (Ohio 1992). See also *Quiner v. Quiner*, 59 Cal. Rptr. 503, 517 (Cal. Dist. Ct. App. 1967) (court noted "clear distinction between beliefs merely professed and acts indulged in pursuant to said beliefs"). Cf. *In re Short*, 698 P.2d 1310, 1313 (Colo. 1985) (evidence of practices or beliefs admissible if shown that reasonably likely to cause present or future harm to child).

The general rule is that a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child. Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 Mich. L. Rev. 1702, 1704-05 (1984) (hereafter "Note"); see *In re Hadeen*, 619 P.2d 374, 382 (Wash. App. 1980) (absent evidence of substantial threat to child's mental or physical welfare, improper to award custody to father based on mother's involvement with and complete submission to fundamentalist church). Although some courts have only permitted evidence showing actual harm to the child, see *Quiner*, 59 Cal. Rptr. at 516, we find a broader rule allowing inquiry into actual or potential harm to be more desirable. See *Short*, 698 P.2d at 1313 (court found actual harm standard too restrictive and adopted standard of whether beliefs or practices "reasonably likely" to cause present or future harm). We find that restricting the inquiry to the practices of the parties and the effect such practices have had or may in the future have upon the child in question sufficiently narrows the inquiry to avoid a chilling effect on the practice of religion yet protect the best interests of the child. We conclude that the limited inquiry may touch upon the religious practices of the parties as they relate to the health and safety of the child, but such inquiry may not focus on the general beliefs and doctrines of a religion. See Note at 1705.

B. The inquiry in the case at hand

[2] After reviewing the transcript of the trial court's proceedings it appears that many questions asked about The Way had no relevance to Paul's best interests, but rather focused on the theological beliefs held by members of The Way. While we neither

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can nor will set down exactly what may or may not be asked, we will provide some examples from the transcript of questions which are clearly unacceptable in a court proceeding to determine custody of a child.

The following exchange between Mr. Michael Levine, attorney for Rogers and Rowe, and Ms. Kisser helps to illustrate the level of inquiry permitted in the trial court:

Q Okay. I believe I asked you . . . what religion encompassed or was involved with The Way International, whether or not it was a Christian religion, and your answer was something about traditional Christianity and non-traditional. Could you explain that, please?

A Right. . . . The Way International, the founder of it, published a book called Jesus Christ is Not God which articulates a main position of that religion. That Jesus Christ was a human being and not a divine being. He is called the Son of God. He is referred to in terms that are Lord and things like that, but the bottom line of the belief system is that he is a man and he is not divine or co-equal with God.

Additionally, they believe about the Holy Spirit, that the Holy Spirit is not a separate persona as traditional Christianity would hold it to be. It is, as they refer to it, a gift from the giver. And so, in essence, they believe in a God but they do not believe in a Trinity. And that, I think, is the simplest explanation I can give you that separates The Way International out as a belief system from the traditional, Christian belief systems that are evident in American society today.

The guardian ad litem questioned Ms. Kisser as follows:

Q . . . You have stated and others have stated that the members of The Way does [sic] not believe that Jesus Christ was God, the Son of God.

A Right.

Q That he possesses no qualities of a Diety [sic]?

A Right.

. . . .

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Q Now, don't the people in The Way believe, however, that God was in Jesus?

A Now, you are getting into the semantics in the sense that they do not believe that—they believe that we all have a spark of divinity in us as individuals so that spark that was in Jesus could be in you or I if we are a believer too. But that would not make you or I God—equal to God in the Trinity, any more than it would make Jesus that way. For him having that divinity in him, that spark of divinity, he is no more or no less than you or I in God's eyes in that sense.

Q And is it true that even though The Way may not particularly espouse like mainstream religions that the Trinity is personified by three individuals, for lack of a better word, don't they believe and profess that their ability to speak in tongues is a result of the Spirit of the Holy Spirit descending upon them?

A But it still is not a persona. Like it is still—It is still a spiritual gift which is delivered onto you because of your level of believing.

. . .

And the Christian church, if you look at it as a historical existence, not in particular denominations, it is very clear on this point that such a position is heresy. Now, I'm not saying that's good or bad. I'm not making a judgment on it, but I'm saying if you look at the history of church literature, that is a heretical position.

The court also permitted counsel to question the accuracy of Way materials and beliefs. Mr. Doyle asked Ms. Kissner:

Q From the literature that you've reviewed in your work have you found a consistent point that there are some inaccuracies in what Dr. Wierwille [founder of The Way] has written concerning—and things that can be disproved that he has written concerning, for example, the language in which the Bible was written?

A Yes.

. . .

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A . . . there is ample literature that has been written . . . that is of a scholarly nature that does dispute the actual accuracy, technically, of some of the claims.

The court permitted Ms. Davis to question Reverend Greene as follows:

Q Rev. Greene, do you know if The Way International is recognized as a religious denomination in the United States?

. . .

Q So it wouldn't surprise you then that in the Handbook of Denominations, The Way International is not listed?

The quoted passages do not in any way relate to Paul or the effect on Paul of the Petersens' involvement in The Way. Although Ms. Kisser expressed concern over some of the practices of The Way, she testified that she had never met the Petersens or Paul. Therefore, none of her testimony could have related to the present or possible future effect of the Petersens' religious practices on Paul. *See Pater v. Pater*, 588 N.E.2d 794, 800 (Ohio 1992) (expert opinions irrelevant where experts had never met child in question). Questions about Jesus Christ, evil spirits, speaking in tongues, tithing, and the Handbook of Denominations had no relevance to determining custody in the child's best interests. We note that other Christian sects practice speaking in tongues and believe in evil spirits. Unless evidence of such practices could be put in the context of this particular family, it was irrelevant.

Furthermore, the trial court's findings of fact did not indicate that the Petersens' religious practices were having a negative effect on Paul. The court found quite the opposite: that Paul

has been raised in a most appropriate fashion, in a good home with great love and care and concern for his physical, his emotional and his spiritual well-being. . . . Paul is an above average child intellectually and he is age-appropriate physically and emotionally. He is healthy and has had no significant illnesses since his birth.

Absent any evidence that Paul was adversely affected or would be adversely affected in the future by the religious practices, the court's acquiescence in the extensive inquiry was impermissible. To allow Ms. Kisser to speculate that the general practices and beliefs of members might be detrimental to children is to condemn

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the entire membership of The Way as unsuitable parents. See *Pater*, 588 N.E.2d at 800 (court denounced expert's "blatant attempt to stereotype an entire religion" in speculating that mental illness more common among Jehovah's Witnesses than among general population). This result would certainly produce a chilling effect upon litigants in future cases where one spouse was a member of The Way or of some other lesser-known religion.

The trial judge attempted to explain her inquiry in the case at hand, stating that she felt "it is absolutely incumbent upon this Judge to understand what The Way is all about. . . . I wanted to know specifically what [Mrs. Petersen] thought, what she believed, and what she was doing I just want to know what it is. I know nothing about these people" In their brief, Rogers and Rowe explain that the court's inquiry was limited to the general teachings and practices of The Way, and did not involve the practices and beliefs of the Petersens themselves. However, this inquiry directly contradicts the rule that such examination must be limited to the religious practices of the parties involved and the effect of those practices upon the child in question.

It would be impossible for this Court to set forth exactly which questions may or may not be asked in this situation. We do note that some of the questions asked at trial were appropriate because they related directly to the impact of the Petersens' religious practices on Paul. For example, on direct examination Mr. Hassell asked Mrs. Petersen:

Q All right. Is there anything about your religious beliefs that has prohibited you or prevented you from seeking medical attention for Paul at any time?

A No.

* * * *

Q . . . Is there anything about your practice of your Christian, religious beliefs which requires you in any way to subject Paul to unusual discipline of any kind?

A No.

* * * *

Q . . . Is there anything about the—your membership within the ministry of The Way International that in any way controls

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your own personal actions toward Paul or toward your husband, William Petersen?

A No.

The court itself posed several questions to Mrs. Petersen as follows:

THE COURT: And in your talking about first aid, second aid and third aid, I believe your statement was that all of these aids could come concurrently or contemporaneously with seeking medical treatment at the same time?

A Yes

THE COURT: Is there anything in your religious beliefs that would be equivalent to the Jehovah's Witnesses where they won't transfuse blood or—

. . . .

where they would not allow surgery with the Christian Scientists or—

A (Interposing) No. We have some very fine surgeons that are involved in The Way Ministry.

THE COURT: So medical treatment really is not a big deal with you all?

A No.

* * * *

THE COURT: . . . And, is there anything in your religion that you would teach your son that would denigrate or derogate in any way the life-style of these people who are his natural, biological parents?

A I will not put them down in front of Paul. We will have to deal with these issues that are going to come up

Of notable interest is the fact that another court has addressed The Way International in the context of a child custody proceeding. In *Rogers v. Rogers*, 490 So. 2d 1017 (Fla. Dist. Ct. App. 1986), the trial court examined the same information involved in this case, some of it provided through the testimony of Ms. Kisser, and decided to award custody to the mother, a Way member, but

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[111 N.C. App. 725 (1993)]

to condition custody upon her severing her connection with The Way. The appellate court reversed, allowing the mother to retain custody but finding that the condition was overbroad and restrictive of her constitutional right to freedom of religion.

III. Conclusion

We conclude that the Petersens should not have been subjected to the inquisition of their religion at trial. The unfamiliarity of a religion to the trial judge or other parties to a case should not serve as an excuse to delve so deeply into such private matters. In the absence of evidence of present or future physical or mental harm to the child in question, parties to a child custody dispute should not be placed in a position requiring them to explain or defend their religious beliefs. We note the potential influence unlimited inquiry could have upon the parties' religious choices. We find that the Petersens' right to freedom of religion guaranteed by the United States Constitution and the North Carolina Constitution was violated. The existence of this constitutional violation renders review of the visitation issue unnecessary. We reverse and remand to the trial court for proceedings free from unwarranted religious inquisition into the beliefs of the parties.

Reversed and remanded.

Judges JOHNSON and JOHN concur.

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No. 921SC283

(Filed 7 September 1993)

1. Pleadings § 364 (NCI4th)— motion to amend complaint— denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint where the motion to amend was not filed until 20 August 1990, over a year

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after the original complaint, and the requested amendment purports to add a seventh cause of action but the cause of action is ambiguous and no relief is requested.

Am Jur 2d, Pleading § 310.

Timeliness of amendments to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 ALR Fed. 123.

2. Evidence and Witnesses § 1994 (NCI4th) — savings and loan — outside agreement — not admissible — D'Oench, Duhme doctrine

The trial court did not err by granting a motion in limine by defendant Outer Banks Financial Services (OBFS) to prohibit introduction of alleged misrepresentations by Mark Parker where OBFS had contracted with Daniels & Daniels for the construction of a shopping center; Daniels & Daniels had sub-contracted some of the work to plaintiff; payments from Daniels & Daniels to plaintiff were late; plaintiff contacted Mark Parker, a director and officer of OBFS, and received payment; plaintiff and Daniels & Daniels entered into a second contract after the initial work was completed; plaintiff was concerned about the late payments under the first contract and was told by Mark Parker that Parker would be monitoring the project and that plaintiff would be paid by OBFS if Daniels & Daniels failed to make payments; plaintiff completed the work but was not paid \$266,232 due under the contract; plaintiff requested payment from OBFS; Great Atlantic Savings Bank, of which OBFS was a subsidiary, was declared insolvent and the Resolution Trust Corporation was eventually appointed Receiver; and plaintiff in the interim filed this action. The doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, as codified at 12 U.S.C.A. § 1823(e), bars any outside agreement Mark Parker may have made with plaintiff.

Am Jur 2d, Contracts §§ 396-398.

Appeal by plaintiff from Judgment and Order of Dismissal entered 19 November 1991 by Judge Thomas S. Watts in Dare County Superior Court. Heard in the Court of Appeals 10 February 1993.

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Pritchett, Cooke & Burch, by William W. Pritchett, Jr. and David J. Irvine, Jr., for the plaintiff-appellant.

Ward & Smith, P.A., by A. Charles Ellis, J. Michael Fields, and Ryal W. Tayloe, and Hughes, Hubbard & Reed, by Dennis S. Klein and Leslie R. Walls, for the defendant-appellee.

WYNN, Judge.

The defendant, Outer Banks Financial Services [hereinafter OBFS] is a wholly-owned subsidiary of Great Atlantic Savings Bank [hereinafter GASB]. OBFS contracted with Daniels & Daniels Construction Co. [hereinafter Daniels & Daniels] to build a shopping center on land owned by OBFS in Avon, North Carolina. The shopping center contract was not reduced to writing.

Daniels & Daniels subsequently entered into a written subcontract agreement with the plaintiff construction company, Outer Banks Contractors [hereinafter OBC], for the grading, paving, curb and gutter construction on the project. Initially, the periodic payments called for by the contract were timely made to OBC, but later payments were between sixty and ninety days past due. When the payments from Daniels & Daniels were not made as scheduled, Mike Beacham, CEO of OBC, contacted Mark Parker, a director and officer of OBFS through March or April 1988, to inform him of the late payments. Subsequent to each of these conversations, OBC received payment.

Once the initial site work was completed, OBC and Daniels & Daniels entered into a second written subcontract, dated 29 June 1988, in which OBC agreed to do the paving, gutter and curb work for the shopping center. Because of the payment problems associated with the first contract, Mike Beacham insisted on meeting with Mark Parker and Danny Daniels, an officer and director of Daniels & Daniels, in June 1988, before OBC began work. At that meeting, Mark Parker told Mike Beacham that he would be monitoring the shopping center project and, if Daniels & Daniels failed to make the payments required under the contract, he would ensure that OBC was paid by OBFS. Mark Parker's assurances were not reduced to writing.

OBC apparently relied on the verbal representations of Mark Parker and commenced and completed the work required by the second contract between 15 August 1988 and 24 October 1988.

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Daniels & Daniels, however, failed to pay the \$266,232 due OBC pursuant to the contract. Thereafter, OBC requested payment from OBFS.

On 29 March 1989, GASB was declared insolvent by the Federal Home Loan Bank Board, which appointed the Federal Savings and Loan Insurance Corporation [hereinafter FSLIC] as Conservator for GASB. Subsequently, on 15 September 1989, the Resolution Trust Corporation [hereinafter RTC] was appointed Receiver for GASB, and the outstanding stock of OBFS became an asset of the RTC.

In the interim, on 30 June 1989, OBC filed a Complaint against OBFS, Mark Parker, Daniels & Daniels, and Danny Daniels alleging six causes of action: breach of contract; conversion; fraud; embezzlement; North Carolina RICO violations; and unfair and deceptive acts and practices. OBFS was the only defendant to file an Answer to the Complaint, and OBFS also filed a Crossclaim against the other defendants, which Crossclaim also went unanswered. The breach of contract claim was subsequently dismissed as against OBFS.

OBC filed a motion to amend its Complaint on 20 August 1990, which motion was denied. (Discussed in detail below). OBFS' subsequent 18 April 1991 motion for summary judgment was also denied and the case came on for trial 18 November 1991. Prior to trial, the trial court granted OBFS' motion in limine to exclude all evidence of the alleged oral misrepresentations of Mark Parker. OBC and OBFS waived a jury trial in open court. No other defendant was present in court during the proceedings.

After hearing evidence, Judge Watts entered a judgment against Daniels & Daniels, Danny Daniels, and Mark Parker. The amount of said judgment was subsequently trebled and OBC was also awarded costs and fees. OBC's case against OBFS was, however, dismissed with prejudice. From the trial court's denial of its motion to amend its complaint and from the trial court's granting of OBFS' motion in limine, OBC appeals to this Court.

I. Motion to Amend

[1] The plaintiff first assigns error to the trial court's failure to grant its motion to amend its Complaint. In support of this contention, the plaintiff argues that the failure to allow the amend-

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ment constitutes an abuse of discretion on the part of the trial court. We disagree.

The rules of civil procedure provide that a pleading may be amended after a responsive pleading has been filed "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). A motion to amend a complaint is addressed to the sound discretion of the trial court and, as with any motion so addressed, the ruling "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 reasoned decision." *House of Raeford Farms v. City of Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d 885, 887 (1991) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)); see also *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986). While the trial judge is not required to set forth specific reasons for denying a motion to amend a complaint, undue delay, bad faith, undue prejudice, futility of the amendment and repeated failure to cure defects by previous amendments have all been recognized as reasons justifying a denial of the motion. *House of Raeford Farms*, 104 N.C. App. at 282-83, 408 S.E.2d at 887.

In the present case, OBC filed its original Complaint on 30 June 1989, which Complaint was answered by OBFS on 20 February 1990. The motion to amend was not filed until 20 August 1990, over a year after the original Complaint. Moreover, the requested amendment purports to add a seventh cause of action, but the cause of action is ambiguous and no relief is requested. Having examined the record before us, we find the trial court did not abuse its discretion in denying the motion to amend the Complaint and, therefore, we find no merit to this first assignment of error.

II. Motion in Limine

[2] The plaintiff's second assignment of error asserts that the trial court erred in granting the defendant's motion in limine to suppress all alleged oral misrepresentations made by Mark Parker. In support of this contention, the plaintiff argues (A) that Mark Parker was not an agent of OBFS at the time he made the oral misrepresentations and, therefore, had no authority to bind OBFS, and (B) that the doctrine enunciated in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 86 L.Ed. 956 (1942), and its progeny does

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not prohibit the admission of such evidence on the facts of the present case. We disagree.

A. Agency

Agency is the relationship that “arises from ‘the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.’” *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397 (1987) (quoting *Colony Assoc. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637-38, 300 S.E.2d 37, 39 (1993) (emphasis omitted)). The presence of a principal-agent relationship is a question of fact for the jury when the evidence tends to prove it; a question of law for the trial court if the facts lead to only one conclusion. *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716 (1985).

In the present case, Mark Parker served as an officer and director of OBFS until, at the latest, April 1988. The oral misrepresentations at issue here were purportedly made in June 1988. We need not, however, decide whether the agency relationship had been properly terminated, nor if OBC had been properly notified of the termination, as we find below that, even if Mark Parker was acting as an agent of OBFS in June 1988, the *D’Oench, Duhme* doctrine bars any oral agreement he may have entered into with Mike Beacham and OBC.

B. *D’Oench, Duhme*

In the *D’Oench, Duhme* case, an Illinois bank executed a promissory note with D’Oench, Duhme & Co. solely because the bank did not want its records to reflect past due bonds sold to it by the Company. Receipts for the note, which were not contained in the bank’s records, indicated: “This note is given with the understanding that it will not be called for repayment. All interest payments to be repaid.” The Company made interest payments in order to “keep [the note] alive,” and when the bank failed and the Federal Deposit Insurance Corporation [hereinafter FDIC] took over, the FDIC called the note due.

The Company attempted to defend against the FDIC’s demand by pointing to the outside agreement as evidenced in the receipts. The Court, however, held that the Company could not use the side agreement as a defense. In so holding, the Court recognized a public policy to protect the FDIC “from misrepresentations made

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to induce or influence the action of [the FDIC], including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans.” *D’Oench, Duhme*, 315 U.S. at 459, 86 L.Ed. at 963.

The *D’Oench, Duhme* doctrine was codified in 1950 at 12 U.S.C. § 1823(e) and provides as follows:

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

- (1) is in writing,
- (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823(e) (1991). The purpose served by the common law *D’Oench, Duhme* doctrine and by its statutory codification is the same, and the case law interpreting both are generally considered in tandem. *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989). Therefore, our discussion in the present case consists of cases interpreting both the original *D’Oench, Duhme* case and those construing section 1823(e) as precedent. See *Baumann v. Savers Federal Savings and Loan Assoc.*, 933 F.2d 1506, 1515 (11th Cir. 1991), *cert. denied*, --- U.S. ---, 118 L.Ed.2d 543 (1992). Moreover, while the original *D’Oench, Duhme* scenario involved the FDIC, the doctrine has been expanded to protect all federal bank regulatory agencies. See *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1106 (11th Cir. 1990); *Baumann*, 934 F.2d at 1515.

From its original application in the case of a fraudulent agreement between borrower and banker affecting a specific bank asset, the *D’Oench, Duhme* doctrine has undergone an expansive develop-

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ment resulting in a rule that has been described as “startling in its severity.” *Bowen v. FDIC*, 915 F.2d 1013, 1015 (5th Cir. 1990). See also *Beighley*, 868 F.2d at 784 (explaining that the doctrine bars outside agreements even where the borrower does not intend to deceive banking authorities, and, moreover, the underlying transaction need not be fraudulent). That rule has been articulated as follows:

In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution’s records.

Baumann, 934 F.2d at 1515. This considerable doctrinal extension has been effectuated to advance the policy considerations first articulated in the original decision. *Bowen*, 915 F.2d at 1015. Stated in its most basic form, that policy constitutes a recognition that the federal banking regulators must be able to rely on a failed financial institution’s written records and its assets. *Victor Hotel Corp. v. FCA Mortg. Corp.*, 928 F.2d at 1077, 1083 (11th Cir. 1991). See also *Bell & Murphy & Assoc. Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 752-3 (5th Cir. 1990) cert. denied, 498 U.S. 895, 112 L.Ed.2d 203 (1990) (stating that *D’Oench* evidences a federal policy to protect the federal regulator and the public funds which it administers against misrepresentations as to the assets in the portfolios of the banks which the banking regulator insures or to which it makes loans); *North Arkansas Medical Center v. Barrett*, 962 F.2d at 780, 788-89 (8th Cir. 1992) (stating the policy as being “to facilitate regulation and protect the FDIC from financial loss by assuring that the bank’s financial condition can be assessed instantaneously; to assure that senior bank officials are aware of unusual transactions before the bank agrees to them; and to prevent collusion between bank employees and customers on the eve of a bank’s failure”); *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d at 975, 979 (5th Cir. 1992) (stating that two considerations underlie this policy: (1) the protection of depositors and creditors over the interests of borrowers; and (2) the ease of understanding a bank’s financial health because FDIC examiners need to be able to accurately assess the condition of a bank based on its books).

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In the case at bar, OBC makes certain contentions in an effort to limit the reach of *D'Oench, Duhme* and its progeny. In so doing it presents this Court with a variety of issues to resolve in order to decide whether the *D'Oench, Duhme* doctrine required the granting of the defendant's motion in limine regarding Mark Parker's statements to Mike Beacham. These issues are (1) whether OBFS has standing to invoke the doctrine; (2) whether a creditor asserting an affirmative claim is subject to the doctrine; and (3) whether the doctrine is applicable to claims that would affect the general assets of the failed institution. We address each of these issues in turn.

1. OBFS has Standing to Assert the *D'Oench, Duhme* Doctrine

In the present case OBFS has sought to invoke the *D'Oench, Duhme* doctrine in an effort to suppress the alleged oral misrepresentations made by Mark Parker. It is undisputed that RTC would have standing to assert the doctrine, and that the doctrine applies to agreements made between a third party and a wholly owned subsidiary, such as OBFS, of the failed institution. See *Victor*, 928 F.2d at 1083 (stating that the receiver "has to rely on a financial institution's written records and its assets, such as wholly-owned subsidiaries, to determine solvency for regulatory purposes"); *Oliver v. Resolution Trust Corp.*, 955 F.2d 583, 585 (8th Cir. 1992) (recognizing that "the scope of the *D'Oench* doctrine includes financial interests held by wholly-owned subsidiaries of the failed institution"). OBC contends, however, that the *D'Oench, Duhme* doctrine may be invoked only by those entities established by the federal government for the purpose of overseeing banking institutions, or by the successors in interest to those entities.

To support its contention that OBFS cannot invoke *D'Oench, Duhme*, OBC points to *Baumann v. Savers Federal Savings and Loan Assoc.*, 934 F.2d 1506 (11th Cir. 1991). In that case, the RTC became conservator of Savers Federal Savings and Loan Association after the plaintiff had received a favorable judgment against the bank in the lower court. The *Baumann* Court ruled that the RTC could raise the *D'Oench, Duhme* doctrine for the first time on appeal as it had not had the opportunity to do so in the earlier proceedings. Because the defense in *Baumann* was not raised until RTC was made a party, OBC argues that the defense *could* not have been raised until RTC was made a party. *Baumann* does not directly indicate, however, whether *the bank* could have in-

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voked the doctrine once it had been placed into receivership. Moreover, in holding as it did, the *Baumann* Court pointed to Congress' recognition that "[t]he appointment of a conservator or receiver can often change the character of litigation" quoting H.R. Rep. No. 54, 101st Cong., 1st Sess., 331 (1989) *reprinted in* 1989 U.S.C.C.A.N. 86, 127. A case involving a failed savings and loan takes on new significance, then, simply by a receiver being appointed, not by the receiver being substituted as a party to the action. See *Victor*, 928 F.2d at 1083 (allowing FCA to bring a motion for summary judgment based on the fact that the *D'Oench, Duhme* doctrine barred Victor's defenses). In fact, the *D'Oench, Duhme* doctrine "extends broadly to cover any secret agreement adversely affecting the value of a financial interest *that has come within the RTC's control as receiver* of a failed financial institution." *Oliver*, 955 F.2d 585 (emphasis added) (indicating that, although RTC was a party, that fact was not essential to the application of the doctrine).

The *D'Oench, Duhme* doctrine is not intended to protect the failed institution. However, once a federal entity such as the FDIC, RTC or FSLIC has been appointed receiver, the protection afforded by the doctrine, even if invoked by the savings and loan, benefits the federal regulator. We find, therefore, that it is consistent with the policy considerations represented by the doctrine to allow OBFS to invoke the doctrine in the present case.

2. A Creditor Asserting an Affirmative Claim is Subject to the *D'Oench, Duhme* Doctrine

OBC next asserts that the *D'Oench, Duhme* doctrine is available only in those situations where a borrower is seeking to defend against the regulator's calling due a debt evidenced in the failed bank's records. While it is true that the majority of instances in which the doctrine was invoked involved a bank borrower, "the policies implicit in [the *D'Oench, Duhme* doctrine and its statutory counterpart] require no . . . distinction [between borrower and creditor]." *North Arkansas*, 962 F.2d at 788. See also *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991) (stating that there is no indication that the doctrine is limited to obligations between a borrower and the bank); *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991) (rejecting the plaintiff's assertion that *D'Oench* applies only to the maker of a note and pointing to a variety of situations outside the borrower-

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lender arrangement in which *D'Oench* has been applied); *Hall v. FDIC*, 920 F.2d 334, 340 (6th Cir. 1991), *cert. denied*, 115 L.Ed.2d 1020 (1991) (stating that if *D'Oench* did not apply to bar the introduction of evidence of a side agreement relating to an affirmative claim against the receiver, "then an obligor could circumvent the sound policy behind *D'Oench* by asserting as a counterclaim that which could not be asserted as an affirmative defense"); *Beighley*, 868 F.2d at 784 (stating that "if [an] obligor may assert oral side agreements reducing the value of assets formerly held by the bank, then the FDIC would be misled." (quoting *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 361 (5th Cir. 1981), *cert. denied*, 456 U.S. 977, 72 L.Ed.2d 845 (1982)). Furthermore, "[t]he goal of enabling regulators to make accurate assessments would be undercut by exempting claims from [the doctrine] simply because they did not pertain to the bank's lending function. The FDIC's picture of the bank's net worth could be just as distorted by hidden liabilities to creditors as by secret agreements that impair the value of a loan." *North Arkansas*, 962 F.2d at 789.

The scope of the *D'Oench*, *Duhme* doctrine is expansive and as such "extends broadly to cover *any* secret agreement adversely affecting the value of a financial interest that has come within [the federal regulator's] control as receiver of a failed financial institution." *Oliver v. RTC*, 955 F.2d at 583 (emphasis added). The developmental history of the doctrine dictates that the most important consideration is whether "one who has dealt with a failed [federally]-insured institution [is asserting] a claim or defense against the [federal regulator] that depends on some understanding that is not reflected in the insolvent bank's records." *Texas Refrigeration Supply v. FDIC*, 953 F.2d 975, 978-79 (5th Cir. 1992). As such, *D'Oench*, *Duhme* applies to "any agreement that 'tends to defeat or diminish [the receiver's] right to an interest' in receivership" not only those between borrower and banker. We find, therefore, that it is consistent with the general policy considerations underlying the *D'Oench*, *Duhme* decision, and supported by case law from the circuit courts, to apply the doctrine to the claims of OBC, as a potential creditor of OBFS, in the present case. *Victor Hotel Corp. v. FCA Mortgage*, 928 F.2d at 1083 (quoting *FDIC v. Hoover-Morris Enterprises*, 642 F.2d 785 (5th Cir. 1981)).

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3. The *D'Oench, Duhme* Doctrine is Applicable to Claims that would Affect the General Assets of the Failed Institution

OBC next contends that the doctrine does not preclude recovery based on breach of fiduciary duty because breach of fiduciary duty is a tort claim rather than a contract claim. As such, the claim constitutes an action against the general assets of OBFS, and OBC asserts that *D'Oench* only applies where a specific asset is concerned. However, "to the extent that . . . [a] breach of fiduciary duty claim is based on the asserted side agreements, the claim is barred by the *D'Oench* doctrine." *Oliver*, 955 F.2d at 586. See *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46 (1st Cir. 1991) (rejecting the proposition that *D'Oench* does not bar affirmative claims sounding in tort because such a proposition is contrary to *D'Oench's* policy of protecting the FDIC from secret agreements). Furthermore, the agreement sought to be invalidated by the doctrine "need not implicate a specific obligation, such as a note or other asset held by the FDIC Simply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either." *Bowen*, 915 F.2d at 1016. See also *Hall*, 920 F.2d at 339 (concluding that while in most cases which rely on *D'Oench* the FDIC does have an interest in a specific asset, the doctrine may be invoked even where FDIC does not have an interest in an asset because its importance arises from allowing banking authorities to determine exactly what a bank's assets are). But see *Vernon v. RTC*, 907 F.2d 1101, 1108 (11th Cir. 1990) (declining to extend the *D'Oench, Duhme* doctrine to cover tort claims against the general assets of the failed institution, believing such action to be "both inappropriate and unnecessary.").

The relevant question in determining whether the *D'Oench, Duhme* doctrine acts to bar a claim is whether the private party lent himself to a scheme or arrangement whereby the relevant authorities were likely to be misled. *Bell & Murphy*, 894 F.2d at 753-54. If, therefore, a claim sounding in tort and seeking recovery against the general assets of the failed institution arises from such a scheme or arrangement, the *D'Oench, Duhme* doctrine bars evidence supporting that claim. "As between private parties and federal deposit insurance agencies, both Congress and the Supreme Court have placed the burden on private parties to document fully the contours of their obligations from the inception of the transaction." *Baumann*, 934 F.2d at 1517.

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In the case at bar, the claim asserted by OBC stems from alleged misrepresentations made by Mark Parker on behalf of OBFS which are not recorded in the bank's records. Because Mark Parker's statements constitute a side agreement that could easily have been put into writing and made part of the bank's records, and because that agreement tended to mislead the RTC when it, as receiver of OBFS, examined the bank's records in an effort to ascertain its value, we find that those statements are prohibited by the *D'Oench, Duhme* doctrine from being introduced at trial.

We note that OBC argues that the *D'Oench, Duhme* doctrine is inapplicable to the case at bar and that, instead, state lien law should be applied to the facts presented in order to decide the merits of this case. However, while OBC did give notice of appeal from the judgment entered by Judge Watts, it assigned error only to the denial of the motion to amend its Complaint and to the granting of OBFS' motion in limine. These are, therefore, the only two issues before this Court and any issues relating to the state lien laws and their potential application to the facts of this case are beyond the scope of our review. See N.C.R. App. P. 10(a).

For the foregoing reasons, we conclude that the denial of the motion to amend the complaint did not constitute an abuse of discretion and that the motion in limine was properly granted. The decision of the trial court is, therefore,

Affirmed.

Judges EAGLES and COZORT concur.

CHESAPEAKE MICROFILM, INC. v. NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 9221SC162

(Filed 7 September 1993)

**Environmental Protection, Regulation, and Conservation § 84
(NCI4th) — waste disposal system operated without permit —
willful violation — maximum penalty — no proof of actual damages**

A superior court judgment was reversed and a penalty of \$30,862.22 imposed by the North Carolina Environmental

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[111 N.C. App. 737 (1993)]

Management Commission was reinstated where an environmental technician for the Division of Environmental Management observed a black hose extending from Chesapeake's building to a drainage ditch; the Director of DEM found that Chesapeake had operated a disposal system in violation of N.C.G.S. § 143-215.1(a)(2) on three occasions; the Director imposed a penalty of \$10,000.00 for each violation plus \$862.22 for the cost of investigation, for a total \$30,862.22; Chesapeake filed a petition for a contested case hearing; the Administrative Law Judge recommended that the Environmental Management Commission uphold the penalty; the Commission did so; and the superior court found, among other things, that the Commission had relied upon two non-statutory factors, harm to the credibility of the regulatory program and harm to the regulated community, with no competent supporting evidence and no evidence of explicit statutory criteria; and the court concluded, among other things, that "harm" does not include generalized damage to competition or the regulatory program resulting from simple violation of the law, that there must be evidence of harm before the Commission can consider harm, and that the \$30,000 penalty was arbitrary, capricious, contrary to law, and unsupported by substantial evidence in the record. The phrase "degree and extent of harm" in N.C.G.S. § 143-215.6(a)(3) encompassed more than physical damage to the environment; it included damage to the regulatory program which results from a willful and insensitive violation of the environmental standards. The Court of Appeals could discern no means by which specific damage to the enforcement of the statute or unfair advantage over competitors could be quantified and took judicial notice that certain violations, especially willful violations such as in this case, undermine the objectives of the regulatory program. The Court recognized that a person who intentionally fails to adhere to the mandates of the regulatory scheme thereby gains an economic advantage over others who comply with the law by expending funds to follow the regulations. Furthermore, the trial court erred by finding that the testimony of the Director of the Division of Environmental Management concerning harm to the regulatory process and community was not competent to support the Commission's findings.

Am Jur 2d, Pollution Control § 182 et seq.

Judge LEWIS dissenting.

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[111 N.C. App. 737 (1993)]

Appeal by respondent State of North Carolina from judgment entered 14 November 1991 by Judge Peter W. Hairston in Forsyth County Superior Court. Heard in the Court of Appeals 13 January 1993.

Moore and Brown, by B. Ervin Brown II and David B. Puryear, Jr., for petitioner appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Francis W. Crawley, for respondent appellant.

COZORT, Judge.

Respondent Department appeals from a judgment by the superior court (1) vacating an order of the North Carolina Environmental Management Commission (Commission) imposing a \$30,862.22 penalty against petitioner Chesapeake for violations of N.C. Gen. Stat. § 143-215.1(a)(2) (1987) and (2) remanding the cause to the Commission for imposition of a penalty not to exceed \$862.22, the cost of the investigation. We reverse and remand for reinstatement of the \$30,862.22 penalty.

The statutory and administrative provisions at issue in this appeal are N.C. Gen. Stat. § 143-215.1(a)(2), N.C. Gen. Stat. § 143-215.6(a) (1987), and N.C. Admin. Code tit. 15, r. 2J .0006 (April 1986) (recodified as N.C. Admin. Code tit. 15A, r. 2J .0006 (December 1990)). N.C. Gen. Stat. § 143-215.1(a)(2) prohibited a person from constructing or operating a disposal system without receiving a permit from the Commission and complying with the permit conditions. Since the institution of the present action, § 143.215.6(a) has been amended. The amended statute is not at issue in this appeal. The statute applicable to this appeal, N.C. Gen. Stat. § 143-215.6(a), provided:

(a) Civil Penalties.—

- (1) A civil penalty of not more than ten thousand dollars (\$10,000) may be assessed by the Commission against any person who:

* * * *

- b. Is required but fails to apply for or to secure a permit required by G.S. 143-215.1, or who violates or fails

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to act in accordance with the terms, conditions, or requirements of such permit.

* * * *

(3) In determining the amount of the penalty the [Environmental Management] Commission shall consider the *degree and extent of harm* caused by the violation and *the cost of rectifying the damage*.

(Emphasis added.) Pursuant to N.C. Admin. Code tit. 15, r. 2J .0006, the Commission was required to consider the following factors in determining the amount of penalty to be assessed:

(1) Gravity of the violation and the degree and extent of harm, including but not limited to the following:

* * * *

(ii) type of other violation,

(iii) duration,

(iv) cause,

(v) effect on receiving waters, public health, and fish or wildlife,

(vi) effectiveness of preventive or responsive measures taken by violator;

* * * *

(2) Cost of rectifying any damage;

(3) The violator's previous record in complying or not complying with the laws and implementing regulations of the Commission[.]

The underlying facts are not in dispute. On 9 September 1986, Mr. Thomas Gray Hauser, Jr., an environmental technician for the Division of Environmental Management (DEM), observed a black hose extending from the second floor of Chesapeake's building to a drainage ditch which eventually emptied into woods across the street. On 17 September 1986, Mr. Hauser, and another DEM employee, Mr. Michael Mickey, observed gray water flowing from the black hose into the ditch. On 18 September 1986, and 21 October 1986, Mr. Hauser observed liquid discharging from the black hose. Analysis of samples of water taken on each of the three dates

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showed increased levels of silver and chromium. In September 1986, Mr. Hauser observed that the leaves on the trees located near the waste water pool had brown edges; he did not observe any dead animals, fish or wildlife.

On 2 April 1987, the Director of DEM, Mr. R. Paul Wilms, found that on three occasions Chesapeake had operated a disposal system in violation of N.C. Gen. Stat. § 143-215.1(a)(2). Director Wilms imposed a penalty of \$10,000.00 for each violation, plus \$862.22 for the cost of investigation, for a total penalty of \$30,862.22. Plaintiff filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH). The petition was originally dismissed for failure to prosecute; the matter was later heard upon motion for reconsideration with OAH.

On 20 April 1990, Administrative Law Judge Thomas R. West addressed the issue of the appropriate penalty for petitioner's three violations and recommended that the Commission uphold the penalty assessed. On 11 January 1991, the Commission upheld the imposition of the penalty, finding in pertinent part, the following: petitioner admitted to operating the disposal system without a permit; Mr. Wilms assessed the penalty, even though the facts did not indicate that the discharge reached state waters, because there was evidence that the disposal system had been constructed and used without a permit; Mr. Wilms considered the standards listed in N.C. Admin. Code tit. 15, r. 2J .0006 in assessing the penalty; Mr. Wilms considered petitioner's willful disregard of the requirement to be the cause of the violation; even though there was no documented actual damage, Mr. Wilms assessed the penalty because the statutory violation harmed the state and regulated community; the state program is harmed by willful disregard of the law because the program is denied the opportunity to assess the potential effect of the proposed discharge on the environment and to discuss alternatives to a direct discharge; the regulated community is harmed when a business competitor disregards the law and enjoys some economic benefit through noncompliance; and harm can exist even though there may not be physical damage to the environment. Based upon the findings of fact, the Commission concluded, in part:

4. Respondent could and did properly consider the harm caused by the violation as it relates to the effectiveness of the Respondent's regulatory program and by the negative impact an unpermitted disposal system has on the members of

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the regulated community who comply with the law and who bear the additional costs associated with properly obtaining permits since this is a permissible interpretation of harm as set forth in G.S. 143-215.6(a)(3) and because these considerations are inherent in any regulatory program.

5. A civil penalty of \$10,000.00 for each of three violations of G.S. 143-215.1(a)(2) plus \$862.22 in investigative costs is reasonable, appropriate and in accordance with the statutory criteria established in G.S. 143-215.6 and the standards set forth in 15 NCAC 2J .0006.

On appeal to superior court, Judge Peter Hairston found in pertinent part: in assessing the penalty, the Commission relied upon two non-statutory factors, harm to the credibility of the regulatory program and harm to the regulated community; there was no competent evidence of harm to the regulatory program or regulated community; there was no evidence of the explicit statutory criteria—the degree and extent of harm and the cost to rectify damage; there was no evidence that petitioner committed other violations; there was no measurement of any specific amount of discharge from the system; there was no evidence of detrimental effect on receiving waters, public health, and fish or wildlife; there was no cost to repair damage because no damage was shown; and no record of petitioner's noncompliance when the penalty was assessed.

Based upon the findings of fact, Judge Hairston concluded in pertinent part: the Commission erred in concluding that the "harm" caused by the violation included harm to the regulated community and harm to the regulatory program; "harm" means, at most, proven specific damage to the environment or persons or proven specific damage to the enforcement of the statute other than a simple willful violation; "harm" does not include generalized damage to competition or the regulatory program resulting from simple violation of the law; even if such factors are considered "harm" within the meaning of the statute, there must be evidence of the harm before the Commission can consider harm; there was no evidence of harm to competitors or the regulatory program beyond the mere opinions of the regulatory personnel; the Commission made no evidentiarily supported findings of fact or conclusions of law regarding the "harm" suffered by the competitive and regulatory communities; the testimony of Mr. Wilms and the entire record on review do not contain substantial, competent evidence

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that the regulatory program and community were negatively impacted as a result of the violations; Mr. Wilms could not point to actual harm nor accurately assess the degree and extent of any harm caused by the violations; Mr. Wilms had no knowledge other than a generalized opinion; the Commission's findings of fact are in error and insufficient because the Commission apparently reviewed the department's actions rather than made an independent decision; the Commission's findings and conclusions of law are in error because there was no basis in the evidence or statute for the department to apply the regulatory standards as it did in assessing the maximum penalty; the Commission's decision assessing the \$30,000.00 penalty is arbitrary, capricious, contrary to law and the constitution, and unsupported by substantial evidence in the record; the Commission's decision assessing the costs of the agency's investigation is supported by competent evidence and authorized by law. Accordingly, Judge Hairston vacated the Commission's final decision and remanded the case to the Commission for assessment of a penalty not to exceed the \$862.22 cost of the investigation.

On appeal, respondent argues that the superior court erred in (1) interpreting the civil penalty statute; (2) finding that there was no evidence to support the Commission's findings of fact and conclusions of law; and (3) finding the Commission's decision to be arbitrary and capricious.

Our review is limited to determining, in light of the whole record, whether the superior court made any errors of law in applying the standards of review set forth in N.C. Gen. Stat. § 150B-51(b) (1991). *Scroggs v. N.C. Criminal Justice Standards Comm.*, 101 N.C. App. 699, 701-02, 400 S.E.2d 742, 744 (1991). N.C. Gen. Stat. § 150B-51 provides that the superior court may reverse or modify the agency's decision if the substantial rights of the petitioner may have been prejudiced by the agency's findings, conclusions, or decisions which 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;

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- (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 determining whether an agency's decision is supported by substantial evidence or is arbitrary and capricious, an appellate court applies the "whole record test" which requires the examination of all competent evidence. *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). In determining whether an agency made an error in interpreting a statutory term, an appellate court may substitute its own judgment and employ de novo review. *In re Appeal of North Carolina Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981). An agency's interpretation of a statute

is traditionally accorded some deference by appellate courts, [although] those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Brooks, Comr. of Labor v. McWhirter Grading Co., Inc., 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981) (quoting *In re Appeal of North Carolina Savings and Loan League*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)) (citation omitted).

First, we consider respondent's argument that the superior court erred in interpreting the phrase "degree and extent of harm" in § 143-215.6(a)(3). The superior court concluded that "the word [harm] means, at most, proven specific damage to the environment or persons or *proven specific damage to the enforcement of the statute* other than a simple willful violation." (Emphasis added.) Respondent argues that the superior court's interpretation "requires the Commission to equate the amount of the civil penalty assessed to the measurable physical damage to the affected environment." This construction, respondent argues, completely eliminates consideration that illegal discharges of pollution damage the State's regulatory program and erode the public policy of achieving and maintaining a total environment of superior quality. We agree.

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“[T]he primary function of a court is to ensure that the purpose of the Legislature in enacting the law . . . is accomplished. The best indicia of that legislative purpose are ‘the language of the statute, the spirit of the act, and what the act seeks to accomplish.’ ” *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)) (citation omitted). In part, the stated purpose of Chapter 143 is to design water and air purity standards

to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

N.C. Gen. Stat. § 143-211 (1990). A civil penalty may be imposed to deter conduct which is contrary to a regulatory scheme. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 381, 379 S.E.2d 30, 35 (1989).

We find that the phrase “degree and extent of harm” in § 143-215.6(a)(3) encompasses more than physical damage to the environment; it includes damage to the regulatory program which results from a willful and insensitive violation of the environmental standards. The superior court’s conclusion that “harm” includes only “proven specific damage to the enforcement of the statute,” is, in effect, a holding that harm to the regulatory program cannot be a factor in assessing the penalty. We discern no means by which (1) specific damage to the enforcement of the statute, or (2) unfair advantage over competitors could be quantified. We therefore take judicial notice that certain violations, especially willful violations such as are present in this case, undermine the objectives of the regulatory program. Further, we recognize that a person who intentionally fails to adhere to the mandates of the regulatory scheme thereby gains an economic advantage over others who comply with the law by expending funds to follow the regulations.

We next consider whether the superior court erred in finding that the Commission’s findings of fact and conclusions of law were unsupported by substantial evidence. “Substantial evidence is such

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relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 300 N.C. at 406, 269 S.E.2d at 565.

The Director of DEM, Mr. R. Paul Wilms, testified, in pertinent part, as follows: Evidence was presented to him that a disposal system had been constructed and utilized without a permit. In assessing the penalty, he considered all the factors set forth in N.C. Admin. Code tit. 15, r. 2J .0006. There was no evidence relating to three of the factors: (1) effect on receiving waters, public health, fish or wildlife; (2) cost of rectifying any damage; and (3) the violator's previous record in complying or not complying with the laws in implementing the regulations of the Commission. There was evidence of three of the factors: (1) other violations, (2) cause, and (3) duration. There was a violation of failing to secure a permit before building a disposal system. The violation was significant because it was willful and belligerent because while Chesapeake had knowledge of the permit requirement, it used the system as an expedient instead of obtaining the permit. Evidence had been presented to him that Mr. Cox stated that Chesapeake had been discharging wastes in this manner for five years and would continue to do so to avoid the costs of complying with the law. The cause of the violation was "willful, egregious, and not only unnecessary but unconscionable." Mr. Wilms stated that he was not aware of any preventative or responsive measures taken by Chesapeake. He further testified that he assessed a penalty even though there was no "actual" damage because

[t]here's also harm to the rest of the regulated community and to the state itself. The credibility of the state's program to protect the environment is harmed by a willful disregard of the law. The rest of the regulated community, most of which does incur the costs of compliance is harmed when a member of its, of that community disregards the law and enjoys some economic benefit through noncompliance. So there's a great deal of harm where there may not be any physical damage to the environment.

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The Commission made findings of fact in accordance with the testimony of Mr. Wilms. The superior court concluded that Mr. Wilm's testimony concerning harm to the regulatory process and community was not competent evidence to support the Commission's findings. We disagree. We find Mr. Wilms well qualified to express an opinion as to the harm caused by willful violations of the regulatory scheme he is in charge of enforcing. In 1976, Mr. Wilms began working with the North Carolina Department of Environment, Health, and Natural Resources in the Division of Environmental Management as a water quality engineer. Mr. Wilms subsequently supervised the Water Quality and Classifications Program and the Air Quality Program. In 1981, he was named Assistant Director for Programs of DEM. From 1985 until the time of the administrative hearing, Mr. Wilms served as Director of DEM. As noted previously, specific harm to the enforcement of a statute or harm to the regulated community cannot be quantified. Based upon eleven years of experience, Mr. Wilms considered factors set forth in N.C. Admin. Code 15, r. 2J .0006, including the nature, duration, and willfulness of the violation, and concluded that the maximum penalty should be imposed. Reviewing the whole record, we find that the evidence supported the Commission's findings of fact, and the findings of fact supported the conclusions of law.

We further find that the Commission's decision was not arbitrary and capricious. The Commission considered the evidence, made findings of fact in accordance with the evidence, and concluded that the penalty assessed was justified.

We hasten to add that not every violation where the actual environmental harm is minimal will justify the maximum penalty. But where, as here, the violation is willful, egregious and conducted as an expedient way to avoid the costs of compliance with the law, the imposition of the maximum penalty is not arbitrary and capricious.

The judgment of the superior court is reversed and the cause is remanded for reinstatement of the penalty of \$30,862.22.

Reversed and remanded.

Chief Judge ARNOLD concurs.

Judge LEWIS dissents.

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Judge LEWIS dissenting.

I respectfully dissent. The violation was not so egregious as to warrant so harsh a penalty when there was no evidence whatever of harm to the environment.

The majority interprets the phrase "degree and extent of harm" in former N.C.G.S. § 143-215.6(a)(3) to include damage to the regulatory program resulting from willful violations of environmental standards. By expanding the meaning of the statute to encompass "harm" to the regulatory program, the majority creates a new standard for penalizing willful violations even absent physical damage or harm to the environment. Although the majority qualifies the opinion by stating that not every violation without actual harm would justify the maximum penalty, it provides no clear guidelines for how the standard should be applied. The opinion would, I believe, create an arbitrary basis for maximizing any willful violation.

I agree with the Superior Court's interpretation of the statute concluding that:

the word [harm] means, at most, proven specific damage to the environment or persons or proven specific damage to the enforcement of the statute other than a simple willful violation.

The trial judge made proper findings under this interpretation in reversing the assessment of the maximum penalty. I would affirm the decision of the Superior Court and therefore respectfully dissent.

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No. 9210SC802

(Filed 7 September 1993)

1. Automobiles and Other Vehicles § 187 (NCI4th) — relocation of dealership — application of statutory amendment — not retroactive

The trial court's application of the amended version of N.C.G.S. § 20-305(4) in an action involving the relocation of

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an automobile dealership was not retroactive where defendant did not present its written proposal until after 1 October 1991, the effective date of the amendments, although plaintiff was aware that defendant had been negotiating the relocation. The right to object did not vest when plaintiff became aware of defendant's negotiations because plaintiff unequivocally stated that it would not approve the proposal only in response to the formal proposal of 3 October 1991; moreover, the Dealer Agreement set no limits on how often a dealer might apply for permission to relocate or how many times the dealer might submit the same proposal.

Am Jur 2d, Automobiles and Highway Traffic §§ 150, 394.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchises. 82 ALR4th 624.

2. Automobiles and Other Vehicles § 187 (NCI4th)— relocation of automobile dealership—statutory regulation—not unconstitutional

The amendments to N.C.G.S. § 20-305(4), providing for administrative review of an automobile manufacturer's or distributor's refusal to approve a dealer's relocation of its facilities, are not an unconstitutional impairment of the parties' right to contract. The statute about which plaintiff complains does in fact prevent plaintiff from blocking a relocation of a dealership without showing that such a relocation would be unreasonable under the circumstances; nonetheless, this amendment is a patently reasonable exercise of the State's police power.

Am Jur 2d, Automobiles and Highway Traffic §§ 150, 394.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchises. 82 ALR4th 624.

3. Notice § 4 (NCI4th)— method of giving notice—statutory requirement of registered mail—Federal Express sufficient

Delivery by Federal Express, with return receipt, is registered mail within the meaning of N.C.G.S. § 20-305 and plaintiff gave proper notice of its objection to defendant's proposed relocation of an automobile dealership within the statutory

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period. The purpose behind the requirement that the notice be sent by registered mail is to avoid disputes about whether or when a party receives notice; delivery by Federal Express with signed receipts meets that purpose.

Am Jur 2d, Notice §§ 5 et seq., 34, 41 et seq.

Judge WELLS concurring.

Appeal by plaintiff from order entered 6 April 1992 by Judge Donald H. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 June 1993.

This action arises out of a dispute between plaintiff, an automobile manufacturer, and defendant Fred Anderson Nissan (defendant), a dealership for motor vehicles and parts manufactured by plaintiff, and involves defendant's decision to move its dealership to a location owned by appellee Meeker Lincoln Mercury, Inc. (Meeker). Under the standard Nissan Dealer Sales and Service Agreement (the Dealer Agreement), defendant was unable to relocate its dealership facilities without plaintiff's prior written consent.

On 24 May 1991, plaintiff wrote defendant stating that it had become aware that defendant was considering relocating its facilities, indicating its opposition to defendant's plan for relocation, but stating that defendant would have to submit a written proposal if it chose to proceed with the plan. On 29 May 1991, defendant informed plaintiff that it was seriously considering acquiring the Meeker Lincoln-Mercury franchises and relocating to the Meeker site and that it would advise plaintiff of the details of the plan. Again on 17 June 1991, defendant wrote to plaintiff concerning the relocation plan and stated, "[s]hould we put this package together we will contact you with the details" and on 19 July 1991, defendant wrote to plaintiff saying "[w]hen we firm up on our plans we will contact you"

On 3 October 1991, defendant hand-delivered to plaintiff notice of its intent to relocate. Plaintiff advised defendant of its opposition to the relocation by a letter dated 31 October 1991, which was delivered by Federal Express on 1 November 1991. On 27 November 1991, defendant filed its petition for a hearing with the Division of Motor Vehicles (DMV) and moved for summary judgment on its petition, alleging that plaintiff's notice of objection was invalid because it was not delivered by the United States Postal Service,

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thereby waiving plaintiff's objection to the relocation. In an order entered 31 January 1992, Robert A. Pruett, the designated Hearing Officer for the DMV, found that plaintiff had waived its objection to the relocation by failing to give proper notice within the statutory period and granted defendant's motion for summary judgment.

On 3 February 1992, plaintiff filed a petition for review of DMV's order in Wake County Superior Court. On 13 April 1992, the court entered its order affirming the decision of the hearing officer. From this order plaintiff appeals.

Smith, Helms, Mulliss & Moore, by David M. Moore, James L. Gale, Mark R. Smith, for petitioner-appellant.

Johnson, Gamble, Mercer, Hearn & Vinegar, by Richard J. Vinegar, for respondent-appellee Fred Anderson Nissan.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Michael D. Meeker, for appellee-intervenors Paul S. Meeker and Meeker Lincoln-Mercury, Inc.

MCCRODDEN, Judge.

On 1 October 1991, certain amendments to the Motor Vehicle Dealers and Manufacturers Licensing Law (the Licensing Law), N.C. Gen. Stat. §§ 20-285 to -308.2 (1989 and Supp. 1992), became effective. The General Assembly amended Section 20-305 to provide for administrative review of an automobile manufacturer or distributor's refusal to approve a dealer's relocation of its facilities. Under the amended statute, after receiving written notice of a proposed relocation, a manufacturer must send the dealer written notice of its opposition to the relocation by registered or certified mail, return receipt requested, within 30 days, or any such opposition shall be considered waived. If the manufacturer gives notice of objection, the dealer may then file a petition for a hearing with DMV. At the DMV hearing, the manufacturer bears the burden of showing that the proposed relocation would be "unreasonable under the circumstances." N.C.G.S. § 20-305(4).

Both DMV and the trial court applied the amended statute to this case, and that application forms the basis of plaintiff's appeal. We address the following issues: (I) whether the trial court retroactively applied the amended version of Section 20-305, thereby depriving plaintiff of its right to block the relocation of a dealership; (II) whether the trial court erred in applying the statutes because,

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according to plaintiff's argument, it unconstitutionally impaired plaintiff's contractual rights to control the location of its dealerships; and (III) whether the trial court erred in affirming the hearing officer's determination that plaintiff had failed to give proper notice of its objection to defendant's relocation.

I.

[1] Plaintiff first argues that the trial court's application of the amended version of Section 20-305 was unconstitutionally retroactive because it deprived plaintiff of its right to block the relocation of a dealership. We disagree.

In the recent case of *Fogleman v. D&J Equipment Rental*, 111 N.C. App. 228, 431 S.E.2d 849 (1993), this Court dealt with the issue of when the application of an amended statute acts to deprive a party of vested rights. In discussing the applicable law, we reiterated:

Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively. The application of a statute is deemed retroactive when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment.

Id. at ---, 431 S.E.2d at 851 (quoting *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980)) (citation omitted). Under this standard, we believe that the trial court in this case did not apply the statute retroactively. Defendant did not initiate the transaction to which the statute was applied, *i.e.*, it did not give plaintiff notice of its proposed relocation, until after the statute became effective. Although plaintiff was aware that defendant had been negotiating with Meeker, defendant did not present its written proposal until after 1 October 1991, the effective date of the amendments. Plaintiff's right to object to this proposed relocation, therefore, did not vest before the statute became effective.

Plaintiff contends, however, that the right to object vested when it became aware of defendant's negotiations with Meeker. The evidence does not bear this out. Plaintiff itself informed defendant several times that any proposal for relocation was to be made in writing, clearly implying that it did not consider any of their correspondence to be an actual proposal. Only in response to the

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formal proposal of 3 October 1991, did plaintiff unequivocally state that it would not approve the proposal.

Moreover, the Dealer Agreement set no limits on how often a dealer might apply for permission to relocate or how many times the dealer might submit the same proposal. Hence, defendant could have requested the same relocation many times before 1 October 1991, and plaintiff could have vetoed each of those requests. Defendant would still have been free to give notice to plaintiff after 1 October 1991, and to have that proposal governed by the amended statute. We find that defendant did not make the proposal to relocate until after 1 October 1991, and that, therefore, the trial court's application of the amended version of Section 20-305(4) was not retroactive. We overrule plaintiff's first assignment of error.

II.

[2] Plaintiff's second argument is that the statute, as amended, is unconstitutional in that it impairs plaintiff's contractual rights, specifically, the exclusive right to control the location of its dealerships. We disagree.

In *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 243 S.E.2d 793 (1978), *rev'd in part on other grounds*, 296 N.C. 357, 250 S.E.2d 250 (1979), this Court considered the constitutionality of N.C.G.S. § 20-305(6), which required franchisors to give dealers written notice of termination of their franchise contracts. Although *Mazda* focused on a different subsection of N.C.G.S. § 20-305, its rationale is controlling.

The Court in *Mazda* expounded the standard for judging whether a statute acts to impair contracts unconstitutionally. Although the Constitution of the United States forbids states from impairing the obligations of contracts, "the 'contracts clause' grants a qualified and not an absolute right. Clearly, the right to make contracts is subject to the power of the General Assembly to impose restrictions for the benefit of the general public in areas of public interest and to prevent business practices deemed harmful." *Id.* at 6-7, 243 S.E.2d at 798. In its statement of purpose to the Licensing Law, the General Assembly declared that the distribution of motor vehicles affects the public interest and welfare of the State of North Carolina, and that, in the exercise of its police power, the State may regulate persons involved in manufacturing and distributing vehicles. N.C.G.S. § 20-285. We presume "that the judgment of

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the General Assembly is correct and constitutional, and a statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise." *Mazda*, 36 N.C. App. at 7, 243 S.E.2d at 798.

In deciding this issue, we must determine whether the law disturbs the "essential or core expectations arising from the particular type of contract . . . [and] such expectations are not disturbed unless the demoralizing effects of state legislation are so great as totally to discourage the parties and others from entering such contracts" *Id.* at 9-10, 243 S.E.2d at 800. After noting that any alteration of a contract involves an interference to some degree, the *Mazda* Court found that the challenged provision was a reasonable exercise of the State's police power and was not an unconstitutional impairment of automobile franchisors' contracts.

In this case, the statute about which plaintiff complains does in fact prevent plaintiff from blocking a relocation of a dealership without showing that such a relocation would be unreasonable under the circumstances. Nonetheless, we believe that this amendment, which provides a procedure by which an automobile dealer may seek administrative review of its franchisor's refusal to approve a relocation, is a patently reasonable exercise of the State's police power. Such a requirement surely will not "totally discourage" the parties in this case, or others, from entering into similar franchise contracts. Following *Mazda*, we cannot say that this amendment disturbs the core expectations of the contract between plaintiff and defendant. Accordingly, we hold that the amendments to Section 20-305(4) are not an unconstitutional impairment of the parties' right to contract, and we overrule plaintiff's second argument.

III.

[3] Plaintiff's final argument is that the trial court erred in affirming the hearing officer's order because, it contends, contrary to the court's order, the notice of objection, which Federal Express rather than the United States Postal Service delivered, complied with the notice requirement of N.C.G.S. § 20-305(4). That statute does not specifically require service by the U.S. Postal Service; in relevant part, it reads:

The franchisor shall send the dealership notice of objection, by registered or certified mail, return receipt requested, to the proposed transfer, sale, assignment, relocation, or change

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within 30 days after receipt of notice from the dealer, as provided in this section. Failure by the franchisor to send notice of objection within 30 days shall constitute waiver by the franchisor of any right to object to the proposed transfer, sale, assignment, relocation, or change.

N.C.G.S. § 20-305(4). The parties have cited, and our research has disclosed, no North Carolina case interpreting this portion of N.C.G.S. § 20-305(4). Meeker cites the case of *Audio Enterprises v. B&W Loudspeakers*, 957 F.2d 406 (7th Cir. 1992), for the proposition that Federal Express is not first class mail. That case, however, interprets service of process under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure and is not helpful to our analysis. When first class mail is used as the method of service, often the determinative issue is when a party places a written document in the hands of the U.S. Postal Service. When a statute requires registered mail, however, the emphasis is on delivery of a written document. See, e.g., N.C. Gen. Stat. § 55-1-41 (1990) (providing that notice to a corporation given by registered mail is effective when actually received).

We are also aware of the case of *Prince v. Poulos*, 876 F.2d 30 (5th Cir. 1989), which dealt with a statute requiring that parties serve their briefs by the most expeditious means. The court rejected the plaintiff's argument that the defendant's brief be stricken because it was not delivered by Federal Express, stating in a footnote that Federal Express is not governed by public authority and, thus, is not mail. We do not find this case persuasive, especially in light of *Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 401 S.E.2d 801 (1991), cited by plaintiff in support of its position that Federal Express is an appropriate means of delivery.

In *Warzynski*, this Court held that an affidavit alleging service upon a foreign corporation by Federal Express delivery was sufficient for Rule 4(j)3 which allows service to be made by "any form of mail, requiring a signed receipt." N.C. Gen. Stat. § 1A-1, Rule 4(j)3 (1990). Although this case is not directly on point, it does stand for the proposition that a written document may be "mail," even though Federal Express delivers it, and it allows courts to escape the narrow interpretation of "mail" as being written documents entrusted only to the U.S. Postal Service. Moreover, in the recent case of *Norquip Rental Corp. v. Sky Steel Erectors, Inc.*, 854 P.2d 1185 (Ariz. Ct. App. 1993), the Court of Appeals

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of Arizona concluded that plaintiff complied with the requirement of sending notice by registered mail when it used Federal Express for delivery. The Court noted that “[t]he statutorily required method is to assure receipt of the notice, not to make the described method mandatory so as to deny a right of suit when the required written notice within the specified time had actually been given and received.” *Norquip*, at 1192.

North Carolina has subscribed to the principle that “[o]rdinarily, ‘where a specific mode of giving notice is prescribed by statute, that method is exclusive.’” *In Re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968) (quoting 39 Am. Jur. *Notice and Notices* § 9, and “[g]enerally speaking, a person relying on the service of a notice by mail must show a strict compliance with the requirements of the statute.” *Id.*, (quoting 66 C.J.S. *Notice* § 18(e)(1) (1950)). In *Harris*, the North Carolina Supreme Court found that a notice sent by regular mail was not sufficient when the statute required that service be made by personal service or registered mail. In reaching this conclusion, the Court said, “[s]eemingly, the General Assembly intended to avoid, if possible, the necessity for hearings to determine whether or when a ‘written copy’ was served.” *Id.* at 24, 159 S.E.2d at 542.

Mindful of *Harris*’s mandate that notice statutes be construed strictly, we believe that, where the controlling statute does not specifically require United States mail, delivery by Federal Express, which provides a signed receipt verifying delivery, is registered mail within the meaning of this statute. As the Court in *Harris* noted, the purpose behind requiring that the notice be sent by registered mail is to avoid disputes about whether or when a party receives notice. Delivery by Federal Express that provides signed receipts meets that purpose.

We, therefore, hold that delivery by Federal Express, with return receipt, is registered mail within the meaning of N.C.G.S. § 20-305. Under this interpretation, plaintiff in the present case gave proper notice of its objection to defendant’s proposed relocation within the statutory period, and the trial court’s conclusions of law 4 and 6 finding otherwise were erroneous.

We reverse the trial court’s entry of summary judgment in favor of defendant and remand for further action consistent with this opinion.

NISSAN MOTOR CORP. v. FRED ANDERSON NISSAN

[111 N.C. App. 748 (1993)]

Reversed.

Judge ORR concurs.

Judge WELLS, writing separately, concurs in the result.

Judge WELLS concurring.

I fully concur with the majority on the disposition of the issues discussed in Sections I and II of the opinion.

On the issue of notice, discussed in Section III, I concur only in the result.

The terms "registered or certified mail" are found in numerous places in our statute books. The terms, frequently used by the General Assembly, have a commonly well-understood meaning, *i.e.*, mail of the United States Postal Service. Therefore, I cannot agree that the General Assembly intended to include Federal Express mail when it used those terms in G.S. 20-305(4). We do not need to reach or decide that question in this case.

The apparent interest and purpose of enacting the notice requirement in G.S. 20-305(4) was to prevent franchisors from stonewalling proposed dealership changes or modifications by not responding to the dealer's request or proposal. In this case, a timely response was sent and petitioner (plaintiff-appellant) does not contend that respondent's (defendant-appellee's) response was not duly and promptly received. As the record before us discloses, it was the receipt of respondent's (defendant-appellee's) letter which prompted petitioner's (plaintiff-appellant's) request for a hearing.

Under the circumstances, I cannot discern any harm or prejudice to petitioner (plaintiff-appellant) from respondent's (defendant-appellee's) failure to follow the statutory directive in sending its letter.

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[111 N.C. App. 758 (1993)]

MARIE A. THRIFT v. FOOD LION, INC., AND TRIANGLE ICE CO., INC.

No. 9221SC640

(Filed 7 September 1993)

1. Appeal and Error § 118 (NCI4th)— slip and fall—claims against store and ice supplier—summary judgment denied—appealability

Defendant Food Lion's appeal from the denial of summary judgment was dismissed where plaintiff slipped and fell in a Food Lion; plaintiff filed a complaint against Food Lion and Triangle Ice; Food Lion filed a motion for summary judgment; and Food Lion's motion was denied. The denial of a motion for summary judgment is interlocutory, does not affect a substantial right, and is non-appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. Appeal and Error § 119 (NCI4th)— slip and fall—claims against store and ice supplier—summary judgment for supplier granted—appealability

An appeal by plaintiff and defendant Food Lion from the granting of summary judgment for defendant Triangle Ice was considered on its merits where plaintiff slipped and fell in the area of a Food Lion where the ice bin was located; Food Lion had received an ice delivery from Triangle Ice Co. and a Food Lion employee had noticed a puddle on the floor; plaintiff filed a complaint against Food Lion and Triangle Ice alleging joint and concurrent negligent acts and omissions; Food Lion cross-claimed against Triangle Ice; both Food Lion and Triangle Ice filed motions for summary judgment; and Food Lion's motion was denied while Triangle Ice's motion was granted. Although an appeal from a grant of partial summary judgment is interlocutory, the facts and circumstances of the present case are such that one jury should determine the outcome of all claims relating to plaintiff's fall. Dismissing the appeal against Triangle could result in two trials on the same factual issues and would consequently deprive plaintiff and Food Lion of a substantial right.

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Am Jur 2d, Appeal and Error § 104.**Reviewability of order denying motion for summary judgment. 15 ALR3d 899.****3. Labor and Employment § 187 (NCI4th)— negligence—delivery of ice to grocery store— independent contractor—delivery completed—summary judgment**

The trial court properly granted summary judgment for Triangle Ice where plaintiff slipped and fell in the area of a Food Lion where the ice bin was located, Food Lion had received an ice delivery from Triangle Ice Co., a Food Lion employee had supervised the delivery and noticed a puddle on the floor after the Triangle Ice employee left the store, a stock boy was sent to get a cloth and dry the floor, and plaintiff entered the area and fell. There is little question that Triangle Ice is an independent contractor, but all of the evidence suggests that the contract to deliver the ice had been completed and was acceptable to Food Lion. Once an independent contractor has completed his work and it is accepted by the party with whom he has contracted, the liability of the independent contractor ceases and the other party becomes answerable for damages which may accrue due to the independent contractor's initial negligence.

Am Jur 2d, Appeal and Error § 104.**Reviewability of order denying motion for summary judgment. 15 ALR3d 899.**

Judge GREENE dissenting.

Appeal by plaintiff Marie Thrift and defendant Food Lion, Inc. from Order entered 13 March 1992 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 1993.

Metcalfe, Vrsecky & Beal, by Anthony J. Vrsecky, for plaintiff-appellant.

Womble, Carlyle, Sandridge, and Rice, by Allan R. Gitter and Lawrence Pierce Egerton, for defendant-appellant Food Lion, Inc.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellee Triangle Ice Co., Inc.

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WYNN, Judge.

On Saturday 18 June 1988 at approximately 2:00 or 2:30 p.m., the plaintiff, Marie Thrift, entered a Food Lion grocery store [hereinafter Food Lion] on Waughtown Street in Winston-Salem, North Carolina to shop for groceries. Prior to Ms. Thrift's entering the store, Food Lion had received an ice delivery from Triangle Ice Co., Inc. [hereinafter Triangle Ice]. A Food Lion employee, Sue Payne, had supervised the delivery, counting off bags of ice as a Triangle Ice employee loaded them into the ice bin, which was located against an interior wall a few feet away from the front entrance of the store. After the Triangle Ice employee left the store, Ms. Payne noticed a small puddle on the floor and sent a stock boy to get a cloth and dry the floor, during which time Ms. Thrift walked into the area where the ice bin was located to get a shopping cart and fell to the floor, sustaining injuries.

On 7 June 1991, Ms. Thrift filed a complaint against Food Lion and against Triangle Ice alleging that their joint and concurrent negligent acts and omissions proximately caused her to slip, fall, and sustain injuries. Both Food Lion and Triangle Ice answered, and Food Lion cross-claimed against Triangle Ice for contribution. Subsequently, Food Lion filed a motion for summary judgment on 2 January 1992, and Triangle Ice filed a motion for summary judgment on 5 February 1992. Both motions were heard on 24 February 1992 and the trial court entered two separate orders: one on 13 March 1992 granting Triangle Ice's motion; and a second on 30 March 1992 denying Food Lion's motion.

Ms. Thrift and Food Lion appeal from the trial court's granting summary judgment in favor of Triangle Ice, and Food Lion also appeals from the trial court's denying its motion for summary judgment.

[1] Summary judgment is proper where, based upon the pleadings, discovery documents, and affidavits, there is no genuine issue of material fact and one party is, therefore, entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *McMurry v. Cochrane Furniture Co.*, 109 N.C. App. 52, 53, 425 S.E.2d 735, 736 (1993). As a general rule, the denial of a motion for summary judgment is interlocutory, does not affect a substantial right, and is, therefore, non-appealable. *Watson Ins. Agency, Inc. v. Price Mechanical Inc.*, 106 N.C. App. 629, 631, 417 S.E.2d 811, 812 (1992); *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769

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(1991); *Lamb v. Wedgewood Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). We, therefore, hold that Food Lion's appeal must be dismissed.

[2] An appeal from a grant of partial summary judgment is also interlocutory because it does not resolve all of the claims between all of the parties. See N.C. Gen. Stat. § 1A-1, Rule 54(b). Such partial summary judgment orders are appealable only if the trial court has specifically determined in its order that "there is no just reason for delay" or if a substantial right is affected by the order. *Id.*; see also N.C. Gen. Stat. §§ 1-277, 7A-7. Where summary judgment has been entered as to some but not all of the claims, a substantial right is affected "if there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492 (1989), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 722 (1989). This is because one has a substantial right to avoid the possibility of two trials on the same factual issues, due to the inconsistent resolutions which might result. *Id.* at 25, 376 S.E.2d at 491. Moreover, where the plaintiff has alleged joint and concurrent liability of more than one defendant, he normally has a substantial right to have "one jury decide whether the conduct of one, some, all, or none of the defendants causes his injuries . . ." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982).

The facts and circumstances of the present case are such that one jury should determine the outcome of all claims relating to Ms. Thrift's fall. Ms. Thrift has alleged in her complaint that it was the joint and concurrent negligence of Food Lion and Triangle Ice that proximately caused her injuries. The resolutions of her legal claims against each defendant are dependent upon the same set of facts surrounding Ms. Thrift's fall. For example, it is disputed whether the water and ice were the cause of the fall. Two different juries, one hearing Ms. Thrift's claim against Food Lion and one her claim against Triangle Ice, could therefore reach different conclusions regarding the cause of her fall. Additionally, both Food Lion and Triangle Ice have pled contributory negligence on the part of Ms. Thrift as an affirmative defense, presenting another issue that might be decided inconsistently by separate juries. We conclude, therefore, that the facts involved in the claims against Food Lion and against Thrift are so intertwined as to necessitate one trial. Dismissing the appeal against Triangle could result in

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two trials on the same factual issues and would consequently deprive Ms. Thrift and Food Lion of a substantial right.

[3] Having decided that the appeal against Triangle Ice should be considered on its merits, we address the contention of both Ms. Thrift and Food Lion that the trial court erred in granting Triangle Ice's motion for summary judgment. Ms. Thrift argues simply that a negligence action should not be the subject of a summary judgment motion, while Food Lion focuses on Triangle Ice's alleged independent contractor status and argues that that status should not shield it from liability.

An independent contractor is, essentially, one who exercises an independent employment and contracts to do certain work according to his own judgment and method, being subject to his employer only regarding the end result of his work. *Yelverton v. Lamm*, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989); see also *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944) (enumerating factors to be considered in determining independent contractor status, none of which are alone determinative). In the instant case, there is little question but that Triangle Ice is an independent contractor, operating as a business separate and apart from Food Lion. Triangle Ice, and not Food Lion, hires the employees charged with delivering the ice. Moreover, Food Lion has not established the method by which the ice must be delivered, but is concerned only with whether or not it is in fact delivered to the store in the amount requested.

Food Lion contends that, as an independent contractor, Triangle Ice is responsible to third parties for injuries they suffer as a result of Triangle Ice's negligently creating a dangerous condition in the course of its work. It is true that every person who embarks upon an active course of conduct has a positive duty to exercise ordinary care in order to protect others from harm, *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584 (1979), *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979) (citing *inter alia Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951)), and that one who performs a service contract has a duty "to protect third parties where a reasonable person would recognize that if he does not use ordinary care and skill in his own conduct, he will cause damages or injury to the person or property of the other." *Westover Products, Inc. v. Gateway Roofing Co.*, 94 N.C. App. 63, 67, 380 S.E.2d 369, 372 (1989). However,

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in the case of an independent contractor, the time frame within which he can be held liable for his negligence is finite.

When an independent contractor has completed his work, and that work has been accepted by whomever has engaged his services, he is no longer liable for injuries to third parties even if he was negligent in carrying out his duties. *Price v. Johnston Cotton Co. of Wendell, Inc.*, 226 N.C. 758, 759, 40 S.E.2d 344, 345 (1946) (also enumerating exceptions to this rule where the independent contractor's work is so negligently defective as to be imminently dangerous to third persons, provided he knew or should have known of the dangerous situation created by him, and the party with whom he has contracted does not know of the dangerous condition and would not discover it by reasonable inspection). Therefore, while an independent contractor is engaged in performing that which he was hired to do, he owes a duty to third parties as does anyone undertaking an active course of conduct. Once he has completed his obligations and the work is accepted, however, *Price* applies and the "completed and accepted" rule shields him from liability for negligent performance.

In two affidavits submitted by Food Lion, Sue Payne, the Food Lion employee present during Triangle Ice's delivery, averred that "After [the Triangle Ice employees] had left, I also noticed that they had left a wet area where they had been working," and "after the last of the 200 bags was counted, the deliveryman proceeded to wheel the laundry cart away from the ice box and out the store." Ms. Thrift's deposition testimony, as well as that of Ms. Carol Inzar, also indicates that, at the time of Ms. Thrift's fall, the cart used to bring the ice into the store was gone, as was the ice truck from the parking lot. The evidence in the record is undisputed that the Triangle Ice employees had vacated the premises at the time of Ms. Thrift's fall. Ms. Payne had been counting the bags of ice as the Triangle Ice employees placed them in the ice bin, and her affidavit indicates that the two hundred bags ordered by Food Lion had been counted before the delivery people left the store. No Food Lion employee prevented the Triangle Ice employees from leaving, made any further requests from them, nor did anything to suggest that they had not completed what was expected of them. Moreover, the Food Lion employee made the necessary arrangements to have the wet floor dried. All of the evidence suggests that the contract to deliver the ice had been completed and was acceptable to Food Lion. *See* 41 Am.

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Jur. 2d *Independent Contractors* § 49 (1968) (acceptance required to relieve the contractor of liability for injuries to third persons is a practical acceptance after the completion of the work, a formal acceptance not being required).

Food Lion contends that this Court should deem the “completed and accepted” rule articulated in *Price* as antiquated and no longer good law because it is based on the now disfavored concept of privity of contract. We note that privity of contract is not disfavored in all areas of North Carolina law. *See, e.g., Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 144, 415 S.E.2d 574, 575 (1992) (recognizing that, outside the exceptions enumerated in chapter 99B of the General Statutes, the general rule is that privity of contract is required to assert a claim for breach of an implied warranty of merchantability); *Crews v. W.A. Brown & Son, Inc.*, 106 N.C. App. 324, 331, 416 S.E.2d 924, 929 (1992) (recognizing that the legislative intent in enacting N.C. Gen. Stat. § 25-2-318 was to eliminate the doctrine of privity as to the buyer’s family, household, and guests, but not to abolish the doctrine as it relates to strangers to the contract). Moreover, that does not appear to be the sole basis for the completed and accepted rule. Rather, there are various reasons recognized for the rule, such as a public policy rationale concerned with avoiding endless litigation and an excessive burden on contractors as well as an awareness that, once the job is completed and accepted, control has passed from the independent contractor to the owner of the premises where the work was done. 41 Am. Jur. 2d *Independent Contractors* § 49 (1968).

We acknowledge that some jurisdictions have abandoned the “completed and accepted” rule and instead impose the same liability on independent contractors that is imposed on manufacturers for injuries to ultimate consumers resulting from defective products. In those jurisdictions, a contractor is held to a standard of reasonable care for the protection of third parties who may foreseeably be endangered by his negligence, even after acceptance of the work by the contractee. We conclude, however, that the completed and accepted rule under *Price*, which has not been reversed either explicitly or implicitly by our Supreme Court, remains the law in North Carolina. Therefore, once an independent contractor has completed his work and it is accepted by the party with whom he has contracted, the liability of the independent contractor ceases, and the other party becomes answerable for damages which may

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accrue due to the independent contractor's initial negligence. *Price*, 226 N.C. at 760, 40 S.E.2d at 345.

The dissenting opinion observes that in North Carolina, the "completed and accepted" rule has been applied only in construction or repair cases. We find, however, that such an application is indicative of the broad scope of the rule. To apply the rule here, in a delivery case, does not increase the scope of the rule but merely employs it in a scenario that is logically included within the broad application articulated by *Price*. One who delivers goods or materials and then leaves the delivery site should be afforded at least the same protection as a contractor who actively participates in the production of a structure or the repair of a building or fixture. While we believe the *Price* rule should be reexamined in light of the developing law of latent defects and products liability, this Court does not have the authority to do so. We are bound, therefore, by the "completed and accepted" rule and apply it accordingly to the facts of the case at bar.

Because we have found that the rule articulated in *Price* controls in the present case, and because we have concluded that Triangle Ice had completed its delivery and that the delivery was accepted by Food Lion at the time of Ms. Thrift's fall, the trial court's grant of summary judgment in favor of Triangle Ice is

Affirmed.

Judge JOHNSON concurs.

Judge GREENE dissents in a separate opinion.

Judge GREENE dissenting.

I agree with the majority for the reasons given that Food Lion's appeal must be dismissed. I disagree, however, with the broad assertion that all independent contractors are absolved from liability once their work is "completed and accepted" and that the summary judgment for Triangle Ice must therefore be affirmed.

The North Carolina courts have applied the "completed and accepted" rule only in the context of contracts for construction

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or repair,¹ see *Price v. Johnston Cotton Co.*, 226 N.C. 758, 40 S.E.2d 344 (1946) (construction of scaffold); *Williams v. Charles Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496 (1936) (repair of gas lamp); *Willis v. J.G. White & Co.*, 150 N.C. 199, 63 S.E. 942 (1909) (construction of roadbed and railway track), and there is no justification for extending its application to the delivery of goods. The proper test of the liability of Triangle Ice requires application of general principles of negligence, that is, all persons are held to a standard of reasonable care for the protection of third parties who may foreseeably be endangered by a negligent act. Thus the issue presented in this case is whether Triangle Ice's negligence, if any, was the proximate cause of plaintiff's injuries. The question of proximate cause requires a determination of whether Food Lion's negligence, if any, is an intervening cause of plaintiff's injuries and therefore insulates Triangle Ice from any liability. See *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233-38, 311 S.E.2d 559, 565-67 (1984). There are genuine issues of material fact on each of these issues and summary judgment for Triangle Ice was accordingly inappropriate. I would therefore reverse entry of summary judgment for Triangle Ice and remand.

STATE OF NORTH CAROLINA v. WILLIAM DAVIS WATKINS

No. 9217SC953

(Filed 7 September 1993)

Searches and Seizures § 12 (NCI3d)— DWI—no reasonable and articulable suspicion to stop vehicle—evidence suppressed

The trial court properly granted defendant's motion to suppress in a DWI prosecution where an officer heard a radio transmission at 3:00 a.m. that there was a suspicious vehicle behind the Virginia-Carolina Well Drilling Company; the of-

1. Many courts have completely abandoned the "completed and accepted" rule, even in the context of construction contracts. See, e.g., *Kapalczynski v. Globe Constr. Co.*, 172 N.W.2d 852 (Mich. App. 1969); W. Page Keeton et al., *Prosser and Keeton on Torts* § 104A, at 723 (5th ed. 1984) ("It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose conditions known by him, but also when the work is negligently done.").

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ficer did not know who had called the dispatcher or whether the caller was a reasonable, believable or reliable person; there was no description of the vehicle and no information as to why the vehicle was suspicious; the officer proceeded to the premises; there were two or three vehicles on the premises and one of several buildings had a light on inside; the officer had driven by the premises in the past and had observed cars parked on the premises but had never before investigated; he saw a car drive away from the premises and followed, turning on his blue light; the car was weaving within its lane but did not cross the center line or run off the road; the officer stopped the car to continue the suspicious vehicle investigation and not because of anything he observed about defendant's driving; the officer smelled alcohol on defendant after having him exit the vehicle and asked him to perform roadside sobriety tests; and defendant was subsequently arrested for driving while impaired. Although the State argued that an officer need only be able to articulate or verbalize the suspicion which precipitated the seizure, that is not the law in this state. The officer did not articulate any specific facts which would lead a reasonable police officer to suspect that the defendant was engaged in criminal activity; to allow the seizure of a vehicle because a vehicle has been reported suspicious without any facts to support the suspicion would also justify the seizures of innocent citizens.

Am Jur 2d, Searches and Seizures §§ 69, 70, 73.

Judge EAGLES dissenting.

Appeal by the State from order entered 1 July 1992 by Judge Joseph R. John, Sr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 June 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jeffrey P. Gray, for the State-appellant.

McNairy, Clifford & Clendenin, by Locke T. Clifford and Robert O'Hale, for defendant-appellee.

JOHNSON, Judge.

The State appeals the trial court's order suppressing all the evidence obtained by an officer pursuant to his stop of defendant's

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vehicle. As a result of the stop, defendant was charged with driving while impaired.

The trial court's findings of fact were not excepted to on appeal; therefore, they are binding on this Court. The trial court found that:

1. On the early morning of February 11, 1990, the defendant was on the premises of the Carolina Virginia Well Drilling Company, hereafter referred to as "the company," with the permission of the owner/operator of the company, his friend Elbert Smith. The Well Company is located on the Purdie [sic] Loop Road, and is outside the city limits of the town of Stoneville.
2. The company had a recreational area with a cable tv set and a kitchen and bar which were used at night and on weekends by Mr. Smith and his friends, including the defendant. Some of these people lived in rural areas that were not served by cable and came to the company regularly with family members and friends to watch ball games, play cards, have fish fries, etc.
3. The defendant had been a regular visitor at the company for many years and was in the habit of coming to the company on a daily basis and sometimes staying until late at night.
4. There was an auto detailing business on the premises and it was not unusual for cars to be parked around the company during night or daylight hours.
5. Mr. Smith had given keys to several of his friends, including the defendant so that they could use the recreational facilities at the company whenever they chose to do so.
6. On the night in question, Officer Norman E. Harbor of the Stoneville Police Department was in his police squad car and was monitoring the Rockingham County Sheriff's Department radio frequency. The Rockingham County Sheriff's Department provides dispatch/communication services to/for the Stoneville Police Department as well as for its own department, and both agencies communicate using the same frequency.
7. At approximately 3:00 a.m. Officer Harbor overheard a radio transmission from the dispatcher to Officer Robert E. Knight saying that there was a "10-50" behind the Virginia-Carolina Well Drilling Company.

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8. No evidence was introduced that tended to show:
 - a. The identity of the dispatcher.
 - b. The identity of the caller.
 - c. Whether the caller refused to identify himself/herself.
 - d. What description of the vehicle the caller gave, if any.
 - e. Any statements given the dispatcher by the caller to support the conclusion that it was a "10-50," or "suspicious" vehicle.
 - f. Whether the dispatcher knew or recognized the caller.
 - g. What, if anything, the dispatcher did to verify the believability of the caller.
 - h. What, if anything, the caller told the dispatcher was "suspicious" about the vehicle.
 9. The "10-50" was understood by Officer Harbor to mean "suspicious vehicle".
 10. Officer Harbor had no idea who had made the call or whether the caller was a reasonable, believable or reliable person.
 11. Officer Harbor was given no description of any alleged "suspicious vehicle" nor any information as to why any vehicle parked behind the company would be suspicious.
 12. Deputy Robert Knight advised the dispatcher that he was a good distance away. Then Officer Harbour [sic] advised Deputy Knight of his location, which was at the Commer Road and the Settle Bridge Road, approximately five hundred feet away from the Virginia Carolina Well Company, and Deputy Knight asked Officer Harbor to assist him.
- Officer Harbor proceeded to the company. There were "approximately" two or three vehicles on the premises when he arrived. When Officer Harbor arrived, he saw several buildings, one of which had a light on inside. He parked his car near the building with the light on and exited his car, and started toward the building.
13. Officer Harbor had driven past the Virginia Carolina Well Drilling Company on many occasions before, had seen cars

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parked on the premises and had never investigated any of the cars on prior occasions. Officer Harbor testified that it would be normal to see a few cars on the premises during day and night.

14. While he was outside his vehicle, he observed a car pull out of the company parking lot onto the Priddy Loop Road and drive away. The car's light went on as he turned onto Priddy Loop Road. There is no evidence that the defendant saw Officer Harbor before Officer Harbor turned on his blue light.

15. Officer Harbor then got in his car and followed the car turning on his blue light as he pulled out of the company parking lot and turned left onto Priddy Loop Road.

16. Officer Harbor testified that he believed that "at three o'clock in the morning" any vehicle at a "place of business that is closed normally" is a suspicious vehicle.

17. Officer Harbor testified that the car was "continually weaving" within its lane, but that "he never crossed the center line or go off the road." Officer Harbor testified that as he followed the car with the blue light on, the car was continually weaving within its lane, but that he never crossed the center line or went off the road.

18. Officer Harbor turned on his blue lights and stopped the car for the purpose of continuing his "10-50" investigation and not because of anything he observed about the defendant's driving.

19. Upon stopping the vehicle and having the driver, the defendant William Davis Watkins, exit the vehicle, Officer Harbor smelled alcohol on the defendant and asked him to perform some roadside sobriety tests, and thereafter arrested him for driving while impaired.

On appeal, the State's sole assignment of error is that "the trial court erred in its conclusion of law that the officer did not have a reasonable and articulable suspicion to stop a vehicle coming from behind a building at a closed business at 3:00 a.m. without its headlights on or after following the vehicle and observing it weave in its lane." We disagree and affirm the decision of the trial court.

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The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated [.]” Seizures of the person involving only a brief detention fall within the ambit of the Fourth Amendment and must therefore be excused by the reasonable or articulable suspicion of a police officer. *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676 (1969).

The seizure of an individual in an investigative stop must be based on specific articulable facts as well as inferences from these facts, viewing the circumstances as would a reasonably cautious police officer on the scene, guided by his experience and training. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968). Law enforcement officers are required to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979).

In the case *sub judice*, Officer Harbor did not articulate any specific facts which would lead a reasonable police officer to suspect that the defendant was engaged in criminal activity. Officer Harbor observed nothing more than defendant driving away from a closed business at night with his car headlights off. The officer testified at trial that there was nothing other than the vehicle coming out from the parking lot that made him follow the car.

The State contends, however, that because a tip was received from an anonymous caller who stated that a suspicious car was at the parking lot, Officer Harbor had a reasonable and articulable suspicion which allowed him to stop defendant's vehicle. The anonymous caller did not identify himself/herself, did not give a description of the car, and did not make any statements to support the conclusion that the car was suspicious. *Distinguish Alabama v. White*, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (anonymous caller gave many details which could be verified such as the name of the person, a good description of the car and an accurate prediction of where the person was going). In the instant case, the anonymous caller provided Officer Harbor with no details which could be verified in order to determine if defendant's vehicle was in fact the alleged suspicious vehicle. The call failed to state what made the vehicle suspicious. Moreover, the caller failed to state that any criminal activity was connected with the suspicious vehicle and the officer did not testify that he observed any criminal activity afoot.

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Our decision finds support in *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), where a police officer observed two young men at 12:10 a.m. in a drug area. The officer observed the two men watching him and other police officers for a few minutes; then, the two men turned and started walking the other way. The officer got in his vehicle and drove around to the men and told them to stop and come to him. The men complied, and the officers searched Fleming and found drugs. This Court held that the officer had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place and the officer's knowledge. Our Court further held that "should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens [.]" 106 N.C. App. at 171, 415 S.E.2d at 785-86. Likewise, in the case now before us, to allow the seizure of a vehicle because a vehicle has been reported suspicious without any facts to support the suspicious nature would also justify the seizures of innocent citizens. Accordingly, the decision of the trial court is affirmed.

We also note that during oral argument, the State argued that an officer need only be able to articulate or verbalize the suspicion which precipitated the seizure. That argument is untenable and is not the law in this State.

The decision of the trial court which granted defendant's motion to suppress is affirmed.

Judge WYNN concurs.

Judge EAGLES dissents by separate opinion.

Judge EAGLES dissenting.

I respectfully dissent and vote to reverse and remand for trial. Since there was brief radio communication between officers, we look to the "collective knowledge" of both officers in assessing whether a reasonable articulable suspicion existed for the stop here. *United States v. Kreimes*, 649 F.2d 1185 (5th Cir. 1981); see *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984); *State v. Tilley*, 44 N.C. App. 313, 260 S.E.2d 794 (1979). The circumstances known by the law enforcement officers before approaching defendant were:

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- (1) The time was around 3:00 a.m.;
- (2) Deputy Knight of the Rockingham County Sheriff's Department was informed by the dispatcher that there was a suspicious vehicle in the vicinity of the Virginia-Carolina Well Company (hereinafter "Company");
- (3) Deputy Knight, who had been a law enforcement officer for five and one-half years, normally went by the Company's premises ten times each night while patrolling;
- (4) Based on his experience patrolling the area, Deputy Knight observed that by 1 a.m., all of the buildings on that side of the county are closed and the people are gone;
- (5) Having checked the buildings of the Company on prior occasions, Deputy Knight had never found anyone at the recreation room as late as 3:00 a.m.;
- (6) Officer Harbor, the responding officer with ten years experience, was from a neighboring jurisdiction and did not normally patrol the area;
- (7) Officer Harbor observed that the businesses were closed and that defendant's vehicle did not have its headlights on until it reached the highway;
- (8) Officer Harbor pulled over defendant's vehicle based upon Deputy Knight's request.

In our review of investigatory stops, it is clear that "[a] police officer . . . is not constitutionally required to be certain that a crime has occurred when he makes a stop." *United States v. Moore*, 817 F.2d 1105, 1107 (4th Cir. 1987), *cert. denied*, 484 U.S. 965, 98 L.Ed.2d 396 (1987) (citations omitted). *Alabama v. White*, 496 U.S. 325, 110 L.Ed.2d 301 (1990), is not inapposite to upholding the constitutionality of the investigatory stop presented here:

Reasonable suspicion is a *less* demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . . Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police

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and its degree of reliability. Both factors—quantity and quality—are considered in the “totality of the circumstances—the whole picture,” that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.

Id. at 325, 110 L.Ed.2d at 309.

It should be particularly noted that this is simply not a case where “there was nothing other than the vehicle coming out from the parking lot that made [the officer] follow the car” as the majority suggests. Here, there was an anonymous tip transmitted by the radio dispatcher which led the officer to the parking lot. Granted, the tip was not detailed, but as the United States Supreme Court recognized in *White*, “ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations.” *Id.* at 329, 110 L.Ed.2d at 308 (citing *Illinois v. Gates*, 462 U.S. 213, 237, 76 L.Ed.2d 527, 548 (1983)). However, the existence of the “suspicious vehicle” described by the anonymous tip was corroborated when the investigating officer observed that defendant was driving his vehicle from behind and beside closed business premises in the wee hours of the morning with its headlights off. See *White*, 496 U.S. at 330-31, 110 L.Ed.2d at 309 (corroboration of anonymous tip can furnish reasonable suspicion); *United States v. Cutchin*, 956 F.2d 1216 (D.C. Cir. 1992). Additionally, common sense dictates that driving an automobile at night without illuminated headlights, even in a parking lot as here, places pedestrians at risk, and Officer Harbor was walking in the parking lot on foot when defendant’s unlighted vehicle drove by him. See generally, *Reeves v. Campbell*, 264 N.C. 224, 227, 141 S.E.2d 296, 298 (1965). While we need not decide whether these circumstances are sufficient for the higher standard of probable cause for an arrest, it is alarming that the majority suggests that a “reasonable and cautious police officer on the scene, guided by his experience and training,” *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, cert. denied, 444 U.S. 907, 62 L.Ed.2d 143 (1979) (citation omitted), in this factual setting would not have a reasonable suspicion of criminal activity sufficient to justify a brief investigatory stop. Although Officer Harbor testified that defendant’s weaving was not the cause of his decision for the investigatory stop, it is noteworthy that other cases have held that merely weaving within one’s own lane

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of traffic can present a reasonable articulable suspicion for an investigatory stop. *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989), *disc. review denied, appeal dismissed*, 326 N.C. 366, 389 S.E.2d 809 (1990).

Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992), relied upon by the majority, is readily distinguishable. The defendants in *Fleming* were on foot the entire time and merely "chose to walk in a direction which led away from the group of officers." *Id.* at 170-71, 415 S.E.2d at 785. Here, defendant was driving late at night with his headlights off in a parking lot behind and next to closed business premises. Under the requisite "totality of the circumstances" test, the circumstances here created a reasonable suspicion of criminal activity and sufficient justification for a brief investigatory stop. See *United States v. Kreimes*, 649 F.2d 1185 (5th Cir. 1981) (upon issuance of bulletin describing a plane which had landed nearby, post-midnight seizure of truck travelling with headlights off on a rural road was based on reasonable suspicion; no description of any vehicle was given in the bulletin); *State v. Fox*, 58 N.C. App. 692, 695, 294 S.E.2d 410, 412-13 (1982), *aff'd*, 307 N.C. 460, 298 S.E.2d 388 (1983) (seizure of defendant who was driving slowly down a dead-end street of locked businesses at 12:50 a.m. and where the officer did not observe any traffic or equipment violations); *State v. Tillet and State v. Smith*, 50 N.C. App. 520, 274 S.E.2d 361, *appeal dismissed*, 302 N.C. 633, 280 S.E.2d 448 (1981).

STATE OF NORTH CAROLINA v. LARRY DONALD EVERETTE

No. 9220SC715

(Filed 7 September 1993)

1. Evidence and Witnesses § 368 (NCI4th) — robbery — evidence of subsequent offense — admissible — common scheme or plan

The trial court did not err in a prosecution for armed robbery and common law robbery by allowing a codefendant to testify as to a subsequent crime for which the defendant was not charged where the evidence tends to show a common scheme or plan on the part of defendant and his cohorts. The evidence reasonably tends to prove a material fact in issue other than the character of the accused, specifically, defend-

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ant's participation as the driver of the car during three robberies; the evidence is probative because the subsequent robbery occurred in a similar manner, in close proximity, and only a few minutes after the charged robberies; and nothing in the record indicates that the probative value of this evidence was outweighed by the danger of unfair prejudice to the defendant. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Robbery §§ 59, 60.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 ALR2d 854.

2. Criminal Law § 113 (NCI4th) — robbery — discovery — failure to comply — no prejudice

The trial court did not err in a robbery prosecution by denying defendant's motion for a mistrial based on the State offering a statement by defendant which was not disclosed pursuant to discovery where the State informed defendant of its intent to use the defendant's statement that "I found the knife a few weeks ago," referring to a pocketknife identified as that taken from Johnny Coleman and found in defendant's possession at the time of arrest; a detective testified at trial that defendant told him that he had "bought the knife"; Johnny Coleman testified that the knife in question was the knife stolen from him; and the detective testified that the knife was the one taken by him from defendant's possession at the time of arrest and verified the subsequent chain of custody. Any error in the failure of the state to comply with discovery was harmless beyond a reasonable doubt.

Am Jur 2d, Depositions and Discovery §§ 426, 427.**3. Robbery § 4.5 (NCI3d) — series of robberies — driver of car — evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss robbery charges where, although defendant contended that he was merely present and not an active participant in the robberies, there was testimony that defendant and two other men decided to get into a "hustle," meaning to "tak[e] something"; they drove to Rockingham, North Carolina and pulled over when they saw Tammy Locklear and Johnny Coleman walking along the street; defendant stopped the car and kept it running while the other two men robbed their

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victims; and defendant sped away when the robberies were complete. Giving the State the benefit of every reasonable inference, this evidence was sufficient to support a jury finding that defendant acted in concert or aided and abetted the other two men.

Am Jur 2d, Robbery § 67.**4. Robbery § 5.4 (NCI3d)— armed robbery — pistol without firing pin—instruction on common law robbery required**

The trial court erred in an armed robbery prosecution by not instructing on common law robbery where there was evidence that the pistol in question was without a firing pin at the time of the robbery, but the evidence was not so compelling as to prevent a permissive inference of danger or threat to life or to require that an instruction on armed robbery be excluded. The court should have instructed on common law robbery as well as armed robbery.

Am Jur 2d, Robbery § 75.

Appeal by defendant from judgment entered 21 February 1992 by Judge F. Fetzer Mills in Richmond County Superior Court. Heard in the Court of Appeals 25 May 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. Sigsbee Miller, for the State.

Pittman, Pittman, Davis & Pittman, by Ira B. Pittman, for the defendant-appellant.

WYNN, Judge.

Defendant was indicted on 11 February 1991 on two counts of robbery with a dangerous weapon. The case was tried to a jury and the jury returned verdicts of guilty of robbery with a dangerous weapon and guilty of common law robbery. The trial judge entered judgment on the verdicts and sentenced defendant to consecutive terms of twenty years imprisonment for robbery with a dangerous weapon and ten years imprisonment for common law robbery.

The State's evidence tended to show the following. On 24 December 1990, Larry Everette ("defendant"), his brother James

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Everette ("Everette") and Maurice Farley ("Farley") met in Hamlet, North Carolina. The three rode around together in a brown Toyota vehicle, drinking and smoking some cocaine. They drove to Rockingham, N.C. to "get a hustle" or "tak[e] something" so they could get some more crack cocaine. As defendant drove down Flowers Street, they observed Tammy Locklear and Johnny Coleman walking on the sidewalk. James Everette and Farley instructed defendant to stop the car. Farley and Everette jumped out and ran towards the couple. Someone said "hold up" and Farley took Ms. Locklear's necklace, rings, and purse. Everette held a long barrel pistol on Mr. Coleman, threatened to shoot him and took his wallet and pocket knife. Defendant remained in the vehicle with the engine running. Farley and Everette ran back to the car and defendant sped away.

Farley testified that defendant drove back to Hamlet and stopped the car at the Little Giant Convenience Store. Farley got out of the car, ran up to a man on the sidewalk and asked him for a cigarette. Farley grabbed the man's necklace and bracelet and jumped back into the car. Defendant continued to drive to South Hamlet. Farley further testified that he did not give defendant any of the items he had taken. Defendant objected to Farley's testimony regarding the robbery of the man at the Little Giant Convenience Store and the trial court overruled the objection.

At the close of the State's evidence and at the close of all of the evidence, defendant moved for a mistrial and dismissal. Both motions were denied. The defendant did not offer any evidence. During the charge conference, defendant requested an instruction on the lesser included offense of common law robbery. The request was granted as to the charge involving Tammy Locklear but denied as to the charge involving Johnny Coleman. The jury returned verdicts of guilty of common law robbery and guilty of robbery with a dangerous weapon. From entry of judgment on the verdicts and sentencing, defendant appeals.

I.

[1] Defendant's first assignment of error contends that the trial court erred by allowing co-defendant, Maurice Farley, to testify as to a subsequent crime for which the defendant was not charged, namely the robbery by Farley of the man at the Little Giant Convenience Store when the trio returned to Hamlet. Defendant argues that this evidence was inadmissible under N.C.G.S. § 8C-1, Rule

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404(b) as evidence of other crimes, wrongs or acts. Even if admissible as an exception, defendant contends that the evidence is irrelevant and that the danger of unfair prejudice outweighs any probative value.

Rule 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

The State argues that this evidence was admissible as an exception to Rule 404(b) because it tends to show a common scheme or plan by the co-defendants. Farley's testimony regarding other crimes, wrongs, or acts is admissible only if

[S]uch evidence (1) is offered for a proper purpose, *see* N.C.G.S. § 8C-1, Rule 404(b) (1992); (2) is relevant, *see* N.C.G.S. § 8C-1, Rules 401 and 104(b) (1992); (3) has probative value which is not substantially outweighed by the danger of unfair prejudice to the defendant, *see* N.C.G.S. § 8C-1, Rule 403 (1992); and (4) if requested, is coupled with a limiting instruction, *see* N.C.G.S. § 8C-1, Rule 105 (1992). *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

State v. Wilson, 108 N.C. App. 117, 121-122, 423 S.E.2d 473, 476 (1992). Evidence offered "solely to show that the defendant has the propensity to commit an offense of the nature of the crime charged," is not offered for a proper purpose. *Id.* (quoting *Haskins*, 104 N.C. App. at 679, 411 S.E.2d at 380). Moreover, "to qualify as 'relevant' the evidence must reasonably tend to prove a material fact in issue other than the character of the accused, *and* there must exist substantial evidence that the other crime, wrong, or act occurred and that the defendant was the actor." *Id.* (citing *Haskins*, 104 N.C. App. at 679-80, 411 S.E.2d at 380-81).

The evidence relating to the robbery by Farley of the man at the Little Giant Store is evidence of another "crime, wrong or act," as defined in Rule 404(b). The trial judge in this case did not specify the purpose for which he was admitting the testimony.

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However, the evidence tends to show a common scheme or plan on the part of defendant and his cohorts. Farley testified that the men set out to get into a "hustle" to obtain money for drugs. The robberies occurred within close proximity of one another, were perpetrated in the same manner and occurred within a short span of time. The evidence was "relevant" because the State presented substantial evidence through the testimony of Farley that the robbery of the man at the Little Giant Store did occur and that defendant was the driver of the vehicle used to get away. This evidence reasonably tends to prove a material fact in issue other than the character of the accused—namely, defendant's participation as the driver of the car during three robberies. The evidence is probative because it occurred in a similar manner, in close proximity to the prior robberies and only a few minutes after the charged Rockingham robberies. Where the facts show the crimes were related by facts indicating similar place, time, type of crime, method of perpetration and principals, the evidence is admissible as an exception. Nothing in the record indicates that the probative value of this evidence was outweighed by the danger of unfair prejudice to the defendant. The defendant was not charged with the subsequent robbery occurring in Hamlet.

Finally, there is no evidence in the record indicating that the defendant requested a limiting instruction with regard to the testimony. As a result, such an instruction was not required and it was not error for the trial court to fail to provide one. *See State v. Wilson*, 108 N.C. App. at 124, 423 S.E.2d at 478 (limiting instruction for evidence admitted under Rule 404(b) required only if requested by defendant).

II.

[2] Defendant next argues that the trial court erred by denying his motion for a mistrial at the close of all of the evidence because the State offered a statement made by defendant which was not disclosed to the defendant pursuant to discovery. Pursuant to defendant's discovery request, the State informed defendant of its intent to use the defendant's statement, "I found the knife a few weeks ago," referring to a pocket knife identified as that taken from Johnny Coleman and found in defendant's possession at the time of arrest. At trial however, Detective James Prevatte of the Richmond County Sheriff's Department testified that defendant told him that he had "bought the knife." The trial court concluded

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that the State had not furnished the statement actually offered, but ruled that in light of all of the evidence such error of the State was harmless beyond a reasonable doubt. The court denied defendant's motion for a mistrial.

Sanctions for failure to comply with a discovery request in criminal cases are governed by N.C.G.S. § 15A-910. The statute authorizes a variety of sanctions for noncompliance, the choice of which to impose or whether to impose a sanction, resting in the sound discretion of the trial court. *State v. Herring*, 322 N.C. 733, 747, 370 S.E.2d 363, 372 (1988). These discretionary rulings are not reviewable on appeal absent a showing of an abuse of discretion. *Id.*; *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, cert. denied, 479 U.S. 871, 93 L.Ed.2d 166 (1986). For the trial court to be reversed for an abuse of discretion, there must be a "showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Gladden*, 315 N.C. at 412, 340 S.E.2d at 682, (citing *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985)).

The trial court's ruling in this case was supported by the evidence presented at trial. Johnny Coleman testified that the knife in question was the knife stolen from him. Detective Prevatte testified that the knife was the one taken by him from defendant's possession at the time of arrest and verified the subsequent chain of custody. As decided by the trial court, any error in the failure of the state to comply with discovery in this case was harmless beyond a reasonable doubt.

III.

[3] By defendant's next assignment of error he contends that the trial court improperly denied his motion to dismiss at the close of all the evidence.

On a motion to dismiss, the trial court's task is to determine whether there is substantial evidence of each essential element of the charged offense. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). Substantial evidence is such relevant evidence as a reasonable mind would accept as sufficient to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). All of the evidence actually admitted, both competent and incompetent may be considered. Such evidence should be viewed in the light most favorable to the State, giving the State the benefit of every

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reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975).

In order to be convicted of robbery with a dangerous weapon the State must show "(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; (3) whereby the life of a person is endangered or threatened." *State v. Bromfield*, 332 N.C. 24, 42, 418 S.E.2d 491, 500 (1992) (citing *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds*, *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)); *see also* N.C.G.S. § 14-87(a) (1986). One who aids or abets any person in the commission of such a crime is equally guilty of the crime of armed robbery. *See* N.C.G.S. § 14-87(a). Common law robbery is the "felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Stewart*, 255 N.C. 571, 122 S.E.2d 355 (1961).

The evidence in the instant case, taken in the light most favorable to the State, was clearly sufficient to show that James Everette robbed Johnny Coleman with the use of a dangerous weapon and further that Maurice Farley robbed Tammy Locklear. Defendant contends that he was merely present and did not aid nor intend to aid the perpetrators. The evidence presented at trial does not support the defendant's contention that he was merely present and not an active participant in the robberies. Rather, Farley testified that the three men decided to get into a "hustle" meaning to "tak[e] something." They drove to Rockingham, North Carolina and pulled over when they saw Tammy Locklear and Johnny Coleman walking along the street. Defendant stopped the car and kept it running while the other two men robbed their victims. Defendant sped away when the robberies were complete. Giving the State the benefit of every reasonable inference, this evidence was sufficient to support a jury finding that defendant acted in concert or aided and abetted James Everette and Maurice Farley in the robbery with a dangerous weapon of Johnny Coleman and the common law robbery of Tammy Locklear. The trial court therefore properly denied the defendant's motion to dismiss at the close of all the evidence. This assignment of error is overruled.

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[111 N.C. App. 775 (1993)]

IV.

[4] Defendant's final assignment of error contends that the trial court committed reversible error by failing to instruct the jury on the lesser included offense of common law robbery in the case involving Johnny Coleman. Specifically, defendant contends that the State's evidence showed that the pistol used in the robbery was without a firing pin at the time the robbery was committed and therefore could not have endangered or threatened anyone's life.

The law regarding whether a robbery with a particular implement constitutes armed robbery as defined by N.C.G.S. § 14-87 was clarified by the North Carolina Supreme Court in *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985). Justice Mitchell writing for the Court states:

When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be. . . . Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory

. . . .

[When however,] *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, "the mandatory presumption disappears, leaving only a mere permissive inference. . . ." [that the victim's life was endangered or threatened]. The permissive inference which survives permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon).

State v. Joyner, 312 N.C. 779, 782-83, 324 S.E.2d 841, 844 (1985) (citations omitted). Where the defendant provides conclusive evidence that the instrument used during a robbery *could not* have endangered or threatened anyone's life at the time, the trial court may not allow the inference to be made by the jury. *Id.* In that case, the trial judge should only instruct the jury as to common

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law robbery and not armed robbery. Where the permissive inference remains, however, because of the inconclusive nature of the evidence, the trial judge must permit the jury to consider a possible verdict of guilty of armed robbery and guilty of the lesser included offense of common law robbery. *Id.*; see also *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982).

The defendant argues that the evidence showed that the weapon in this case, a .22 caliber pistol, did not have a firing pin in it at the time of the robberies. Detective Prevatte testified that when he recovered the pistol, one month after the robberies occurred, it had one spent shell in the chamber. He did not testify that the pistol was without a firing pin at the time he obtained it. Maurice Farley testified that when Everette got back in the car after the robbery, Farley looked at the gun. According to Farley's testimony, the firing pin was missing from the gun at that time and two barrels fell out of it.

Assuming *arguendo* that this evidence tended to show that the pistol in question was without a firing pin at the time of the robbery, it was *some evidence* of the nonexistence of the element of danger or threat to life. This evidence was sufficient to remove the mandatory presumption in the present case and required the trial court to permit the jury to consider the possible verdict of guilty of the lesser included offense of common law robbery. The evidence was not so compelling however to prevent a permissive inference of danger or threat to life or to require an instruction on armed robbery to be excluded. Thus the trial court in this case should have instructed on common law robbery as well as armed robbery with respect to the robbery of Johnny Coleman and it was error to fail to do so.

For the foregoing reasons we find that there must be a new trial on the charge for the armed robbery of Johnny Coleman. We find no error in the conviction for robbery of Tammy Locklear.

No. 91 CRS 748—No Error.

No. 91 CRS 749—New Trial.

Judges JOHNSON and GREENE concur.

STATE v. JAMES

[111 N.C. App. 785 (1993)]

STATE OF NORTH CAROLINA v. CLAYTON JAMES

No. 9118SC1116

(Filed 7 September 1993)

**Constitutional Law § 295 (NCI4th)— second-degree murder—
representation of defendant and witness—conflict of interest**

An attorney's dual representation of defendant and a key prosecution witness in a second-degree murder prosecution established a conflict of interest wherein the attorney could not effectively represent defendant even though the representation of the witness took place during concurrent criminal charges not related to this case. The overlap of representation prior to and at the time of trial resulted in an unavoidable conflict as to confidential communications and affected counsel's ability to effectively impeach the credibility of the witness; furthermore, the witness's plea bargain was never explored on cross-examination, in contrast to the suggested plea bargain of another witness. The trial judge should inquire into an attorney's multiple representation once made aware of the fact. No such inquiry was made in this case, a remand for a new trial rather than a hearing was necessary because the record clearly shows on its face that the conflict adversely affected counsel's performance, and, while the Sixth Amendment right to conflict-free representation can be waived by a defendant, the record does not indicate that defendant intended to waive this right.

Am Jur 2d, Criminal Law § 754 et seq.

**Circumstances giving rise to prejudicial conflict of interests
between criminal defendant and defense counsel—state cases.
18 ALR4th 360.**

Appeal by defendant from judgment entered 16 November 1990 by Judge Joseph R. John in Guilford County Superior Court. Heard in the Court of Appeals 2 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Rebecca B. Barbee, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

STATE v. JAMES

[111 N.C. App. 785 (1993)]

JOHNSON, Judge.

Defendant was convicted of second degree murder resulting from the death of Shawn Ford on 27 May 1989. The facts pertinent to this appeal are as follows: a high school graduation party attended by several hundred people was in progress at a club called "B. J.'s" on East Market Street in Greensboro in the early morning hours of 27 May 1989. Defendant arrived at B. J.'s with Michael Hammonds and Kenneth Tisdale sometime after midnight.

Defendant testified as follows: Jimmy Allred was standing near a van and kept staring at him. Allred said something to defendant; Allred was standing by Haywood Parker and Bernard Best. Robert "Lee Lee" Jamison walked up and told defendant to do what he was going to do and get it over with. Defendant and Jamison then backed off and someone threw a beer can at Jamison. Defendant could not see who threw the beer can because he was watching Allred. Defendant went around the van, looked down, saw a gun and grabbed it for protection. As he picked it up, it fired. He ran to Jamison, who was fighting with Ford. Defendant struck Ford on the head with the gun. When an officer grabbed defendant, he threw the gun out of his hand. Defendant repeatedly denied aiming the gun at anyone, and insisted that the gun went off when he picked it up.

After locking defendant in the patrol car, the police officer checked on the victim, who was bleeding from a head wound. The victim died approximately one hour later at a hospital emergency room. An autopsy showed that the cause of death was a gunshot wound to the left chest. Lacerations on the side of his head were caused by blunt force and did not contribute to his death.

Michael Hammonds and Kenneth Tisdale testified that they had arrived at B. J.'s with defendant, and that defendant had tight jeans on and did not have anything that appeared to be a gun in his pockets.

Timothy Cole testified to the following: that he was at B. J.'s that night, in the company of his friends Allred, Parker and Best; that he tried to break up the argument between Allred and defendant; and that while holding back Allred, Ford came up to the group and hit Jamison in the back with a beer can; and that defendant, who had his hand in his pocket, "came out of his pocket and shot him," although Cole had previously told the police in

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a statement that he did not actually see the defendant remove the gun from his pocket. Cole also testified that he had been sentenced to twenty years the previous week in federal court upon a guilty plea to a drug conspiracy charge.

Haywood Parker testified that he saw defendant approach the group and was "right there in Jimmy's face" with his hand in his pocket. He told Allred he should not fight. As he was pushing Allred back, Jamison walked over to the defendant and told him to stop arguing or do what he had to do. He saw Ford walk up and throw a beer can, striking Jamison in the back of the head, and then heard a gun shot and saw a gun in defendant's hand. He testified he did not actually see defendant fire the gun. One week earlier, Parker had been sentenced to twenty-three years in prison for his participation in the same drug conspiracy for which Timothy Cole was charged.

Tracy Fewell, who dated Timothy Cole, was at B. J.'s the night of the shooting. She testified as follows: She saw defendant and Jimmy Allred arguing. After hearing a shot, she saw Timothy Cole walk away from the crowd, holding a gun by his side. He walked by her and slid the gun under the seat of a car nearby, which was then driven away by someone else. Tonya Towns and Danielle Towns also testified that they saw Timothy Cole throw something into the car which drove away.

Defendant called Bill Osteen, the attorney who represented Timothy Cole on the federal drug conspiracy charges for which he had been sentenced the previous week, to the witness stand. Osteen testified that as part of his plea agreement in the federal case, Cole agreed to provide cooperation and assistance in the prosecution of "related persons," including testimony, and that in exchange, the government would file a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure for a reduction of Cole's sentence. The United States Attorney asked for a proffer of information about any criminal activity of which the defendants in the federal case were aware. Because of Cole's proffer of information concerning his statement to the Greensboro police regarding the death of Ford, Cole received a sentence reduction of 84 months for his "substantial assistance."

Osteen also testified that his letter to the U.S. Attorney had forecast that Cole might testify and that he advised Cole, having chosen this route of "substantial assistance," that it was his duty

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to follow through "in the hope that something would be done later on." If Cole went back to the court for a further sentence reduction, Osteen intended to make the federal court aware of Cole's testimony in the state case. However, Osteen believed this testimony alone would not be enough to cause the government to file a Rule 35 motion and he did not intend to give Cole a contrary impression.

On rebuttal, David Smith, United States Attorney for the Middle District of North Carolina, testified that Cole had no verbal or written agreement with the U.S. Attorney's office to testify in this case. Smith did not intend to file a substantial assistance pleading as a result of Cole's testimony.

Attorney John B. "Jack" Hatfield was appointed to represent defendant on 25 July 1989, upon defendant's affidavit of indigency. Haywood Parker retained Hatfield on 8 February 1990 to represent him on a state felony charge of possession of a firearm by a felon. Hatfield also began advising Parker as to his alleged participation in a conspiracy to possess and traffic in crack cocaine, for which he was federally indicted on 28 February 1990.

Hatfield first appeared in federal court for Parker on 10 April 1990, representing him through the imposition of his sentence on 7 November 1990. Parker's sentence for the federal offense reflected a departure from the sentencing guidelines "upon motion of the government, as a result of defendant's substantial assistance, and nature of offense" (the state charge of possession of a firearm by a felon was not resolved until 24 April 1991).

On 3 July 1990, Hatfield received a list of the State's witnesses as to the case at hand and was placed on formal notice that Parker might be called to testify against defendant. During cross-examination of Parker at defendant's trial, Hatfield acknowledged this dual representation, and it was thus brought to the attention of the trial court.

Defendant argues that he was deprived of his federal and state constitutional rights to the full and effective assistance of counsel and due process of law by trial counsel's conflicting interests in simultaneously representing defendant and State's witness, Haywood Parker. For reasons which follow, we agree with defendant, reverse the trial court's decision, and remand the case for a new trial.

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The right to counsel guaranteed by the Sixth Amendment of the United States Constitution is a fundamental right. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed.2d 530 (1972). And, "unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 64 L.Ed.2d 333, 343 (1980). This constitutional right is applicable to the states through the Fourteenth Amendment of the United States Constitution, and § 19 and § 23 of the North Carolina Constitution. *State v. Shores*, 102 N.C. App. 473, 402 S.E.2d 162 (1991).

As a starting point, we note that we are dealing with a question of conflict of interest, not ineffective assistance of counsel. *Cuyler* set forth the standard that establishes a violation of the Sixth Amendment while performing multiple representation: a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected the performance of his lawyer. *Id.* at 346-47, 64 L.Ed.2d at 345-46; *State v. Yelton*, 87 N.C. App. 554, 561, 361 S.E.2d 753, 758 (1987). In *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984), Justice O'Connor said:

In *Cuyler* . . . the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . [p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'

Strickland, 466 U.S. at 692, 80 L.Ed.2d at 696. *Cuyler*, 446 U.S. at 350, 348, 64 L.Ed.2d at 347, 346. See also *State v. Loye*, 56 N.C. App. 501, 289 S.E.2d 860, appeal dismissed by 306 N.C. 748, 295 S.E.2d 483 (1982).

The three criminal defendants charged with first degree murder in *Strickland* were represented by the same two privately retained attorneys. In the case *sub judice*, we deal with a defendant and a prosecution witness who are represented by the same attorney

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in different matters. Although we have found no North Carolina law on these facts, a number of jurisdictions have dealt with conflicts of interest in a similar context and have required reversal of a criminal conviction.

Gordon v. State, 684 S.W.2d 888 (1985), a Missouri case, held that there is an inherent conflict of interest when defense counsel is representing the defendant and a prosecution witness, whether in a related or unrelated case. In *Commonwealth v. Hodge*, 386 Mass. 165, 434 N.E.2d 1246 (1986), the Court determined that there was a genuine conflict of interest where defense counsel's law partner represented a witness for the State in an unrelated libel suit before, during and after counsel's representation of the witness. *E.g.*, *State v. Duncan*, 435 N.W.2d 384 (1988); *State v. Carmouche*, 508 So.2d 792 (1987); *State v. Serpas*, 485 So.2d 999 (1986); *Bellows v. State*, 12 Fla. L. Weekly 1578, 508 So.2d 1330 (1987); *In Interest of Saladin*, 359 Pa.Super. 326, 518 A.2d 1258 (1986); *Lace v. United States*, 736 F.2d 48 (2nd Cir. 1984); *Pinkerton v. State*, 395 So.2d 1080 (1980). See generally 27 ALR3d 1431.

We believe representation of the defendant as well as a prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

We have reviewed the record and find that attorney Hatfield, by representing defendant in this matter and representing witness Parker in a different matter, did actively represent conflicting interests and this adversely affected defendant herein. The nature of a claim of this sort is such that it will not appear on the face of the record. *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983). However, various factors influence our ruling. We find the overlap of representation prior to and at the time of trial of both parties by attorney Hatfield resulted in an unavoidable conflict as to confidential communications, and affected counsel's ability to effectively impeach the credibility of witness Parker, thus compromising defendant's representation. A further example is that Parker's suggested plea bargain arrangement was never explored

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by defendant's counsel on cross-examination; this is in contrast to the suggested plea bargain arrangement of witness Timothy Cole which was vigorously attacked by counsel. Having demonstrated that counsel actively represented conflicting interests and that this actual conflict of interest adversely affected his lawyer's performance, prejudice is presumed and defendant is entitled to a new trial.

We further find that in a situation of this sort, the practice should be that the trial judge inquire into an attorney's multiple representation once made aware of this fact. If the possibility of conflict is raised before the conclusion of trial, the trial court must "take control of the situation." *United States v. Cataldo*, 625 F. Supp. 1255, 1257 (S.D.N.Y. 1985) (citations omitted). A hearing should be conducted "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment." *Cataldo*, 625 F. Supp. at 1257. *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), cert. denied, *Alberti v. U.S.*, 411 U.S. 919, 36 L.Ed.2d 311 (1973) and cert. denied, *Depompeis v. U.S.*, 411 U.S. 965, 36 L.Ed.2d 685 (1973) advised:

[W]hen the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially compelling interest is known to be a prosecution witness . . . the district judge shall conduct a hearing to determine whether there exists a conflict of interest[.] . . . In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

Alberti, 470 F.2d at 881-82. No such inquiry was made in the instant case, and the failure of the trial judge to conduct an inquiry, in and of itself, constitutes reversible error. Ordinarily, we would remand the case to the trial court for a hearing to determine if the actual conflict adversely affected the lawyer's performance. However, where the record, as in this case, clearly shows on its face that the conflict adversely affected counsel's performance, we will not remand for an evidentiary hearing, but order a new trial.

Finally, it should be noted that the Sixth Amendment right to conflict-free representation can be waived by a defendant, if

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done knowingly, intelligently and voluntarily. *U.S. v. Swartz*, 975 F.2d 1042 (4th Cir. 1992). *United States v. Akinseye*, 802 F.2d 740, 744-45 (4th Cir. 1986), *cert. denied*, *Ayodeji v. United States*, 482 U.S. 916, 96 L.Ed.2d 678 (1987). However, the record does not indicate nor do we believe defendant intended to waive this right.

We hold that attorney Hatfield's dual representation of defendant and Parker, a key prosecution witness, established a conflict of interest wherein Hatfield could not effectively represent defendant. We hold as such although Hatfield's representation of Parker took place during concurrent criminal charges not related to this case. Further, we do not speculate as to the extent defendant may have been prejudiced, as prejudice in this case is presumed.

New trial.

Judges Greene and Martin concur.

ROBERT L. EVANS, PLAINTIFF v. PEGGY SHOAF EVANS, DEFENDANT

No. 9221DC810

(Filed 7 September 1993)

1. Divorce and Separation § 20 (NCI4th)— separation agreement—pension benefits as alimony—no prohibition by ERISA

A provision in a 1981 separation agreement incorporated into a consent judgment requiring the husband to pay to the wife as alimony thirty percent of his pension benefits upon his retirement was not void on the date the agreement was entered under the anti-alienation and preemption clauses of the Employment Retirement Income Security Act of 1974 (ERISA) since ERISA had been construed to contain an implied exception to the anti-assignment clause for domestic orders relating to the assignment of retirement benefits pursuant to spouse or child support obligations before a specific exception was enacted in 1984.

Am Jur 2d, Divorce and Separation § 838 et seq.

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2. Divorce and Separation § 20 (NCI4th)— separation agreement—social security benefits as alimony—no prohibition by Social Security Act

A provision in a 1981 separation agreement incorporated into a consent judgment requiring the husband to pay to the wife as alimony thirty percent of his social security benefits was not void under the anti-alienation and preemption clauses of the Social Security Act because this provision comes within the exception to the anti-alienation clause enacted in 1975 subjecting social security benefits to legal process to enforce a beneficiary's alimony obligations.

Am Jur 2d, Divorce and Separation § 838 et seq.

3. Divorce and Separation § 526 (NCI4th)— alimony case— attorney's fees—wife as "spouse" after divorce

The trial court was not without authority to award attorney's fees to defendant as the dependent spouse in an alimony action after a divorce had been entered and defendant was no longer plaintiff's wife since defendant did not lose her status as a "spouse" for purposes of N.C.G.S. §§ 50-16.3 and 50-16.4 at the time of the divorce.

Am Jur 2d, Divorce and Separation § 596.

Amount of attorneys' fees in matters involving domestic relations. 59 ALR3d 152.

Appeal by plaintiff from order entered 13 April 1992 in Forsyth County District Court by Judge Margaret L. Sharpe. Heard in the Court of Appeals 16 June 1993.

Plaintiff and defendant were married on 24 March 1951. Plaintiff-husband filed for absolute divorce on 1 June 1979, and defendant-wife filed an answer and counterclaim for temporary and permanent alimony. The marriage was dissolved by divorce judgment entered 30 July 1981. On the same day, the parties entered into a Separation Agreement and Property Settlement Agreement (hereinafter "Agreement") wherein plaintiff agreed to pay alimony to defendant, as well as pay her attorney's fees. The only child of the marriage was emancipated. The Agreement was incorporated into a Consent Judgment which ordered plaintiff to comply with the Agreement.

At the time the Consent Judgment was entered, plaintiff was employed by Piedmont Airlines as a commercial airline pilot earn-

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ing approximately \$80,000 per year. He continued his employment with Piedmont until he retired in August 1989, whereupon he received a lump sum retirement benefit distribution of \$688,267.52 before taxes. Defendant was unemployed.

Prior to August 1989, plaintiff paid to defendant alimony in compliance with the terms of the Agreement. On 19 September 1990, however, after a year of not receiving alimony payments in accordance with the Consent Judgment, defendant filed a Motion in the Cause seeking to hold plaintiff in contempt. Plaintiff subsequently filed a Motion pursuant to N.C. Gen. Stat. § 50-16.9 (1987) seeking an order modifying the prior order regarding payment of alimony based on substantial and material changes in circumstances. On 5 December 1990, a Temporary Order was entered requiring plaintiff to pay defendant \$3,517.20, thereby bringing plaintiff current with his obligations under the Agreement without prejudice to the determination of what amounts were owed by plaintiff to defendant pursuant to the 1981 Agreement.

These matters came on for hearing before Judge Margaret L. Sharpe presiding at the 3 February 1992 Session of Forsyth County Civil District Court. On 13 April 1992, Judge Sharpe entered judgment and order in favor of defendant which plaintiff now appeals.

White & Crumpler, by Fred G. Crumpler, Jr. and Clyde C. Randolph, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Jimmy H. Barnhill, for defendant-appellee.

ARNOLD, Chief Judge.

The basis for plaintiff's appeal concerns Paragraph A.2. of the Agreement, which fixed the rights of the parties upon plaintiff's retirement from Piedmont. Paragraph A.2. of the Agreement states:

If the Husband retires from his employment with Piedmont at normal retirement age, the Wife will receive as alimony thirty percent (30%) of all income from his pension or retirement plan less income taxes attributable to said retirement income plus thirty percent (30%) of any Social Security payments he receives, payable monthly. The Husband will furnish the Wife satisfactory evidence of his income from these sources.

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Based on the triggering of Paragraph A.2. by plaintiff's retirement from Piedmont at normal retirement age, the district court ordered that under the terms of the Agreement, defendant was entitled to \$138,259.18 (thirty percent of plaintiff's retirement income less taxes) plus interest accruing at the rate of eight percent per annum from 19 September 1990 until paid. Plaintiff was also ordered to pay to defendant, when received, thirty percent of such Social Security benefits as he receives monthly. The court also ordered that plaintiff pay defendant \$11,000 on account of attorneys' fees. Plaintiff assigns as error the court's order regarding these three payments.

RETIREMENT BENEFITS

[1] The district court ordered that plaintiff "within ten days, pay to defendant the sum of \$138,259.18, plus interest accruing at the rate of eight percent per annum from September 19, 1990, until paid." The court found plaintiff's retirement effective 4 August 1989, thereby triggering Paragraph A.2. and entitling defendant to thirty percent of plaintiff's retirement benefits. Plaintiff contends that the purported assignment of pension benefits was void on the date it was made, 30 July 1981, under the Employee Retirement Income Security Act (ERISA) of 1974. We disagree.

In 1974, Congress passed ERISA "in order to provide better protection for beneficiaries of employee pension and welfare benefit plans" in the private workplace. *Rohrbeck v. Rohrbeck*, 318 Md. 28, 30, 566 A.2d 767, 768 (1989). ERISA contained a series of amendments relating to requirements including reporting and disclosure, vesting, discontinuance, and payment of benefits. *Id.* One of the provisions added to ERISA was an anti-alienation requirement or "spendthrift" provision which required that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1985).

Another amendment which became part of the labor code was a preemption provision that stated "[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA requirements]." 29 U.S.C. § 1144(a) (1985). Therefore, under the 1974 ERISA, a beneficiary could not assign or alienate his retirement benefits to anyone under any State law relating to employment benefit plans. It is under this strict construction of ERISA plaintiff would

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have the Court conclude that pursuant to §§ 1056(d)(1) and 1144(a) of the Code, the assignment of thirty percent of his retirement benefits was void from the date of the Consent Judgment. We are not persuaded by plaintiff's narrow reading of these two ERISA provisions.

Plaintiff ignores significant case law regarding the 1974 ERISA provisions at issue. The combination of the anti-alienation provision and the preemption provision eventually raised questions, evidently not anticipated by Congress, as to the validity of orders entered in State domestic relations proceedings whereby pension benefits were required to be paid to a person other than the plan beneficiary, i.e., spouse or child. *Rohrbeck*, 318 Md. 28, 566 A.2d 767. The majority of jurisdictions confronting this issue concluded that an implied exemption to the anti-assignment provision existed for domestic relation decrees authorizing the transfer of retirement benefits in satisfaction of support obligations. See *Tenneco Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688 (4th Cir. 1983) (employee's interest in benefit plan is subject to garnishment where debt is support obligation); *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979) (garnishment of pension fund benefits under plan subject to ERISA due to arrearages in wife and child support obligations was not in conflict with anti-alienation clause of ERISA); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979) (garnishment order may be used to satisfy court ordered family support payments out of pension benefits because such an order is impliedly excepted from the anti-alienation and preemption clauses of ERISA); see also *Ball v. Revised Retirement Plan, Etc.*, 522 F. Supp. 718 (1981); *Ward v. Ward*, 164 N.J. Super. 354, 396 A.2d 365 (1978). For example, in *Cody*, 594 F.2d 314, the Second Circuit court relied on *Merry*, 592 F.2d 118, which upheld a garnishment of an ERISA regulated pension plan to enforce a post-divorce judgment for alimony and child support payments. The *Cody* court stated that "it may not be necessary to distinguish, in the ERISA context, between garnishments to enforce family support orders and spousal property settlements." *Cody*, 594 F.2d at 316.

Since the 1981 judgment in the case at bar and the implied exception followed by the majority of jurisdictions, Congress has amended the anti-alienation clause of ERISA. Known as the Retirement Equity Act of 1984, Pub. L. No. 98-397, Congress amended § 1056(d) by creating an exception for certain domestic relations orders. In short, § 1056(d)(3)(A) excepted from anti-alienation domestic

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relations orders which were determined to be qualified domestic relations orders (QDRO). 29 U.S.C. § 1056(d)(3)(A) (1985). The House Education and Labor Committee's intent was to remove the confusion then existing in this area and to remove ERISA as a barrier to recovery of alimony, child support and property settlements under certain conditions. *Rohrbeck*, 318 Md. 28, 566 A.2d 767. The 1984 amendment, however, has no retroactive effect on the 1981 judgment at issue. See 29 U.S.C. § 1001, Pub. L. No. 98-397, § 303(d) (1985) (plan administrator must have been actually paying out the benefits in 1985 to qualify for retroactivity). Thus, we are guided by the law that existed at the time of the 1981 judgment and recognize Congressional intent to create an exception for domestic orders relating to the assignment or alienation of retirement benefits pursuant to spouse or child support obligations. We hold that the trial court's order pursuant to the 1981 Consent Judgment for plaintiff to pay defendant \$138,259.18 plus interest was not error.

SOCIAL SECURITY BENEFITS

[2] Plaintiff's next assignment of error is that the court erred by ordering that "[p]laintiff shall pay to defendant, when received, thirty percent of such social security benefits as he receives. Such payments shall be paid monthly." Plaintiff contends that insofar as the order attempts to enforce the assignment of Social Security benefits, it is void. He bases his argument on provisions of the Social Security Act which prohibit assignments of Social Security benefits. We disagree with plaintiff's contention.

Like ERISA, the Social Security Act provides an exhaustive benefit plan. Although the Social Security Act provides a scheme by which divorced spouses may be entitled to portions of their former spouse's benefits, see 42 U.S.C. § 402(b)(1) (1991), the Act also has an anti-alienation clause and preemption clause similar in nature to the ones in ERISA:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process

(b) No other provision of law, enacted before, on, or after [the date of the enactment of this section] April 20, 1983, may

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be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. §§ 407(a) and (b) (1991). In 1975, Congress created an exception to the anti-alienation clause by enacting 42 U.S.C. § 659(a), which provides:

Notwithstanding any other provision of law (including section 407 [anti-assignment and preemption clauses] of this title) . . . , [Social Security benefits] payable . . . to any individual . . . shall be subject . . . to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659(a) (1991).

The purpose of the anti-assignment clause, as recognized by the majority of jurisdictions, is to protect the Social Security benefit recipient and those dependent upon him from claims of creditors. *Kirk v. Kirk*, 577 A.2d 976 (1990); *Sharlot v. Sharlot*, 494 N.Y.S.2d 238, 110 A.D.2d 299 (1985); *Meadows v. Meadows*, 619 P.2d 598 (1980); *Brown v. Brown*, 32 Ohio App. 2d 139, 288 N.E.2d 852 (1972). But where a wife seeks her husband's Social Security benefits in the form of alimony, she is not a creditor as such; and the statute should not apply, therefore, to defeat her claim for alimony. *Brown*, 32 Ohio App. 2d 139, 288 N.E.2d 852.

It would be inconsistent to hold that a wife could not reach Social Security benefits under § 407(a) because the statute allowing benefits to be subject to legal process for a claim of alimony, § 659(a), was enacted partially to protect her as a dependent. *Id.* It is true that this Court in *Cruise v. Cruise*, 92 N.C. App. 586, 374 S.E.2d 882 (1989) reversed a trial court's order awarding the wife a percentage of defendant's Social Security benefits, but that case involved a distribution of benefits under North Carolina's Equitable Distribution statute. Federal law precludes Social Security benefits from being treated by state courts as property. *Id.*; 42 U.S.C. § 662(c) (1984). This case involves alimony payments pursuant to a Separation Agreement and Property Settlement Agreement. Unlike *Cruise*, the payments at issue in the case at bar are subject to the anti-alienation exception, § 659(a).

Clearly Congress has expressly recognized an exception to the general bar against assignments in the case of Social Security

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benefits paid to individuals obligated to pay alimony. *See Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985). Future Social Security benefits payable to plaintiff are subject to Judge Sharpe's order enforcing plaintiff's obligation under the Consent Judgment to make alimony payments in the form of a percentage of Social Security benefits. Plaintiff's requests for this Court to void the order based on the anti-alienation and preemption clauses of §§ 407(a) and (b) is rejected.

ATTORNEYS' FEES

[3] Finally, plaintiff contends that the court was without authority to make an award of attorneys' fees pursuant to N.C. Gen. Stat. § 50-16.4 (1987) because at the time the order was entered, defendant was not the "spouse" of plaintiff as defined by statute and Webster's Dictionary. We disagree.

This Court has held that attorneys' fees are only allowed in alimony cases that come within the ambit of G.S. §§ 50-16.4 and 50-16.3. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977), *cert. denied*, 294 N.C. 363, 242 S.E.2d 634 (1978). G.S. § 50-16.4 provides:

At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4 (1987). The effect of this section is not to limit attorneys' fees only to alimony pendente lite proceedings. *Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701. Rather, *anytime* a dependent spouse can show grounds for alimony pendente lite under G.S. § 50-16.3, the court can award attorneys' fees. "Anytime" includes time subsequent to the determination of the issues in the dependent spouse's favor at the trial of his or her cause on the merits. *Id.* To recover attorneys' fees pursuant to G.S. § 50-16.3, the spouse must show he or she (1) is entitled to the relief demanded, (2) is a dependent spouse, and (3) has insufficient means to subsist during prosecution or defense of the suit and to defray the expenses thereof. *Caldwell v. Caldwell*, 86 N.C. App. 225, 356 S.E.2d 821, *cert. denied*, 320 N.C. 791, 361 S.E.2d 72 (1987). Plaintiff does not argue that defendant fails to meet the three requirements

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set forth above; he merely contends that defendant does not meet the definition of a "spouse" by virtue of the divorce decree rendered in 1981. He contends that a spouse means a husband or wife, and that defendant was no longer a wife at the time of the 13 April 1992 order awarding attorneys' fees.

Plaintiff's argument is without merit. We do not believe that a spouse loses her status for purposes of the relevant provisions of § 50-16 by obtaining a divorce decree. If we were to hold that defendant cannot be awarded attorneys' fees only because she is no longer the per se wife of plaintiff, the purpose of allowance for attorneys' fees would be defeated. An award of attorneys' fees is meant to enable the dependent spouse to employ counsel to meet her supporting spouse on an equal level at trial, or subsequent to trial, while still maintaining herself according to her station in life. *See Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971). In order to award attorneys' fees in an alimony case, the trial court must make findings of facts showing that the fees are allowable and that the amount awarded is reasonable. *Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701. The trial court made findings of fact as to these factors, and thus, we conclude that attorneys' fees were properly awarded.

Affirmed.

Judges COZORT and MARTIN concur.

STATE EX REL. UTILITIES COMM. v. N.C. CELLULAR ASSN.

[111 N.C. App. 801 (1993)]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, THE PUBLIC STAFF OF THE UTILITIES COMMISSION, METRO MOBILE CTS OF CHARLOTTE, INC., GTE MOBILE COMMUNICATIONS INC., CONTEL CELLULAR COMPANY, GENERAL CELLULAR CORPORATION, BLUE RIDGE CELLULAR TELEPHONE COMPANY, G.M.D. LIMITED PARTNERSHIP, CONTEL CELLULAR COMPANY, N.C. RSA 2 CELLULAR TELEPHONE COMPANY, N.C. RSA 3 CELLULAR TELEPHONE COMPANY, CELLCOM OF HICKORY, INC., ALLTEL MOBILE COMMUNICATIONS, INC., AND UNITED STATES CELLULAR CORPORATION, APPELLEES v. NORTH CAROLINA CELLULAR ASSOCIATION, INC., APPELLANT

No. 9210UC815

(Filed 7 September 1993)

1. Telecommunications § 1.1 (NCI3d)— deregulation of cellular telephone service—competitiveness of service

The evidence supported the Utilities Commission's finding and conclusion that cellular telephone service is competitive in North Carolina as a whole so as to satisfy one prerequisite to the Commission's deregulation of cellular service where it tended to show that although some rural service areas (RSAs) had no carrier or only one carrier, a carrier operating alone in an RSA must behave competitively because it knows that another carrier will soon share the RSA, two carriers had been licensed and granted construction permits for all but one RSA at the time of the hearing, and all RSAs will have two carriers in operation in a matter of months.

Am Jur 2d, Administrative Law §§ 673, 683.

2. Telecommunications § 1.1 (NCI3d)— cellular telephone service—deregulation in public interest

The evidence supported the Utilities Commission's finding and conclusion that deregulation of cellular telephone service is in the public interest where there was evidence that deregulation would increase competition among carriers because advance notice of price changes would no longer be required; regulation inhibits incentives for technological innovation; regulation decreases competition strategies and consumers are better off if competitors can explore the entire range of competitive options; and cellular prices are lower in deregulated states.

Am Jur 2d, Administrative Law §§ 673, 683.

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3. Telecommunications § 1.1 (NCI3d)— deregulation of cellular service—bundling—scope of proceeding not improperly enlarged

Where the Utilities Commission's notice and order stated that the issue before it was whether bundling of cellular equipment and services without regulation is in the public interest, and bundling has been permitted but regulated in North Carolina, the Commission did not enlarge the scope of the proceeding without notice by its conclusion that bundling is in the public interest so long as consumers have the right to purchase service and equipment independently, since it is clear that the Commission was not deciding whether bundling itself is in the public interest but only whether bundling should be permitted without regulation.

Am Jur 2d, Administrative Law §§ 359, 360.

4. Telecommunications § 1.1 (NCI3d)— cellular service resellers—deregulation improper

The Utilities Commission erred in deregulating cellular service resellers because N.C.G.S. § 62-125 authorizes the Commission to deregulate only cellular service providers licensed by the FCC, and resellers are not licensed by the FCC.

Am Jur 2d, Administrative Law §§ 617, 646.

Appeal by intervenor from order entered 14 February 1992 by the North Carolina Utilities Commission. Heard in the Court of Appeals 24 May 1993.

This appeal arises from an order in which the North Carolina Utilities Commission (Commission) deregulated the provision of cellular telephone service in North Carolina. Until this time cellular service was regulated under Chapter 62 of the North Carolina General Statutes.

The Federal Communications Commission (FCC) established a two-carrier market structure for the provision of cellular telephone service. The FCC, through a lottery, initially awards a license to a cellular carrier to operate in a certain area, and that is followed by the issuance of a construction permit. The license will lapse if cellular service is not available within eighteen months after the construction permit is issued. If the license happens to lapse, the area is relotteried to ensure that another carrier will be providing cellular service in that area.

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Cellular carriers are licensed to operate in two types of service areas: (1) metropolitan statistical areas (MSAs) and (2) rural service areas (RSAs). North Carolina has nine MSAs and fifteen RSAs. Due to the FCC's licensing scheme, there has been considerable delay in granting licenses for the RSAs in North Carolina, but as of 17 December 1991, construction permits were issued for two competing carriers in all but one RSA. The MSAs and RSAs that were served by two competing carriers as of 21 November 1991 represented seventy percent of North Carolina's population.

In May 1991, the Commission was authorized by statute to deregulate cellular service in North Carolina. Petitioners filed their joint petition on 24 May 1991 seeking deregulation. After hearing evidence on the issue, the Commission ordered the deregulation of cellular service. From this order intervenor appeals.

Bailey & Dixon, by David M. Britt, Ralph McDonald, and Cathleen M. Plaut, for intervenor appellant.

Public Staff/Utilities Commission, by staff attorney Robert B. Cauthen, Jr., appellee.

Parker, Poe, Adams & Bernstein, by Henry C. Campen, Jr., for petitioner appellees GTE Mobile Communications, Inc., Centel Cellular Corporation, General Cellular Corporation, Blue Ridge Cellular Company, and G.M.D. Limited Partnership.

Crisp, Davis, Schwentker, Page, Currin & Nichols, by Robert F. Page, for petitioner appellees Centel Cellular Company, N.C. RSA 2 Cellular Telephone Company, and N.C. RSA 3 Cellular Telephone Company.

Bode, Call & Green, by Robert W. Kaylor, for petitioner appellee Metro Mobile CTS of Charlotte, Inc.

Burns, Day & Presnell, by F. Kent Burns, for petitioner appellees ALLTEL Mobile Communication, Inc. and United States Cellular Corporation.

Kennedy, Covington, Lobdell & Hickman, by James P. Cooney, III, for petitioner appellee Cellcom of Hickory, Inc.

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ARNOLD, Chief Judge.

I

In 1991, the General Assembly enacted N.C. Gen. Stat. § 62-125 which permits the Commission to exempt cellular telephone service from regulation. The Commission may grant the exemption only if it finds (1) that cellular telephone service is competitive, and (2) that exemption is in the public interest. G.S. § 62-125 (Cum. Supp. 1992). After a hearing on the matter, the Commission concluded that the two requirements for deregulation were satisfied and issued an order deregulating cellular service.

The Commission's decision is *prima facie* just and reasonable and will be reversed or modified only if it (1) violates a constitutional provision, (2) exceeds the Commission's statutory authority or jurisdiction, (3) is a result of unlawful proceedings, (4) is affected by other errors of law, (5) is unsupported by competent, material and substantial evidence, or (6) is arbitrary or capricious. The Commission's decision, upon review, is viewed in light of the entire record. N.C. Gen. Stat. §§ 62-94(b) and (c) (1989).

A. Competitive service.

[1] Appellant contends that the evidence does not support the Commission's finding and conclusion that the provision of cellular service is competitive. As long as there is substantial and competent evidence in the record to support the Commission's finding and conclusion we must affirm, even though appellant supports its argument with evidence to the contrary. *State ex rel. Utilities Comm'n v. Springdale Estates Ass'n*, 46 N.C. App. 488, 490, 265 S.E.2d 647, 649 (1980). We believe that the record supports the Commission's finding and conclusion.

Appellant first argues that because sixty percent of the RSAs had zero carriers, or only one carrier, at the time of the hearing, the market could not, by definition, be competitive in those areas. There was evidence, however, that in RSAs with only one carrier, the first carrier had to behave competitively because the presence of a second carrier was imminent. As petitioners' economist explained, a carrier operating alone in an RSA must behave competitively because it knows that another carrier will soon share the RSA, and if the original carrier gouges customers initially, it will ultimately suffer for it. The evidence indicated that a second carrier would in fact soon join the carriers which were operating

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alone. Licenses to provide cellular service are very valuable and highly sought after, and once a carrier obtains a license to provide service, the license is almost never allowed to lapse. In addition, there was evidence that two carriers had been licensed and granted construction permits for all but one RSA at the time of the hearing. In all, the evidence supported a conclusion that all of the RSAs would have two carriers in operation in a matter of months. In light of this evidence, the Commission was justified in finding that cellular service is competitive in North Carolina as a whole.

Appellant also argues that there was no competition in the areas where two carriers were operating. The weighing of evidence and the judgment thereon are matters for the Commission. *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 54, 132 S.E.2d 249, 257 (1963). Each side presented substantial evidence in support of its position, but the Commission chose to place more weight on petitioners' evidence. Furthermore, petitioners' economist convincingly rebutted much of the evidence presented by appellant's economist.

The Commission's order describes in detail the evidence it relied upon in concluding that cellular service is competitive. Rather than repeating the evidence here, suffice it to say that we reviewed the entire record and found substantial and competent evidence to support the Commission's finding and conclusion that the provision of cellular service in North Carolina is competitive. We will not, therefore, disturb this conclusion.

B. Public interest.

[2] Appellant argues that the evidence did not support the finding and conclusion that deregulation is in the public interest. We disagree with this argument as well.

Petitioners' witnesses provided ample evidence that deregulation was in the public interest. There was evidence that deregulation would increase competition among carriers because advance notice of price changes would no longer be required, that regulation inhibits incentives for technological innovation, and that regulation decreases competition strategies and consumers are better off if competitors can explore the entire range of competitive options. An economist's study indicated that cellular prices are five to fifteen percent lower in deregulated states. The vice president and general manager of GTE Mobilenet-Southeast testified, based upon

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his experience in deregulated states, that deregulation could lead to decreased prices and to increased promotion and pricing strategies to the benefit of consumers. He described how regulation increases the risk of implementing different price strategies because if an implemented strategy did not work, regulation hindered companies in retracting it. He also testified that GTE's rates are on average lower in deregulated states in this region. This substantial and competent evidence supports the Commission's finding and conclusion that deregulation is in the public interest.

Although evidence in support of appellant's position exists, the Commission concluded that the provision of cellular service is competitive and that deregulation is in the public interest. Even if we disagreed with the Commission's conclusions, we could not change them because they are supported by substantial and competent evidence. For these reasons, that portion of the Commission's order deregulating cellular telephone service is affirmed.

II

Appellant also assigns error to two additional conclusions in the order which are not related to deregulation of cellular telephone service. Appellant first argues that the Commission erred in concluding that bundling of cellular premises equipment and cellular service is in the public interest, and second, that the Commission erred in deregulating cellular service "resellers."

A. Bundling.

[3] Bundling is the practice of selling telephone equipment and telephone service together. The FCC has indicated that bundling is unlawful, but it is not clear that the practice referred to as bundling in this case is the practice referred to by the FCC. Petitioner's economist, who had extensive experience in the cellular industry, testified that the practice in North Carolina is not really bundling because customers have the option of purchasing service and equipment separately or together. The Commission noted this distinction in its order when it stated that "packaging," as opposed to "tying" or "bundling," is the best word to describe the practice in North Carolina. A "tying" arrangement gives the customer no option—equipment and service must be purchased together.

The Commission concluded that "so long as consumers have the right to purchase service and [equipment] independently, [bundling] is in the public interest." Appellant does not argue that

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this conclusion is erroneous or unsupported by evidence; instead, appellant argues that it was deprived of due process because the Commission did not provide notice of or an opportunity to be heard on the bundling issue. The Commission denied appellant's motion to enlarge the scope of the proceeding to consider if bundling is lawful and in the public interest, but the Commission expressly notified the parties that it would consider whether or not *bundling without regulation* is in the public interest. Appellant argues that the Commission nonetheless enlarged the scope of the proceeding, without giving the parties notice or an opportunity to be heard, to consider if bundling itself is in the public interest. We disagree with appellant's perception of both the proceeding and the Commission's conclusion.

At first glance, it does appear that the Commission addressed whether or not bundling is in the public interest, but closer scrutiny reveals that this was not so. The Commission stated early on in its order that the "issue [before it] was limited to whether *bundling in the absence of regulation* is in the public interest." (Emphasis added.) This was the only pertinent issue because bundling has been permitted in North Carolina so long as the carrier filed a tariff. In other words, it has been permitted but regulated. Bundling remains a permitted practice in North Carolina, and the Commission prevented appellant from challenging the practice. There was no need to address the lawfulness of bundling, or if it is in the public interest, because it was irrelevant to the main issue at the hearing—deregulation of cellular service. The only change from the prior practice is that now bundling is permitted without regulation, a change which follows directly from the issue considered at the hearing.

The language in the order is misleading, but considering the prior permissibility of bundling, and the Commission's express statement in the order of what it was deciding, it is clear that the Commission did not enlarge the scope of the proceeding. Appellant was given notice of the issue under consideration and cannot complain that it did not have notice of or an opportunity to present evidence on an issue that was not before the Commission. This argument is rejected.

B. Resellers.

[4] Finally, appellant argues that the Commission exceeded its authority when it deregulated cellular service resellers. The Com-

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mission had authority to “exempt domestic public cellular radio telecommunications service providers, *if licensed by the Federal Communications Commission*, from regulation under any or all of the provisions of [Chapter 62].” G.S. § 62-125 (emphasis added). Appellant argues that because resellers of cellular service are not licensed by the FCC, they cannot be deregulated.

Although we agree with petitioners that appellant’s construction produces an absurd result, we cannot ignore the express language of the statute. The statute limits the Commission’s authority such that it may deregulate only cellular service providers that are licensed by the FCC. All wholesale providers must be licensed by the FCC, so it is obvious which providers the legislature intended to benefit. We must, therefore, read the limitation as prohibiting the Commission from deregulating resellers because they are unlicensed providers. Otherwise, the limiting language in the statute would be rendered meaningless.

We must reverse that part of the Commission’s order which deregulates cellular service resellers and remand for modification of the order. In all other respects, the Commission’s order is affirmed.

Affirmed in part, reversed in part and remanded.

Judges ORR and MARTIN concur.

STATE OF NORTH CAROLINA v. MARY ALICE PITTMAN

No. 9218SC1204

(Filed 7 September 1993)

Searches and Seizures § 12 (NCI3d)— lawful stop of defendant at train station—lawful investigatory stop of car—unlawful search of person—suppression of cocaine

Where defendant and a man were seen talking in a train station by two drug interdiction officers; defendant and the man parted when they noticed that they were being watched by the officers; one of the officers stopped and questioned defendant while the second officer stopped and questioned

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the man to whom she had been speaking; defendant showed the officer her train ticket, and both defendant and the man told officers that they were travelling alone and did not know each other; both consented to a search of their bags, but no drugs or contraband were discovered by the searches; defendant and the man thereafter left the train station in the same car; the officers had a uniformed officer stop the car and called a female officer to the scene; defendant refused to consent to a search; the female officer took defendant to the police station and searched her person; and the search uncovered two bags of cocaine, it was *held* that (1) the first stop of defendant at the train station was consensual and did not constitute a seizure, (2) the stop of the car was a lawful investigatory stop pursuant to a reasonable suspicion of criminal activity based on discrepancies between defendant's statements and her actions, and (3) the search of defendant's person was not based on probable cause and was unlawful. Therefore, the trial court should have granted defendant's motion to suppress evidence of the cocaine discovered by the search.

Am Jur 2d, Searches and Seizures §§ 70, 83.

Judge MCCRODDEN concurring in the result.

Appeal by defendant from judgment entered 30 June 1992 by Judge Howard R. Greeson in Guilford County Superior Court. Heard in the Court of Appeals 8 July 1993.

A motion to suppress the evidence of cocaine found upon the defendant's person was filed 4 September 1991, and a hearing was held 30 June 1992. Defendant's motion to suppress was denied and defendant pled guilty to the offense and received a seven-year prison term, subject to her right to appeal the suppression issue.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan, for the State.

John Bryson for defendant-appellant.

ORR, Judge.

The facts, as determined by the lower court, are that on 19 April 1991, Officers J.M. Ferrell and J.A. Gunn were at the Amtrak railroad station in High Point patrolling as part of a drug interdiction operation. At 1:30 a.m., the officers observed the defendant,

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Mary Alice Pittman, and a man speaking. Upon noticing that they were being watched by the two officers, defendant and the man parted company. Officer Gunn stopped the defendant, and Officer Ferrell stopped the man with whom defendant was seen. The two were stopped approximately twenty feet apart. Defendant showed Officer Gunn a train ticket bearing the name A. Reynolds and stated that she was travelling alone and did not know the man with whom she had been seen. During the conversation, Officer Gunn noticed the defendant was constantly looking over at the man and Officer Ferrell. Defendant consented to a search of her bag. No drugs or contraband were discovered by the search. Meanwhile, Officer Ferrell spoke with the man who had been observed with the defendant. The man claimed to be travelling alone and said he did not know the defendant. The man consented to a search of his bag, and this search was also negative.

After Officer Ferrell ended his conversation with the man, a Honda automobile pulled up to the train station, and the man put his bag in the trunk. The man then motioned to the defendant to approach the car and he placed her bag in the trunk and the two of them got in the car and left. Officers Gunn and Ferrell compared the information they had gathered from the defendant and the man, noting particularly that both said they were travelling alone and did not know the other. When the officers observed the two leaving in the same car, their suspicions were aroused. Officers Gunn and Ferrell followed the car and had a uniformed police car stop the Honda. Before speaking to the defendant a second time, a call was made for a female officer to go to the scene. Officer Gunn asked the defendant to get out of the car and asked her why she had misrepresented that she was travelling alone as well as several other questions. The officers requested to search the defendant, and she refused. The female officer, Sherry Byrum, had arrived and was instructed to conduct a search of defendant's person. Because of the hour, defendant was taken to the police station where the search was conducted in the ladies public rest room. The search uncovered two bags of cocaine.

The issue on appeal is whether the lower court committed prejudicial error by denying the defendant's motion to suppress evidence seized in violation of the defendant's rights as guaranteed by the United States Constitution, the North Carolina Constitution, and N.C. Gen. Stat. § 15A-974. Defendant makes three contentions in support of her appeal.

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First, defendant claims that the initial encounter between herself and the police at the train station was a seizure without reasonable suspicion. Recently, the United States Supreme Court has reiterated that police officers may approach individuals in public places “to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.” *Florida v. Bostick*, 501 U.S. ---, ---, 115 L. Ed. 2d 389, 396 (1991). The Court further explains that “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” *Id.* at ---, 115 L. Ed. 2d at 398. Such encounters are considered consensual by the Court and no reasonable suspicion is necessary. *Id.* This Court has found that “[c]ommunications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.” *State v. Thomas*, 81 N.C. App. 200, 205, 343 S.E.2d 588, 591, *disc. review denied*, 318 N.C. 287, 347 S.E.2d 469 (1986) (quoting *State v. Perkerol*, 77 N.C. App. 292, 298, 335 S.E.2d 60, 64 (1985), *disc. review denied*, 315 N.C. 595, 341 S.E.2d 36 (1986)). In the case *sub judice*, defendant was approached by only one clearly identified police officer at the train station who merely asked her a few questions. Defendant voluntarily gave Officer Gunn her train ticket and consented to the search of her bag. Because of the consensual nature of the encounter, defendant’s argument that this encounter constituted a seizure is without merit.

The second contention defendant makes is that the stop of the car in which defendant was a passenger was an arrest without probable cause. In support, defendant asserts that because she had already been questioned once, there was no other investigative work to be done; therefore, the second stop was an arrest. The State asserts that defendant lacks standing to challenge the stop of the vehicle. However, the State is precluded from raising the argument of lack of standing on appeal because it failed to raise lack of standing to defeat the Fourth Amendment claim at the suppression hearing in the lower court. *State v. Cooke*, 306 N.C. 132, 138, 291 S.E.2d 618, 621-22 (1982).

This Court has found that “[i]t is well-settled law that a police officer may make a brief investigative stop of a vehicle if justified by specific, articulable facts giving rise to reasonable suspicion of illegal activity.” *State v. Reid*, 104 N.C. App. 334, 342, 410 S.E.2d 67, 71 (1991), *disc. review allowed*, 331 N.C. 121, 414 S.E.2d 765 (1992). Reasonable suspicion is determined by the totality of the

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circumstances. *Reid*, 104 N.C. App. at 342, 410 S.E.2d at 72, (quoting *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990)). The existence of reasonable suspicion of criminal activity is determined by trained police officers from objective facts and circumstantial evidence. *State v. McDaniels*, 103 N.C. App. 175, 180, 405 S.E.2d 358, 361, *disc. review on additional issues denied*, 329 N.C. 791, 408 S.E.2d 527 (1991), *decision aff'd*, 331 N.C. 112, 413 S.E.2d 799 (1992). By the standards set out by the Supreme Court and this Court, the stop of the car in which defendant was a passenger was not an arrest. The police were making an investigative stop of the vehicle to clarify the discrepancies between defendant's story and her actions. The specific articulable facts that were the basis of the officers' reasonable suspicion of illegal activity were: (1) defendant was observed in a public transportation area where controlled substances are commonly trafficked; (2) upon questioning, defendant had claimed she was travelling alone; (3) she claimed she did not know the man to whom she had been speaking; (4) she constantly looked over at the man being questioned by Officer Ferrell, and (5) subsequently, she left with that very man in a car. These specific, articulable facts justified the subsequent stop of the vehicle.

So long as a stop is investigative, the police only need to have a reasonable suspicion. *Reid, supra*. However, if the police conduct a full search of an individual without a warrant or consent, they must have probable cause, and there must be exigent circumstances. *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991). Whether there were exigent circumstances need not be considered because probable cause to search did not exist. The United States Supreme Court compared the difference between investigative stops and situations which required probable cause in *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983).

Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.

Id. at 499, 75 L. Ed. 2d at 237.

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This Court has determined that probable cause to search exists when a "reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction." *Mills*, 104 N.C. App. at 730, 411 S.E.2d at 196. At the time Officer Ferrell called for a female officer to conduct a search and subsequently ordered the defendant to submit to a search, there was no probable cause to search, at best only reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 904 (1968), limited the scope of searches so that they are strictly tied to the factors which give rise to the search. In this case, the officer acted on what seemed to be an attempt by the defendant to deny knowing the man with whom she left. A reasonable person could not reasonably believe that a full body search, based on this one factor, would reveal controlled substances, therefore no probable cause existed. *Ybarra v. Illinois*, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 245 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *See also Sibron v. New York*, 392 U.S. 40, 62, 20 L. Ed. 2d 917, 934 (1968) (finding that the inference of criminal activity based on mere association with known drug addicts is not sufficient for a finding of probable cause to search).

The State asserts that the police had probable cause to search the defendant based on information gathered from the questioning of the defendant during the second stop. However, Officer Ferrell called for a female officer specifically to conduct a search of the defendant, and he did so before the second stop and further questioning of the defendant began. When the decision to search the defendant was made, the police were working from the limited information gathered from the first stop, and at that point there was no probable cause. Assuming *arguendo* that the decision to search was made subsequent to the second stop, we also find insufficient evidence of probable cause to permit a search of the defendant's person.

Lastly, defendant contends that three of the lower court's findings of fact are not supported by the record. Defendant failed to properly preserve for review by this Court these remaining assignments of error. N.C.R. App. P. 10(b) (1975).

For the reasons stated above, we conclude that the search of the defendant's person was conducted in violation of the right

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of the defendant to be free from any unreasonable searches as guaranteed by the Fourth Amendment, the North Carolina Constitution, and the North Carolina General Statutes. Accordingly, the order denying defendant's motion to suppress is reversed and the judgment entered upon defendant's plea of guilty is vacated.

Reversed.

Judge WELLS concurs.

Judge MCCRODDEN concurs in the result with a separate opinion.

Judge MCCRODDEN concurring in the result.

I concur with the majority on the disposition of the issues concerning the two investigatory stops. As to the issue of the search of the defendant, however, I concur only in the result. The majority cites no authority, and indeed my research can disclose no case law, for the proposition, implied by the majority, that, for the purpose of determining the existence of probable cause for a warrantless search, a search begins when law enforcement officers make the decision to search. The proper time to determine whether there is probable cause to justify a warrantless search is immediately before law enforcement officers begin the actual search because, at any point prior to that, the officers may abandon the search, and the target of the aborted search would have suffered no constitutional harm. To the extent that the majority opinion implies that we measure probable cause at an earlier point in time, I disavow it.

I believe that the officers in this case in actuality arrested defendant without probable cause immediately prior to searching her. I would therefore find the search in violation of defendant's Fourth Amendment right and agree with the majority that the trial court should have granted defendant's motion to suppress.

WHITECO INDUSTRIES, INC. v. HARRELSON

[111 N.C. App. 815 (1993)]

WHITECO INDUSTRIES, INC. TA WHITECO METROCOM v. THOMAS J. HARRELSON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 9210SC486

(Filed 7 September 1993)

1. Costs § 37 (NCI4th) — attorney's fees against State agency — time for motion

The trial court had jurisdiction to rule on petitioner's motion for attorney's fees pursuant to N.C.G.S. § 6-19.1 which was filed well before final judgment. The statutory requirement that the motion be filed within thirty days following final disposition of the case does not establish a starting point as well as a deadline.

Am Jur 2d, Costs §§ 79-82.**2. Costs § 37 (NCI4th) — attorney's fees — substantial justification for agency action — conclusion of law**

Whether a State agency acted without substantial justification so as to permit an award of attorney's fees under N.C.G.S. § 6-19.1 is a conclusion of law reviewable on appeal.

Am Jur 2d, Costs §§ 79-82.**3. Costs § 37 (NCI4th) — attorney's fees — substantial justification for action — burden of proof**

Substantial justification constitutes justification to a degree that could satisfy a reasonable person, and the party against whom attorney's fees are sought has the burden of showing substantial justification for its action.

Am Jur 2d, Costs §§ 79-82.**4. Costs § 37 (NCI4th); Highways, Streets, and Roads § 33 (NCI4th) — outdoor advertising permit — cutting of vegetation by lessee's agents — substantial justification for revocation — attorney's fees**

The DOT had substantial justification to revoke petitioner's outdoor advertising permit and to defend petitioner's action contesting the revocation so that the trial court erred in awarding attorney's fees to petitioner under N.C.G.S. § 6-19.1 where petitioner's billboard lessee hired a landscaping company to

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cut limbs and trees on the highway right of way in front of the billboard in violation of DOT regulations. Petitioner's responsibility to abide by DOT's requirements to obtain and retain outdoor advertising permits did not end when it leased billboard space to a third party, and it is not excused when an agent of the third party violates those requirements.

Am Jur 2d, Costs §§ 79-82.

Appeal by respondent from order entered 21 January 1992 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 15 April 1993.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth N. Strickland, for respondent-appellant.

MCCRODDEN, Judge.

This is an appeal from the trial court's order granting attorney's fees to petitioner pursuant to N.C. Gen. Stat. § 6-19.1 (1986). The North Carolina Department of Transportation (DOT) presents for review four arguments representing nine assignments of error. We necessarily address the jurisdictional issue, but because of our analysis of the question of substantial justification, we need not reach DOT's additional arguments.

The facts of the case are as follows. Prior to 20 April 1990, DOT issued an outdoor advertising permit to petitioner Whiteco Industries, Inc. t/a Whiteco Metrocom for its outdoor advertising billboard. On 20 April 1990, a DOT official, District Engineer B. B. Isom (Isom), observed three men cutting limbs and trees on the highway right of way in front of the billboard owned by petitioner. Upon questioning the men, Isom learned that they were with Byrd's Lawn & Landscaping, and were hired by Jagdish G. Patel (Patel), owner of the Comfort Inn in Dunn, North Carolina. At the time of Isom's observation, the advertisement on the billboard featured the Dunn Comfort Inn.

On 21 April 1990, Sherwood Brock, DOT Engineering Technician, investigated the cutting and determined that ten trees had been cut from the highway right of way in front of petitioner's billboard, in violation of N.C. Admin. Code tit. 19A, r. 2E.0210(8)

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(December 1990). On the basis of the unlawful cutting of the trees, Isom revoked petitioner's outdoor advertising permit on 2 May 1990. DOT upheld the revocation on 22 September 1990.

On 26 September 1990, petitioner filed a petition for judicial review of DOT's final decision. On 6 May 1991, petitioner served DOT with affidavits of Patel and Robert Sykes, petitioner's Vice President and General Manager, and with a motion for summary judgment. On 7 June 1991, DOT reinstated the permit and requested that petitioner cancel the hearing on the motion for summary judgment scheduled for 10 June 1991, since the permit had been reinstated. At the hearing on 10 June 1991, the trial court directed petitioner to prepare an order denying summary judgment because it was moot. The order was filed 25 June 1991.

On 10 June 1991, petitioner filed a motion for attorney's fees pursuant to N.C.G.S. § 6-19.1 and N.C. Gen. Stat. § 1A-1, Rule 11 (1990). At the 2 July 1991 hearing, the trial judge made no ruling in open court, but suggested that the parties schedule a hearing in January 1992, when he returned to Wake County so that, if the fee request were granted, a hearing could be held on the reasonableness of the attorney's fees. On 30 October 1991, the trial judge made a notation to the courtroom clerk to place an entry in the court file finding that, pursuant to N.C.G.S. § 6-19.1, petitioner was entitled to costs and attorney's fees in the amount of \$8,167.11.

On 10 January 1992, the trial judge heard arguments on the substantial justification of DOT's position in the underlying litigation and the reasonableness of attorney's fees requested by petitioner. On 21 January 1992, the trial judge entered an order granting petitioner's motion for attorney's fees and awarding fees in the amount of \$9,822.43 and costs in the amount of \$1,022.40.

[1] The first argument we consider is DOT's contention that the trial court did not have jurisdiction to rule on petitioner's motion for attorney's fees pursuant to N.C.G.S. § 6-19.1. DOT contends, *inter alia*, that petitioner filed its motion for attorney's fees prematurely because there was no final disposition of the case at the time the motion was filed and, therefore, the trial court did not have jurisdiction to award attorney's fees. We disagree.

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The attorney's fee provision of N.C.G.S. § 6-19.1 provides that "[t]he party shall petition for the attorney's fees within 30 days following final disposition of the case." Black's Law Dictionary 630 (6th ed. 1990) defines "final disposition" as "[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon." The 30-day filing period contained in the statute is a jurisdictional prerequisite to the award of attorney's fees, *cf.*, *J.M.T. Mach. Co., Inc. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987) (interpreting the Equal Access to Justice Act (EAJA), which provides for the recovery of attorney's fees against the U.S. government), and it begins to run *after* the decision has become final and it is too late to appeal. *Cf.*, *Taylor v. United States*, 749 F.2d 171 (3rd Cir. 1984) (interpreting the EAJA). We reject as too narrow DOT's argument that the 30-day period establishes a starting point as well as a deadline, *cf.*, *McDonald v. Schweiker*, 726 F.2d 311 (7th Cir. 1983) (interpreting the EAJA), and hence we find that petitioner's motion for attorney's fees, filed well before final judgment, was timely. The trial court, consequently, had jurisdiction to hear the matter.

(We would note, however, that judicial economy favors the hearing of petitioner's motion for attorney's fees only after the judgment has become final, thereby avoiding piecemeal litigation of the issue. In this particular case, but for our analysis of the issue of substantial justification, this would have presented problems since the trial court heard the motion prior to final judgment.)

DOT's second contention is that the trial court erred in awarding attorney's fees because DOT was substantially justified in revoking petitioner's outdoor advertising permit. N.C.G.S. § 6-19.1 grants a trial court the power to require the State to pay attorney's fees under certain conditions:

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

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- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

In order to award reasonable attorney's fees under this statute, the trial judge had to determine first that the petitioner was the "prevailing party". DOT does not argue that the trial court erred in finding that petitioner was the prevailing party since petitioner's petition demanded reinstatement of its outdoor advertising permit and DOT ultimately reinstated it.

[2] Additionally, the trial court had to determine that DOT acted without substantial justification in pressing its claim against petitioner and revoking petitioner's outdoor advertising permit. In reviewing DOT's argument on this issue, our first task is to determine the standard of review of the trial court's decision that DOT lacked substantial justification. Petitioner argues that the standard is abuse of discretion, *i.e.*, that the trial court's ruling is discretionary and that this Court cannot alter that ruling unless there is an abuse of discretion. We disagree. In *Tay v. Flaherty*, 100 N.C. App. 51, 55, 394 S.E.2d 217, 219, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990), this Court treated substantial justification as a conclusion of law, reviewable on appeal. Indeed, the language of the statute is clear that the court's determination of whether there is substantial justification is not discretionary, but mandatory. We follow *Tay* in treating substantial justification as a conclusion of law and hence review the court's determination.

[3] This Court has relied on the case of *Pierce v. Underwood*, 487 U.S. 552, 101 L.Ed.2d 490 (1988), to define substantial justification as justification "to a degree that could satisfy a reasonable person . . ." *Tay*, 100 N.C. App. at 56, 394 S.E.2d at 219 (citation omitted). To be "substantially justified" means "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce*, 487 U.S. at 566, 101 L.Ed.2d at 505. We agree with petitioner that the burden is on the party against whom attorney's fees are sought to show substantial justification of its action. *Tay*, 100 N.C. App. at 55, 394 S.E.2d at 219.

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[4] DOT argues that its position in revoking petitioner's permit was substantially justified because this matter is a case of first impression and DOT was attempting to obtain an interpretation of North Carolina caselaw to determine in which situations DOT may revoke outdoor advertising permits. For DOT to revoke an outdoor advertising permit, it must meet certain criteria, which are set forth in *National Advertising Co. v. Bradshaw*, 60 N.C. App. 745, 299 S.E.2d 817 (1983), and *Whiteco Metrocom Inc. v. Roberson*, 84 N.C. App. 305, 352 S.E.2d 277 (1987). The *National Advertising* Court found that DOT must (1) clearly identify persons (2) who committed a violation for which revocation is permissible and (3) show a sufficient connection between those persons and the permit holder. *National Advertising*, 60 N.C. App. at 749, 299 S.E.2d at 819.

In *National Advertising*, the Court found that DOT improperly revoked petitioner's outdoor advertising sign permit for unlawful destruction of vegetation on the highway right of way. *Id.* In that case, the evidence tended to show that vegetation around petitioner's sign had been cut and that petitioner had worked on the sign at approximately the time the vegetation was cut. However, DOT failed to identify the persons who cut the trees. *Id.*

In the instant case, unlike *National Advertising*, DOT clearly identified the persons who violated N.C. Admin. Code tit. 19A, r. 2E.0210(8) and connected those persons to the petitioner by showing that the trees were cut by persons hired by Patel, who was renting space on the billboard from petitioner.

In *Whiteco*, the Court held that petitioner's permit was properly revoked under the Outdoor Advertising Control Act, N.C. Gen. Stat. §§ 136-126 to 140 (1986 and Supp. 1992), when petitioner hired an independent contractor to maintain its sign and employees of the independent contractor violated the Act. The Court stated that "by obtaining the statutorily authorized permit, petitioner accepted the duty to follow the law in its exercise; and petitioner did not rid itself of this duty by hiring an independent substitute to act for it; for a duty imposed by statute cannot be delegated." *Whiteco*, 84 N.C. App. at 307, 352 S.E.2d at 278.

In the case at hand, petitioner argues that since Patel, rather than the petitioner, hired Byrd's Lawn & Landscaping to cut the trees, there was not a sufficient connection between petitioner and those persons who committed the violation. To accept this

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argument would be tantamount to inviting circumvention of the law, and we reject it. Petitioner's responsibility to abide by DOT's requirements to obtain and retain outdoor advertising permits did not end when it leased billboard space to a third party, and it is not excused when an agent of the third party violates those requirements.

In reaching this conclusion, we have reviewed caselaw in other jurisdictions and have found support. In *Hulshof v. Mo. Highway & Transp. Comm'n.*, 737 S.W.2d 726 (Mo. 1987), the Court reversed the trial court's decision, finding that petitioner's permit was properly revoked when petitioner rented the billboard to the advertiser, and the advertiser violated the Act by increasing the size of the sign without the knowledge of the petitioner. The Court stated that the enlargement was not inadvertent because "it was the result of the deliberate choice of the lessee . . .", and sign owners may not avoid the consequences of violating billboard regulations by claiming ignorance of the infraction. *Id.* at 728. In *State v. Mo. Highway & Transp. Comm'n.*, 801 S.W.2d 421, 425 (Mo. App. 1990), the Court stated that a deliberate and intentional change to the size of the sign by the lessee of the owner does not render the change inadvertent as to the owner.

Based upon our analysis and the cited cases, we find that petitioner had violated N.C. Admin. Code tit. 19A, r. 2E.0210(8) and that DOT was substantially justified in revoking petitioner's permit.

Petitioner argues further, however, that, even if DOT were substantially justified in revoking its permit, it was not substantially justified in not reinstating petitioner's permit until three days prior to the hearing on motion for summary judgment. After petitioner filed affidavits on 6 May 1991, DOT reinstated petitioner's permit on 7 June 1991. The affidavits stated that petitioner had not hired Byrd's Lawn & Landscaping, and at the time of the violation petitioner was unaware that trees were being cut around its billboard. For the reasons stated above, however, DOT's knowledge that petitioner's lessee had hired the landscaping company that was cutting trees in violation of DOT's regulations did not excuse petitioner. While DOT did reinstate petitioner's permit, we find no law that mandated that action. Thus, petitioner's argument that DOT should have done so sooner is without merit.

We reverse the trial court's order of attorney's fees.

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[111 N.C. App. 822 (1993)]

Reversed.

Judges JOHNSON and ORR concur.

BUNCOMBE COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. BONNIE NEWBURN ANDRES, PLAINTIFF/APPELLANT v. MELVIN B. NEWBURN, DEFENDANT/APPELLEE

No. 9228DC813

(Filed 7 September 1993)

Judgments § 104 (NCI4th) — amendment of order — improper substantive change rather than clerical correction

Where the parties had entered a consent judgment requiring defendant father to pay child support and a specific monthly amount on his child support arrearage, defendant's 1989 North Carolina income tax refund was garnished due to the arrearage, and the trial court entered an order which granted defendant a credit on his child support arrearage for the amount garnished from his income tax refund but which had no effect on plaintiff mother's collection of the arrearage, the trial court erred by granting defendant's Rule 60(a) motion to amend the original order by adding language suspending his arrearage payments until plaintiff stopped seeking garnishment since the amendment deprived plaintiff of her right to collect the arrearage and was thus a substantive change and not a mere correction of a clerical error.

Am Jur 2d, Divorce and Separation §§ 425, 426.

Appeal by plaintiff from Amended Order entered orally on 12 November 1991, and written order filed on 18 May 1992, by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals on 16 June 1993.

Buncombe County IV-D Child Support Enforcement Agency, by Carol A. Saliba, for plaintiff-appellant.

Hylar & Lopez, P.A., by George B. Hylar, Jr. and Robert J. Lopez, for defendant-appellee.

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[111 N.C. App. 822 (1993)]

LEWIS, Judge.

The issue presented by this appeal is whether or not the trial court's entry of an Amended Order on 12 November 1991 constituted a substantive change from the previous Order entered on 3 May 1991. The facts giving rise to this appeal reveal that Bonnie Newburn Andres ("plaintiff") and Melvin B. Newburn ("defendant") were granted a Judgment of Divorce by the State of Michigan on 11 July 1975. As part of the Judgment of Divorce, plaintiff was awarded custody of the couples' two minor children and defendant was ordered to pay support in the amount of \$22.00 per week. Some time thereafter, defendant moved to North Carolina and plaintiff filed a Notice of Registration of Foreign Support Order in Buncombe County in March of 1988. Defendant originally objected, but an Order Confirming Registration was entered on 1 November 1989.

Shortly after the confirmation, Buncombe County's Child Support Enforcement Agency filed a Motion in the Cause on behalf of plaintiff, seeking an increase in defendant's child support payments, as well as payments towards his arrearage. The parties entered into a Consent Judgment wherein defendant agreed to pay \$250 per month in child support for a period of one year. It was further stipulated that the total amount of defendant's arrearage was \$9,900 which defendant agreed to reduce at the rate of \$300 per month for thirty-three months.

Subsequent to the entry of the Consent Judgment, defendant's 1989 North Carolina income tax refund was garnished by the Michigan Department of Social Services. Defendant was also led to believe that the Michigan Department of Social Services intended to garnish his 1990 Federal and State income tax refunds due to his arrearage. Thus, defendant filed a Motion in the Cause on 25 March 1991, requesting credit for the \$240 garnished from his 1989 North Carolina income tax refund and also requesting an order either relieving him of his arrearage or an injunction preventing further garnishments.

Defendant's motion was heard on 3 May 1991 at which time Judge Peter L. Roda entered an oral order granting defendant a credit for the \$240 garnished from his North Carolina tax refund as well as a credit for any future garnishments. Defendant's counsel prepared the written order and submitted it to Judge Roda who

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signed the Order on 26 August 1991. No mention was made in the Order that defendant's arrearage payments were to be suspended.

Thereafter, on 15 October 1991, defendant filed a motion under Rule 60 seeking to correct what he perceived to be the omission of any language suspending payments on his arrearage. In support of the motion, defendant alleged that during the dictation and preparation of the original Order, the provision suspending defendant's payments had been omitted. The motion was heard on 12 November 1991. No testimonial evidence was presented, only the oral arguments of counsel. Judge Roda reviewed his notes from the prior hearing and concluded that the Order entered in open court had included a provision that defendant's payments were suspended until plaintiff complied with the Consent Judgment. Accordingly, Judge Roda amended the original Order to include the following:

a) By adding a Finding of Fact #11 as follows:

"11. That this Court can withhold payments on the agreements of the parties until such time as the Plaintiff comes in compliance with the agreements made in this Court. This Court will not honor the agreements made by the Plaintiff if the Plaintiff continues to redress through other means."

b) By adding a Conclusion of Law #4 as follows:

"4. Though this Court is without authority to enter orders and injunctions against the State of Michigan Friend of Court Office in Detroit, Michigan, this Court does have authority to suspend all payments of this Defendant until such time as the Plaintiff comes into compliance with her agreements made in open Court and by and through counsel in this Court."

c) By adding in the Order a paragraph #3 as follows:

"3. That Defendant's obligation to make payments through this Court be and the same are hereby suspended effective his payment due on June 1, 1991 and all future payments are suspended until such time as the Plaintiff comes in compliance with her agreements herein by suspending all further efforts to try to collect any other arrearages and judgments except as compromised by the Judgment in this cause."

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Plaintiff has appealed from the entry of the Amended Order, arguing that the trial court abused its discretion in granting defendant's Rule 60 motion. We agree.

Rule 60(a) provides in pertinent part that:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

N.C.G.S. § 8C-1, Rule 60(a) (1990). This Court has stated that Rule 60(a) allows correction of clerical errors, but it does not permit the correction of serious or substantial errors. *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989). Similar language appears in *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985), *disc. rev. denied*, 316 N.C. 376, 342 S.E.2d 895 (1986), where it was held that Rule 60(a) does not allow a court to make substantive changes in its decisions. *See also*, 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 60-1 (1989) ("court does not have the power to make substantive changes that affect the underlying legal rights of the parties"). Although Rule 60(a) clearly grants the authority to the trial court to make clerical corrections, our appellate courts have consistently rejected attempts to change substantive provisions under the guise of making clerical changes. *Hinson*, 78 N.C. App. at 615, 337 S.E.2d at 664. A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order. *Howard Schultz & Assocs. v. Ingram*, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Defendant contends that the Amended Order corrected an inadvertent omission in the original Order therefore falling under the scope of Rule 60(a) as a clerical error. Defendant emphasizes in his brief that Judge Roda reviewed his notes after hearing arguments to find that the written order had omitted part of the findings stated in open court. However, neither a transcript of the hearing on defendant's motion nor a copy of Judge Roda's notes have been included in the record for our review. It is well settled that our review is limited to those items contained in the record. N.C.R.App. P. 9(a). Though each party blames the other for the lack of Judge Roda's notes, that issue was mooted by the judicial settlement of the record. If after the settlement of the record, either party felt that items were missing from the record,

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they should have filed a writ of certiorari as provided by *Craver v. Craver*, 298 N.C. 231, 258 S.E.2d 357 (1979). Neither party followed this procedure. Thus, since Judge Roda's original Order is regular on its face and signed, we can only compare the original Order with the Amended Order to ascertain whether the effect of the amendment was substantive or clerical, and we cannot consider the arguments of counsel as to what Judge Roda's notes might have shown.

Defendant relies on *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981), as a factually analogous case and contends that it is dispositive of the issue presented. We disagree. In *Peirce*, a termination of parental rights case, the trial judge on his own accord determined that the written order previously entered had inadvertently omitted part of the actual judgment rendered in open court. As a result, the judge amended the original order to add the language "the best interest of the minor child would be served by the termination of parental rights." *Id.* at 389, 281 S.E.2d at 208. Although *Peirce* seems analogous, we find that it is readily distinguishable. In *Peirce*, the addition of the language about the best interest of the child did not change the effect of the original order. Such is not the case before us now. Judge Roda's Amended Order has deprived plaintiff of her right to collect the arrearage. We also note that the language added in *Peirce* was typical of that in all child custody cases and was very short. In contrast, the amendments in the present case were very detailed and covered several paragraphs.

Our research has revealed a more similar case in which a judge after consulting his notes altered an original order under Rule 60(a). In *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E.2d 715 (1975), the trial court amended an alimony pendente lite order to provide that rentals from a guest house should be credited against the amount of alimony. The reason for the change in the original order was that "upon examination of the trial notes and upon the personal recollection, it appear[ed] to the trial Judge that he intended for the Defendant to have credit for the rentals on the guest cottage. . . ." *Id.* at 281, 218 S.E.2d at 716. On appeal, this Court found that the trial court was not remedying a clerical error but was instead changing the judgment and accordingly vacated the amended order.

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Although not specifically stated, the main reason justifying the differing results in *Vandooren* and *Peirce* is that the substantive rights of the party were affected by the trial court's amended order in *Vandooren*, whereas in *Peirce* the party's rights were not affected. This distinction is supported by several recent decisions of this Court. In *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 518 (1991), this Court vacated an amended order which attempted to recalculate defendant's monthly expenses because the change in defendant's monthly expenses may have affected defendant's ability to pay alimony. Similarly, in *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989), this Court reversed an amended order requiring one of the parties to pay \$50,000 into court because the order was of a serious or substantial nature. In contrast, those cases in which Rule 60(a) motions have been allowed have all involved minor corrections where the substantive rights of the parties were not affected. *See e.g. Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984) (order inadvertently omitting costs could be amended under Rule 60(a) because the taxing of costs does not affect the substantive rights of the parties); *Howard Schultz & Assocs. v. Ingram*, 38 N.C. App. 422, 248 S.E.2d 345 (1978) (clarification of preliminary injunction by adding the facts which supported the granting of the injunction was proper because party was not prejudiced).

In comparing the two orders at issue, the original Order had no effect on plaintiff's collection of the arrearage to which she was entitled. However, the Amended Order suspended plaintiff's collection of the arrearage by adding a condition of future compliance requiring plaintiff to refrain from seeking further redress through garnishment. This newly imposed condition effectively severed plaintiff's ability to receive the arrearage the Consent Judgment granted. It cannot be said that these changes in the Amended Order did not affect plaintiff's substantive rights. Accordingly, we find that the Amended Order made substantive changes in the original Order and was not, as defendant claims, an attempt to correct clerical errors.

The Amended Order is hereby vacated as outside the authority of Rule 60(a) and the original Order remains in full force and effect. Having decided this matter in plaintiff's favor, we need not address her remaining assignments of error.

CAGE v. COLONIAL BUILDING CO.

[111 N.C. App. 828 (1993)]

Vacated.

Judges EAGLES and GREENE concur.

RUTHANN M. CAGE, PLAINTIFF-APPELLANT v. COLONIAL BUILDING COMPANY,
INC. OF RALEIGH, DEFENDANT-APPELLEE

No. 9210SC883

(Filed 7 September 1993)

Limitations, Repose, and Laches § 32 (NCI4th) — builder in possession and owner of house — sale to plaintiff — defective condition subsequently discovered — ten-year statute of repose applicable — action improperly dismissed

In an action to recover for damages to plaintiff's home resulting from defendant's allegedly negligent construction, the trial court erred in finding that the six-year limitation of N.C.G.S. § 1-50(5)(a) barred plaintiff's action, since defendant builder was in actual possession and the owner of the house at the time it was constructed and at the time the defective condition causing the damage was constructed and the six-year limitation could not be asserted as a defense pursuant to N.C.G.S. § 1-52(5)(d); the ten-year statute of repose set out in N.C.G.S. § 1-52(16) applied; the three-year statute of limitations for plaintiff's cause of action did not accrue until physical damage to the house became apparent in October 1990; and plaintiff's suit filed in January 1991 was well within the three-year statute of limitations and within the ten-year statute of repose which began to run on 7 December 1984 when defendant sold the home to plaintiff.

Am Jur 2d, Building and Construction Contracts § 114.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

Appeal by plaintiff from judgment entered 20 May 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 July 1993.

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[111 N.C. App. 828 (1993)]

*Petree Stockton, by John F. Mitchell and Katherine E. Flanagan,
for plaintiff-appellant.*

Joslin & Sedberry, by William Joslin, for defendant-appellee.

JOHNSON, Judge.

Plaintiff-appellant, Ruthann M. Cage, filed a *pro se* action against Colonial Building Company, Inc. of Raleigh (Colonial) on 25 January 1991 in the small claims division of Wake County District Court to recover her expenses from repairs made to her home at 1419 Traherne Drive in Raleigh, North Carolina. The magistrate's 25 February 1991 decision dismissing the complaint was appealed to Wake County District Court.

On 13 May 1991, Ms. Cage retained counsel who filed a motion to amend the original small claims complaint. The motion was allowed, and the amended complaint was filed on 12 June 1991. Colonial filed its answer and motion to dismiss on 12 July 1991. By consent order, this action was transferred to the Wake County Superior Court Division on 27 August 1991. On 18 May 1992, after hearing the arguments of counsel, Colonial's motion to dismiss was allowed. Ms. Cage filed timely notice of appeal.

This case arises out of the construction of a townhouse in Gloucester Village in Raleigh, North Carolina. Colonial was the general contractor for the townhouses in Gloucester Village. Ms. Cage purchased her townhouse in Gloucester Village on 7 December 1984. Colonial was the owner of the townhouse at the time it was conveyed to Ms. Cage and throughout the construction of the townhouse.

Ms. Cage has lived in the townhouse with her two children from December 1984 when she purchased the townhouse through the present. In October of 1990, water from a second floor bathroom in the townhouse began to leak, pouring through the first floor ceiling and light fixture, onto the dining room table and carpeting on the first floor. Ms. Cage contacted a contractor, Forest Hill Associates, for a repair estimate and a plumber to evaluate the plumbing problem. The plumber could not determine the cause for the water leak. In the process of assessing the damage, the Forest Hill Associates' repairman pulled up the carpeting and discovered rotting floorboards underneath the carpet. The contractor pulled up more carpeting and continued to find rotting floor-

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boards throughout the entire first floor of the townhouse. Forest Hill Associates provided Ms. Cage with an estimate of the repair costs, including the costs of replacing the floorboards. Ms. Cage's homeowner's insurance carrier would not pay for the costs of repairing and replacing the rotting floorboards or the carpeting that needed to be removed to replace the floorboards because it determined that the extensive rotting floorboards were not caused by the October 1990 leak from the second floor bathroom. Ms. Cage filed her small claims action in January of 1991 to recover the costs to repair the rotting floorboards caused by the improper workmanship in the construction of the townhouse.

In April of 1991, Ms. Cage contacted Birmingham Consultant Services, a North Carolina licensed building contractor, to evaluate the possible cause of the rotting floorboards so that the cause could be corrected and further destruction of the townhouse prevented. George Birmingham of Birmingham Consulting Services conducted a thorough inspection of the townhouse and found several conditions contributing to the deterioration and rotting of the floorboards as well as numerous violations of the North Carolina Building Code. Specifically, Mr. Birmingham found that the copper flashing around the door frames and window frames was improperly constructed, causing water to drain toward the house rather than away from the house. The door and window openings to the exterior were not "fully weatherstripped, gasketed or otherwise treated to limit infiltration" as required by the applicable North Carolina Uniform Residential Building Code. Also, the brick front stoop was constructed at a slant toward the bottom of the front entrance so that water flowed toward the front entrance rather than away from the house. Water running underneath the entrance frame and running down behind the door frames and window frames due to the improper flashing and the improper construction of the brick front stoop caused the rotting and deterioration of the window frames and door frames and the rotting and deterioration of the floorboards and support joists underneath the townhouse. As a result of this improper workmanship and alleged negligence, Ms. Cage had to replace the door frames, window frames, floorboards, support joists and carpeting, and needs to replace the brick front stoop and stairs and do some landscaping to provide for proper drainage away from the house.

The amended complaint filed on 21 June 1991 sought to recover the costs of these repairs on the grounds of Colonial's negligence,

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breach of implied warranties, and negligence *per se* for violations of the North Carolina Building Code by defendant.

On appeal, plaintiff first argues that the trial court erred in finding that North Carolina General Statutes § 1-50 (Cum. Supp. 1992) bars her cause of action against defendant and erred in granting defendant's 12(b)(6) motion. We agree.

North Carolina General Statutes § 1-50(5)(a)¹ states in pertinent part that:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause or substantial completion of the improvement.

Plaintiff, however, contends that the six year statute of repose does not apply to her case because of the exception found in North Carolina General Statutes § 1-50(5)(d)² which states that:

The limitation prescribed by this subdivision *shall not be asserted as a defense* by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition (emphasis added).

In light of the statutory language, we are first concerned as to when the defective or unsafe condition constituted the proximate cause of the damage occurring. We note that from the facts, plaintiff incurred substantial damage resulting from defendant's improper workmanship and original breach of warranty. In *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 85, 194 S.E.2d 817, 820 (1973), our Supreme Court stated that the statutory language "at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury . . ." must be read in light of the established rule that subsequent substantial damage

1. North Carolina General Statutes § 1-50(5)(a) was modified slightly in 1991.

2. North Carolina General Statutes § 1-50(5)(d) was unaffected by changes made to this section in 1991.

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is but an aggravation of the perhaps nominal damages which are inferred from the original breach of warranty or tortious invasion of a right." (citation omitted.)

Ms. Cage alleged in her complaint that she purchased a townhouse on 4 December 1984, when Colonial was the owner and builder, and that she discovered the defective condition in October of 1990 and filed her complaint on 25 January 1991, more than six years after the specific last act of defendant. Ms. Cage contends that because Colonial was in actual possession and the owner of the townhouse at the time it was constructed and at the time the defective condition causing the damage was constructed, North Carolina General Statutes § 1-50(5) cannot be asserted by Colonial as a defense to these claims. We believe that plaintiff is correct. At the time the copper flashing was improperly constructed, the openings and exterior improperly treated to limit infiltration, and at the time the brick front stoop was improperly constructed, defendant was in actual control as owner of the property. *Accord Earls v. Link, Inc.*, 38 N.C. App. 204, 247 S.E.2d 617 (1978) (in an action for breach of implied warranty against builder to recover costs of repairing a defective chimney, the discovery rule and the ten year statute of repose governed rather than North Carolina General Statutes § 1-50(5) because defendant builder was in actual control as owner at the time the defective condition was constructed).

Therefore, the ten year statute of repose set out in North Carolina General Statutes § 1-52(16)³ applies. The statute states that:

Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . 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.

Accordingly, the statute of limitations for plaintiff's cause of action did not accrue until physical damage to the townhouse became apparent in October of 1990 when the carpeting was removed.

3. North Carolina General Statutes § 1-52(16) was unaffected by changes made to this section in 1991.

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[111 N.C. App. 833 (1993)]

It was in October of 1990 that the three year statute of limitations enumerated in North Carolina General Statutes § 1-52(5), which governs the breach of implied warranty, negligence, and negligence *per se*, began to run. See *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); *Pembee Mfg. Corp. v. Cape Fear Constr. Co. Inc.*, 69 N.C. App. 505, 317 S.E.2d 41 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985).

Plaintiff then had three years from the time she discovered the latent defects (October 1990) to file suit. Plaintiff filed suit on 25 January 1991, well within the three year statute of limitations. Plaintiff's filing was also well within the ten year statute of repose which began to run on 7 December 1984 when defendant sold the townhouse to plaintiff. We, therefore, hold that plaintiff's complaint was timely filed and that the 12(b)(6) motion was improvidently granted by the trial court.

The decision of the trial court is reversed and this case is remanded for trial.

Judges WYNN and JOHN concur.

LAMONT BREWINGTON v. NORTH CAROLINA DEPARTMENT OF
CORRECTION

No. 9210IC675

(Filed 7 September 1993)

1. State § 8.3 (NCI3d) — unsecured drain cover in prison kitchen — negligence action against State — sufficiency of evidence to support findings

In an action to recover for injuries sustained by plaintiff inmate who slipped and fell on an unsecured drain cover in the kitchen of Central Prison, evidence was sufficient to support the trial court's findings with regard to the request to repair the drain cover, the availability of tamper-resistant screws, and completion of the repair.

Am Jur 2d, Penal and Correctional Institutions §§ 181, 200.

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[111 N.C. App. 833 (1993)]

2. State § 10 (NCI3d) — claim under Tort Claims Act — appeal to full Commission — findings and conclusions not required of Commission

The Industrial Commission, when hearing appeals of claims from a hearing commissioner under the Tort Claims Act, may make its own findings of fact and conclusions of law but is not required to do so, and though the ideal practice would be for the full Commission to give some factually specific reason for its decision in every case, when, as here, the claimant appeals to the Commission making only a general allegation that the hearing commissioner erred in finding that the defendant was not negligent and that such decision was not supported by the evidence, the Commission may respond to such appeal by reviewing the record and, when appropriate, affirming and adopting the decision and order of the hearing commissioner.

Am Jur 2d, Administrative Law §§ 447, 450.

Appeal by plaintiff from a decision and order of the Industrial Commission filed 6 March 1992. Heard in the Court of Appeals 26 May 1993.

Plaintiff filed this action on 12 June 1989, with the North Carolina Industrial Commission, pursuant to the North Carolina Tort Claims Act (N.C. Gen. Stat. §§ 143-291 to -300.1 (1990 & Supp. 1992)). Plaintiff alleged that, on 2 March 1989, while he was working in the kitchen of Central Prison, he was injured when he slipped and fell on an unsecured drain cover. Deputy Commissioner Scott Taylor heard the case, and by decision and order filed on 27 December 1990, he found that there was no negligence on the part of any of the named employees and officers of the defendant and denied the plaintiff's claim. Plaintiff appealed to the full Industrial Commission, which affirmed and adopted the decision and order of the Deputy Commissioner on 6 March 1992. From the decision and order of the Commission, plaintiff appeals.

Leland Q. Towns for plaintiff.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General E. H. Bunting, Jr., for defendant.

MCCRODDEN, Judge.

Plaintiff brings forward two arguments based on numerous assignments of error. First, he contends that the Commission erred

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in adopting the decision and order of the Deputy Commissioner because the Deputy Commissioner's findings of fact were not supported by the evidence which, he contends, actually showed that defendant was negligent.

Appeals to this Court from the full Industrial Commission are "for errors of law only . . . and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (1990). It does not matter that the evidence might support a contrary finding. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 683-84, 159 S.E.2d 28, 30-31 (1968). Thus, there are only two questions on appeal, whether there was any competent evidence to support the findings and whether those findings support the conclusions of law. *Id.* at 684, 159 S.E.2d at 31.

In his order, the Deputy Commissioner found, in pertinent part, the following facts:

4. Prior to 2 March 1989, Mr. George Jones, the food service supervisor, had been informed that the drain cover in the pots and pans area of the kitchen needed screws. Mr. Jones completed a work request for the replacement of the screws on 22 February 1989.
5. The drain covers in the Central Prison kitchen use tamper resistant screws . . . [which] are not available from general retail stores and must be ordered.
6. Prior to 2 March 1989, Mr. George Jones and Mr. Chester Edwards warned the inmates working in the kitchen, including plaintiff, about the unsecured drain cover.
7. Defendant's employee George Jones is not responsible for maintenance repairs, such as the replacement of screws. Maintenance of this type was carried out by the maintenance department, whose supervisor is Mr. [Marvin] Sills. The maintenance department handles such requests in the order of priority by need.
8. On and prior to 2 March 1989, Mr. Chester Edwards was not responsible for maintenance or repairs to the drain cover.
9. Following receipt of the request from Mr. Jones on 22 February 1989, the maintenance department responded. There were, however, no tamper resistant screws which were available at the time. As a temporary measure, regular screws were

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put in the drain cover, which were subsequently removed prior to plaintiff's injury on 2 March 1989. . . .

10. The drain cover was repaired with tamper resistant screws on 10 March 1989.

[1] Plaintiff assigned error to each of these findings. However, in his brief, he made arguments concerning only the last two of these assignments of error. Consequently, plaintiff has abandoned the balance of the assignments of error to the findings of fact, N.C.R. App. P. 28(b)(5), and we address only findings 9 and 10.

Upon review of the record, we determine that there was competent evidence to support finding of fact 9. At the hearing, George Jones, the food service supervisor, testified that he had submitted a maintenance request concerning the unsecured drain cover and that a drain in the kitchen was fixed on 22 February 1989. Jones, Harold Pearce, the plumber-supervisor at Central Prison, and Marvin Sills, the head of maintenance at the prison, all testified that there were no tamper resistant screws available at that time. No witness directly testified that the drain cover had been fixed with standard screws as a temporary measure prior to plaintiff's fall on 2 March 1989. However, Jones testified that at least one drain in the kitchen had been fixed on 22 February 1989. Pearce testified that during the period when there were no tamper resistant screws available, regular screws were used as a temporary measure; that it was possible that the drain in question had been one of the ones fixed on 22 February 1989; and that it was possible that regular screws had been placed in the drain cover and pried out again before the drain was fixed with tamper resistant screws. Sills also testified that the drain in question could have been one of those fixed on 22 February 1989. We conclude that this was sufficient evidence to support finding of fact 9.

Although we question the prejudice that would result from plaintiff's successful contention regarding finding of fact 10, we have reviewed the record and conclude that there was competent evidence supporting that finding as well. Pearce testified that tamper resistant screws were generally used to secure drain covers throughout the kitchen. During cross examination of Pearce by plaintiff's attorney, the following exchange occurred:

Q. When did you first try to fix the drain cover in question here?

A. It was fixed on the 10th.

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Q. On March 10?

A. Yes.

It is reasonable to infer that when Pearce said the drain was fixed on 10 March 1989, he meant it was fixed with tamper resistant screws. This is clearly some competent evidence from which the Deputy Commissioner could find that the drain had been fixed with tamper resistant screws on 10 March 1989.

Having reviewed the full record, we conclude that there was, in fact, competent evidence to support each of the Deputy Commissioner's findings of fact. There was evidence supporting the findings that the named defendants acted in a reasonable manner and breached no duty to the plaintiff, and these findings support the conclusion that none of the named defendants was negligent. This conclusion in turn supports the order denying plaintiff's claim. Accordingly, plaintiff's first argument is without merit.

[2] Plaintiff's second argument is that the full Commission denied him meaningful appellate review under N.C.G.S. § 143-292 by summarily affirming and adopting the Deputy Commissioner's decision and order.

In its order, the Commission stated that:

This matter is before the Full Commission on plaintiff's appeal from a Decision and Order filed by Deputy Commissioner Scott M. Taylor on December 27, 1990.

The undersigned have reviewed the record in its entirety and find no reversible error.

In view of the foregoing, the Full Commission AFFIRMS and ADOPTS as its own the Decision and Order as filed.

After discharge from prison, plaintiff may seek relief for any disability related to the injury per G.S. 97-13(c).

Each side shall pay its own costs.

Plaintiff relies on cases like *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988), and its progeny for the proposition that the full Commission must make its own findings of fact and conclusions of law. In *Joyner*, a panel of this Court proclaimed:

[A]lthough it hardly need be repeated, . . . the "full Commission" is not an appellate court in the sense that it reviews

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decisions of a trial court. It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it.

Joyner, 92 N.C. App. at 482, 374 S.E.2d at 613. The *Joyner* Court held that when the full Commission entered a decision and order that merely affirmed and adopted the findings of fact of the hearing officer, it denied the plaintiff effective appellate review. Our courts have consistently upheld and applied this principle, most recently in a case from last year, *Hardin v. Venture Construction Co.*, 107 N.C. App. 758, 421 S.E.2d 601 (1992).

The *Joyner* line of cases, however, is distinguishable from the case at hand, and we believe that it is not controlling in this situation. In *Joyner*, and in each of the cases that has followed its decision, the claim at issue was one for workers' compensation benefits, whereas the claim at issue here is one brought under the Tort Claims Act. The controlling statute in *Joyner et al*, Section 97-85 of the Workers' Compensation Act, provides that "[i]f application is made to the Commission . . . the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." N.C. Gen. Stat. § 97-85 (1991).

On the other hand, N.C.G.S. § 143-292 governs appeals to the Commission from a hearing commissioner, and it provides, in pertinent part:

Such appeal, when so taken, shall be heard by the Industrial Commission, sitting as a full Commission, on the basis of the record in the matter and upon oral argument of the parties, and said full Commission may amend, set aside, or strike out the decision of the hearing commissioner and *may* issue its own findings of fact and conclusions of law.

N.C.G.S. § 143-292 (emphasis added).

We believe that the function performed by the full Commission when addressing claims under the Tort Claims Act is not the same as the one it performs when hearing a workers' compensation claim. The clear meaning of the last sentence of the quoted portion of Section 143-292 is that the full Commission may, but is not required to, issue its own findings of fact and conclusions of law. It is also

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significant, we think, that under the Tort Claims Act, the full Commission is not empowered to hear new evidence as it is when hearing workers' compensation appeals. This means that the responsibility of weighing the credibility of the witnesses lies solely with the hearing commissioner. The Commission may only review the record of the deputy commissioner's hearing and oral arguments of the parties.

We conclude that the Commission, when hearing appeals of claims from a hearing commissioner under the Tort Claims Act may make its own findings of fact and conclusions of law, but that it is not required to do so. The ideal practice would be for the full Commission to give some factually specific reason for its decision in every case. However, when, as here, the claimant appeals to the Commission making only a general allegation that the hearing commissioner erred in finding that the defendant was not negligent and that such decision was not supported by the evidence, we believe that the Commission may respond to such appeal by reviewing the record and, when appropriate, affirming and adopting the decision and order of the hearing commissioner. Accordingly, we reject this assignment of error and affirm the decision and order of the Industrial Commission.

Affirmed.

Judges EAGLES and LEWIS concur.

WHITECO INDUSTRIES, INC. T/A WHITECO METROCOM v. JAMES E. HARRINGTON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 9210SC484

(Filed 7 September 1993)

1. Costs § 37 (NCI4th) — revocation and reinstatement of outdoor advertising permit — petitioner's motion for attorney's fees — trial court's jurisdiction

Where DOT revoked and subsequently reinstated petitioner's outdoor advertising permit for unlawful violation of control of access in violation of the Outdoor Advertising Con-

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trol Act, the trial court had jurisdiction to rule on petitioner's motion for attorney's fees pursuant to N.C.G.S. § 6-19.1, since the motion, filed well before final judgment, was timely.

Am Jur 2d, Costs §§ 79-82.

2. Costs § 37 (NCI4th); Highways, Streets, and Roads § 33 (NCI4th) — DOT's revocation of petitioner's outdoor advertising permit — substantial justification — award of attorney's fees improper

Where DOT revoked and subsequently reinstated petitioner's outdoor advertising permit for unlawful violation of control of access, the trial court erred in awarding petitioner attorney's fees since, at the time DOT revoked the permit, it had substantial justification for doing so, and its later reinstatement of the permit did not nullify that justification.

Am Jur 2d, Costs §§ 79-82.

Appeal by respondent from order entered 21 January 1992 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 15 April 1993.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth N. Strickland, for respondent-appellant.

MCCRODDEN, Judge.

This is an appeal from the trial court's order granting attorney's fees to petitioner pursuant to N.C. Gen. Stat. § 6-19.1 (1986). The North Carolina Department of Transportation (DOT) presents for review four arguments representing ten assignments of error. As in the companion case, *Whiteco v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993) (*Harrelson*), we address the jurisdictional question, but we do so only briefly since the analysis used in that case applies to this one as well. Also as in *Harrelson*, we reverse the trial court on the issue of substantial justification, and we do not reach DOT's other issues.

The facts of the case are as follows. Prior to 26 January 1989, DOT issued an outdoor advertising permit to petitioner Whiteco Industries, Inc. t/a Whiteco Metrocom for its outdoor advertising

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billboard. On 26 January 1989, two DOT officials, District Engineer R. J. Nelson (Nelson) and Transportation Technical L. D. Cook, observed a pickup truck within the controlled access area of Interstate 95. When DOT officials stopped along the interstate, a man who identified himself as Eddie Edwards (Edwards), stated that he was working for J. W. Wellons (Wellons) of J. W. Management Company. Wellons was the secretary of Hornes Motor Lodge, and Hornes Motor Lodge was the subject of the advertisement on petitioner's billboard on 26 January 1989. After talking to DOT officials, Edwards crossed the control of access fence for the interstate to move his vehicle.

On 27 January 1989, Nelson revoked petitioner's outdoor advertising permit for unlawful violation of control of access, in violation of the Outdoor Advertising Control Act, N.C. Admin. Code tit. 19A, r. 2E.0210(9) (December 1990). DOT upheld the revocation on 3 March 1989.

On 3 April 1989, petitioner filed a petition for judicial review of DOT's final decision. On 6 May 1991, petitioner served DOT with affidavits of Wellons and Robert Sykes, petitioner's Vice President and General Manager, and a motion for summary judgment. The affidavits stated: that Edwards was employed by Wellons; that Wellons had instructed Edwards to paint a sign owned by Wellons; Edwards, instead of going to the sign owned by Wellons, mistakenly went to petitioner's billboard; and Edwards committed the violation while at petitioner's billboard. On 7 June 1991, respondent reinstated the permit and requested that petitioner cancel the hearing on the motion for summary judgment scheduled for 10 June 1991, since the permit had been reinstated. At the hearing on 10 June 1991, the trial judge directed petitioner to prepare an order denying summary judgment because it was moot. The order was filed 25 June 1991.

On 10 June 1991, petitioner filed a motion for attorney's fees pursuant to N.C.G.S. § 6-19.1 and N.C. Gen. Stat. § 1A-1, Rule 11 (1990). At the 2 July 1991 hearing, the trial judge made no ruling in open court, but suggested that the parties schedule a hearing in January 1992, so that if the fee request were granted, a hearing could be held on the reasonableness of the attorney's fees. On 30 October 1991, the judge made a notation to the courtroom clerk to place an entry in the court file finding that, pursuant to N.C.G.S. § 6-19.1, petitioner was entitled to costs and attorney's fees in the amount \$9,834.21.

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On 10 January 1992, the trial judge heard arguments on the substantial justification of DOT's position in the underlying litigation and the reasonableness of attorney's fees requested by petitioner. On 21 January 1992, the trial judge entered an order granting petitioner's motion for attorney's fees and awarding fees in the amount of \$9,834.21 and costs in the amount of \$1,022.40.

[1] The first argument we consider is DOT's contention that the trial court did not have jurisdiction to rule on petitioner's motion for attorney's fees pursuant to N.C.G.S. § 6-19.1. DOT contends, *inter alia*, that petitioner filed its motion for attorney's fees prematurely because there was no final disposition of the case at the time the motion was filed and, therefore, the trial court did not have jurisdiction to award attorney's fees. We addressed the same issue in *Harrelson*, and we rejected as too narrow DOT's argument that the 30-day period establishes a starting point as well as a deadline. We found that petitioner's motion for attorney's fees, filed well before final judgment, was timely, and accordingly, we ruled that the trial court had jurisdiction in the matter. We adopt the reasoning from that opinion and determine that the trial court had jurisdiction in this case as well.

[2] DOT's second contention is that the trial court erred in awarding attorney's fees because DOT was substantially justified in revoking petitioner's outdoor advertising permit. N.C.G.S. § 6-19.1 grants a trial court the power to require the State to pay attorney's fees under certain conditions:

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) The Court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The Court finds that there are no special circumstances that would make the award of attorney's fees unjust.

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In order to award attorney's fees under this statute, the trial judge had to determine first that the petitioner was the prevailing party. Since petitioner's petition demanded reinstatement of its outdoor advertising permit and DOT ultimately reinstated it, DOT does not contest the trial court's finding that petitioner was a prevailing party.

In addition to finding that petitioner was the prevailing party, the trial court had to determine that DOT acted without substantial justification in pressing its claim against petitioner and revoking petitioner's outdoor advertising permit. In reviewing DOT's argument on this issue, our first task is to determine the standard of review of the trial court's decision that DOT lacked substantial justification. In *Harrelson*, we followed *Tay v. Flaherty*, 100 N.C. App. 51, 55, 394 S.E.2d 217, 219, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990), in treating substantial justification as a conclusion of law, and hence reviewable by this Court on appeal.

This Court has relied on the case of *Pierce v. Underwood*, 487 U.S. 552, 101 L.Ed.2d 490 (1988), to define substantial justification as justification "to a degree that could satisfy a reasonable person . . ." *Tay*, 100 N.C. App. at 56, 394 S.E.2d at 219. To be "substantially justified" means "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce*, 487 U.S. at 566, 101 L.Ed.2d at 505. We agree with petitioner that the burden is on the party against whom attorney's fees are sought to show substantial justification of its action. *Tay*, 100 N.C. App. at 55, 394 S.E.2d at 219.

As in *Harrelson*, DOT argues that their position in revoking petitioner's permit was substantially justified because this matter is a case of first impression and DOT was attempting to obtain an interpretation of North Carolina caselaw to determine in which situations DOT may revoke outdoor advertising permits. For DOT to revoke an outdoor advertising permit, it must meet certain criteria, which are set forth in *National Advertising Co. v. Bradshaw*, 60 N.C. App. 745, 299 S.E.2d 817 (1983), and *Whiteco Metrocom Inc. v. Roberson*, 84 N.C. App. 305, 352 S.E.2d 277 (1987). The *National Advertising* Court found that DOT must (1) clearly identify persons (2) who committed a violation for which revocation is permissible and (3) show a sufficient connection between those persons and

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the permit holder. *National Advertising*, 60 N.C. App. at 749, 299 S.E.2d at 819.

In *National Advertising*, the Court found that DOT improperly revoked petitioner's outdoor advertising sign permit for unlawful destruction of vegetation on the highway right of way. *Id.* In that case, the evidence tended to show that vegetation around petitioner's sign had been cut and that petitioner had worked on the sign at approximately the time the vegetation was cut. However, DOT failed to identify the persons who cut the trees. *Id.*

In the instant case, unlike *National Advertising*, DOT clearly identified the persons who violated N.C. Admin. Code tit. 19A, r. 2E.0210(9) and connected those persons to the petitioner by showing that Edwards, who crossed the control of access fence, was employed by Wellons of Hornes Motor Lodge, which was the advertiser on petitioner's billboard.

In *Whiteco Metrocom*, this Court held that petitioner's permit was properly revoked under the Outdoor Advertising Control Act, N.C. Gen. Stat. §§ 136-126 to -140 (1986 and Supp. 1992), when petitioner hired an independent contractor to maintain its sign and employees of the independent contractor violated the Act. The Court stated that "by obtaining the statutorily authorized permit, petitioner accepted the duty to follow the law in its exercise; and petitioner did not rid itself of this duty by hiring an independent substitute to act for it; for a duty imposed by statute cannot be delegated." *Whiteco Metrocom*, 84 N.C. App. at 307, 352 S.E.2d at 278.

Citing *Whiteco Metrocom* and *Hulshof v. Mo. Highway & Transp. Comm'n.*, 737 S.W.2d 726 (Mo. 1987), we held in *Harrelson*, that DOT was substantially justified in revoking petitioner's outdoor advertising permit when an agent of the lessee of the billboard violated the Outdoor Advertising Control Act. To have ruled otherwise would have invited petitioner to do indirectly what it could not do directly, *i.e.*, violate the Act with impunity.

The case at hand is somewhat different from *Harrelson*, because the person who violated the Act, while an employee of Hornes Motor Lodge which rented the billboard, was at petitioner's billboard by mistake. The record reveals, however, that petitioner filed affidavits to this effect on 6 May 1991, more than two years after DOT upheld the revocation of petitioner's permit, and that DOT responded by reinstating the permit on 7 June 1991. Given peti-

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tioner's delay in advising DOT of this fact, we cannot say that DOT's reinstatement of the permit was untimely.

In summary, we find that, at the time DOT revoked petitioner's outdoor advertising permit, it had substantial justification for doing so and that its later reinstatement of the permit did not nullify that justification. We consequently reverse the trial court's order of attorney's fees.

Reversed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. JAMES ROBERT BYNUM, DEFENDANT

No. 9210SC468

(Filed 7 September 1993)

1. Evidence and Witnesses § 373 (NCI4th) — other offense committed by defendant — admissibility to show victim's state of mind

In a prosecution of defendant for taking indecent liberties with a minor and statutory sexual offense, the trial court did not err in admitting testimony by the victim that defendant, her stepfather, put her on the kitchen counter, took out a knife and sharpened it, and was going to kill her except that her mother walked into the room, since the evidence was not offered to show defendant's character but was instead offered to show the victim's state of mind; the evidence was probative on the issue of the victim's hesitancy in telling her mother of the alleged abuse; and the possible prejudicial effect of the testimony did not outweigh its probative value.

Am Jur 2d, Evidence § 360.

2. Rape and Allied Offenses § 19 (NCI3d) — taking indecent liberties with minor — failure to prove defendant's age — jury's inference reasonable

In a prosecution of defendant for taking indecent liberties with a minor, there was no merit to defendant's contention that the case should have been dismissed for failure of the

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State to produce any evidence of his age, which was an essential element of the crime, since the jury could reasonably infer from its observation of defendant and other evidence that defendant was at least sixteen and that he was five years older than the victim, particularly in light of the fact that he was twenty-four years older than the age element of the crime.

Am Jur 2d, Rape §§ 51, 88.

Appeal by defendant from judgment entered 16 December 1991 by Judge Dexter M. Brooks in Wake County Superior Court. Heard in the Court of Appeals 13 April 1993.

Defendant was convicted on two counts of taking indecent liberties with a minor and one count of being a habitual felon. Defendant appeals the sentence of life imprisonment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Alexander McC. Peters, for the State.

Cheshire, Parker, Hughes & Manning, by John F. Oates, Jr., for defendant-appellant.

ORR, Judge.

Defendant was indicted and tried on two counts of taking indecent liberties with a minor, one count of statutory sexual offense, and one count of obtaining status as a habitual felon. The charges stem from two separate incidents involving the defendant's stepdaughter, Crystal Frances Rockriver.

Trial was held in Wake County Superior Court on 12 August 1991. The State called the alleged victim as a witness. She testified on direct examination that during the time that she lived with her stepfather, he had on one occasion told her to disrobe and lay on top of him, so that "her privates were touching his stomach . . ." and on another occasion, he had pushed his foot into her crotch. When questioned by the prosecutor during its case-in-chief as to the reason she waited over one year to report these incidents, the witness responded that she was afraid of the defendant. She further testified, over defense objection, as follows:

Q. Did Jim ever threaten you any other time that summer?

A. Un-uh

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Q. Okay. When and what happened?

A. Well, when he pulled out a knife, he had threatened me.

Q. When did he pull out a knife? Where were you?

A. I was in my bed. Mama told me to go to bed.

Q. If you can speak up; I can't hear you.

A. Okay. Well, my mama told me and Ryan to go to bed, and then Ryan went up and got on the couch, and Jim got me up, and he just made me walk into the kitchen, he kicked my back.

Q. And then what happened?

A. And then he put me up on the shelf—well, up on the counter, and then he pulled—he took out the knife, started to sharpen it with, you know, a knife sharpener. He started to sharpen it, sharpen it, and—

Q. Go ahead.

A. And then my mama came in because Ryan told her.

Q. What did Jim do with the knife when he sharpened it?

A. He was going to kill me.

After the close of all the evidence, the jury found the defendant guilty on both counts of taking indecent liberties with a minor. The defense then moved to overturn the verdicts on the grounds that the State had failed to introduce evidence that the defendant was over sixteen years old, an essential element of the crime of taking indecent liberties with a minor. At the time of the trial, the defendant was forty-one years old. The court denied the motion, and the defendant was sentenced to life imprisonment.

I.

[1] In his first assignment of error, defendant contends that the admission of the testimony regarding the knife threatening incident was beyond the scope of Rule 404(b)'s exceptions. We are compelled to disagree and therefore affirm the decision of the trial court.

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N.C.G.S. § 8C-1, Rule 404(b) provides that:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1986).

The courts of North Carolina have interpreted the exceptions listed in Rule 404(b) as examples of "other purposes" and have held that there is a "clear general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis in original).

"Evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the person accused." *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 889 (1991) (quoting *Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990)). Therefore, even though evidence presented may tend to show that the defendant may have committed other crimes or "bad acts", or that the defendant had a propensity to commit those acts, it will be admissible if it is relevant for some other purpose. *Stager* at 303, 406 S.E.2d at 890.

State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986), set forth the procedure to be followed in considering the admissibility of evidence pursuant to Rule 404(b). The trial court must first make the determination that the evidence is of the type and offered for a proper purpose under the rule. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). Next, a determination of relevancy should be made. Relevancy is defined as "any tendency to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). Upon a finding that the evidence offered is of the type intended, that its purpose is other than to show propensity, and that it is relevant, the trial judge is then required to balance the probative value of the extrin-

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sic conduct evidence against its prejudicial effect. *Morgan*, at 640, 340 S.E.2d at 91.

The State contends that the above testimony was elicited to show the victim's state of mind, explaining the delay in reporting the incidents to her mother. In *State v. Barnes*, 77 N.C. App. 212, 334 S.E.2d 456 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986), on facts similar to those in the case at bar, an incest victim was permitted to testify that she was afraid of her father because he was mean. There, the trial court found that the state of mind of the victim was relevant evidence and admitted for a proper purpose. "The disputed evidence was not elicited to show the bad character of the defendant, but to explain why [she] had not told her mother about the incident." *Barnes*, at 216, 334 S.E.2d at 458. Likewise, here the evidence was not proffered to show the defendant's character, but to show that Crystal was afraid of her father. Even though no further testimony was elicited from the witness in *Barnes* to explain what specific acts made the child think her father was mean, the inclusionary nature of the rule allows evidence of other acts, crimes, or wrongs, unless its only purpose is to show the character of the defendant or his propensity to commit the crime charged. Therefore, the last determination that the trial judge was required to make was whether the testimony's probative value outweighed the prejudicial effect under Rule 403.

The record indicates that the trial court conducted a *voir dire* hearing in order to rule on the admission of the disputed testimony. The court found that the "testimony of the witness is relevant to the issue of the delayed reporting, and weighing the evidence under Rule 403, [the court found] that it's not unduly prejudicial." Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *State v. Schultz*, 88 N.C. App. 197, 362 S.E.2d 853 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). His decision will not be reversed absent an abuse of that discretion. *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

In the case *sub judice*, the prosecutor's questions concerning Crystal's state of mind were relevant and probative on the issue of her hesitancy in telling her mother of the alleged abuse. The possible prejudicial effect to the defendant did not outweigh these

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factors. We conclude therefore that there was no error in the trial court's ruling on its admission.

II.

[2] Defendant next asserts that the trial court erred in denying defendant's motion to dismiss the case for insufficiency of evidence. He argues that the State failed to produce any evidence of his age, and that age is an essential element of the crime he is charged with. The offense of taking indecent liberties with a child, a felony, is set forth at N.C. Gen. Stat. § 14-202.1 which provides:

(a) A person is guilty of taking indecent liberties with any child if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for a purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C.G.S. § 14-202.1 (1986). Defendant does not dispute that his alleged conduct falls within the purview of both subsections of the statute. However, defendant argues that the State offered no specific evidence on the first element of the offense which requires defendant to be at least sixteen years of age.

However, "a jury may base its determination of a defendant's age on its own observation of him even when the defendant does not testify." *State v. Gray*, 292 N.C. 270, 286, 233 S.E.2d 905, 915-16 (1977). The defendant was in fact forty-one years old at the time of the trial. Testimony was given that showed that the defendant married the victim's mother in 1987. The defendant was present in the courtroom during the trial so that the jury could see him. There was evidence that the defendant drank alcoholic beverages and had done so for a number of years.

The jury could reasonably infer that the defendant was at least sixteen, and that he was five years older than the victim, particularly in light of the fact that he was twenty-four years older than the age element of the crime. Accordingly, this assignment of error is also overruled.

WALKER v. N.C. DEPT. OF E.H.N.R.

[111 N.C. App. 851 (1993)]

No error.

Judges JOHNSON and McCRODDEN concur.

RICHARD WALKER, ET AL., PETITIONERS v. N.C. DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT, COASTAL RESOURCES COMMISSION, RESPONDENT, AND ORIENTAL HARBOR DEVELOPMENT COMPANY, INC., RESPONDENT-INTERVENOR

ORIENTAL YACHT CLUB, JOSEPH H. COX, ET AL., PETITIONERS v. N.C. DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT, COASTAL RESOURCES COMMISSION, RESPONDENT, AND ORIENTAL HARBOR DEVELOPMENT COMPANY, INC., RESPONDENT-INTERVENOR

No. 923SC348

(Filed 7 September 1993)

Environmental Protection, Regulation, and Conservation § 45 (NCI4th) — proposed marina over public trust lands — easement required prior to issuance of dredge/fill permit

The Coastal Resources Commission erred in issuing a CAMA major development/dredge and fill permit allowing construction of a marina by a private developer over public trust waters without the prior granting of an easement by the Department of Administration, subject to approval by the Governor and the Council of State, since the proposed marina was to have 148 boat slips, was to cover 5.9 acres of public trust waters, and would require hydraulic excavation of 9 acres of public trust lands; as a matter of law, a project of such magnitude could not be deemed to have only a "minor impact" on public trust waters; petitioner had no independent riparian or littoral property rights to construct the marina; and an easement was therefore required prior to issuance of a CAMA permit. N.C.G.S. § 146-12 and N.C. Admin. Code tit. 1, r. 6B.0605.

Am Jur 2d, Pollution Control §§ 117 et seq., 220 et seq., 517.

Validity of state statutory provision permitting agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

Appeal by petitioners from order entered 20 December 1991 by Judge G. K. Butterfield in Pamlico County Superior Court. Heard in the Court of Appeals 10 March 1993.

Manning, Fulton & Skinner, by Howard E. Manning and Edwin Pate Bailey, for petitioner appellants.

Attorney General Lacy H. Thornburg, by Associate Attorney General David G. Heeter, and Assistant Attorney General Robin W. Smith, for respondent appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for respondent-intervenor appellee.

COZORT, Judge.

The dispositive issue presented by this appeal is whether the Department of Administration must grant an easement for the construction of a commercial marina by a private developer over public trust waters pursuant to N.C. Gen. Stat. § 146-12 (1991) and N.C. Admin. Code tit. 1, r. 6B.0605 (June 1987). We answer in the affirmative and hold the trial court erred in upholding an order of the Coastal Resources Commission issuing a development permit to respondent without the granting of an easement by the Department of Administration.

On or about 25 September 1989, the Oriental Harbor Development Company, Inc. (Oriental Harbor) applied for a Coastal Area Management Act (CAMA) major development/dredge and fill permit to build a commercial marina on Smith Creek in Oriental, North Carolina. The marina site plan calls for approximately 148 boat slips on four floating docks eight feet wide and ranging from 375 to 560 feet long. The docks of the proposed marina would encircle approximately 5.9 acres of public trust waters. Approximately 9 acres of submerged lands would be excavated to construct the marina. The waters near the proposed site of Smith Creek are designated as a primary nursery area by the North Carolina Marine Fisheries Commission. The Commission has closed the waters in the vicinity of the site to shellfishing because of bacterial contamination. Prior to the closing, the area had been used for trawling shrimp and crab, netting fish, and anchoring and launching boats.

As part of the review process for issuance of the CAMA permit, the Department of Environment, Health and Natural Resources, Division of Coastal Management, Coastal Resources Commission

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[111 N.C. App. 851 (1993)]

(CRC) submitted Oriental Harbor's application to the Department of Administration (DOA) with a request for comments. On 6 November 1989, DOA responded in writing: "No Easement Required." The CRC issued permit No. 39-90 (the "permit") to Oriental Harbor on 9 March 1990. Petitioners objected to the issuance of the permit and initiated this action on 9 May 1990 by filing petitions for contested case hearings with the Office of Administrative Hearings, pursuant to N.C. Gen. Stat. § 150B-22, et seq. (1991).

The contested cases were assigned to Administrative Law Judge Fred G. Morrison, Jr., who consolidated the cases. A full evidentiary hearing was held on the matter from 28 August to 30 August 1990. On 11 January 1991, Judge Morrison filed a recommended decision, recommending:

That the CAMA Major Development/Dredge and Fill Permit No. 39-90 be revoked and that no CAMA Permit be issued to the Oriental Harbor Development Company, Inc. as requested in its application filed on September 25, 1989, on the grounds that the Permit allows the conversion of public trust lands and waters to private use, contrary to law, and no easement for use of public trust submerged lands has been granted by the Department of Administration and approved by the Governor and Council of State.

The CRC issued an order on 19 April 1991 rejecting the ALJ's recommended decision, finding that the permit was properly issued, and denying the petitioners' appeals in the contested cases. On 22 May 1991, petitioners filed a petition for judicial review in the Pamlico County Superior Court seeking review of the CRC's order. In their petition, the petitioners specifically raised the issue of "the DOA's non-action regarding an easement." The petition included a lengthy argument contending that "[t]he reply of the DOA to the CRC stating 'No easement required' does not comply with the requirements of law and on its face is unlawful."

A hearing was held before Judge G. K. Butterfield in Pamlico County Superior Court. By order entered 20 December 1991, the trial court affirmed the CRC's order upholding issuance of the permit. Petitioners filed timely notice of appeal.

Petitioners advance twenty-two assignments of error on appeal, five of which address the legality of the issuance of the permit without requiring an easement from the DOA. We hold the CRC

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erred by issuing the permit in this case without the granting of an easement by the DOA.

It is undisputed that the site for the marina approved by the permit is situated in the public trust waters and submerged lands thereunder. Our Supreme Court noted long ago:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Land Co. v. Hotel, 132 N.C. 517, 527-28, 44 S.E. 39, 42 (1903). According to N.C. Gen. Stat. § 146-3, the State may not convey submerged lands in fee; it may grant easements therein. *See* N.C. Gen. Stat. § 146-3 (1991). The power to grant such easements is vested as follows:

The Department of Administration may grant, to adjoining riparian owners, easements in lands covered by navigable waters or by the waters of any lake owned by the State for such purposes and upon such conditions as it may deem proper, with the approval of the Governor and Council of State. The Department may, with the approval of the Governor and Council of State, revoke any such easement upon the violation by the grantee or his assigns of the conditions upon which it was granted.

N.C. Gen. Stat. § 146-12 (1991).

The statute does not impose an affirmative duty to grant an easement in every circumstance. However, the regulations promulgated thereunder clearly indicate that a project of the magnitude of the project below requires an easement prior to the issuance of a CAMA and dredge/fill permit. N.C. Admin. Code tit. 1, r. 6B.0605 provides:

(a) Riparian owners may construct piers or docks to gain access to navigable waters without an easement. Such structures may include a weatherproof shelter if the use of the shelter is in keeping with riparian access.

(b) Easements in lands covered by navigable waters are generally required for any structure built over navigable waters

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for purposes other than gaining riparian access. The Department of Administration may exempt from this provision structures deemed minor in their impact upon the public trust waters of the state. Examples of such exempt structures include boat ramps, duck blinds, small groins, and the like.

(c) Easements in lands covered by navigable waters will be granted upon application to the Department of Administration for such purposes and upon such conditions as the Department of Administration may deem proper and in the public interest, with approval of the Governor and the Council of State.

Our reading of the statute and the regulations leads us to the conclusion that the proposed development required an easement from the DOA. The project includes a 148-slip marina covering 5.9 acres of public trust waters, requiring the hydraulic excavation of 9 acres of public trust lands. The respondent Department's own witness, Preston P. Pate, the Assistant Director of the Division of Coastal Management, acknowledged that the project authorized by the CRC permit does not fall within the "minor impact" exception outlined in subsection (b). We hold, as a matter of law, that an undertaking of this magnitude cannot be deemed to have only a "minor impact" on public trust waters. A large commercial marina cannot be compared to a duck blind or boat ramp. Because the marina therefore does not fall within an exemption to the easement requirement as outlined in N.C. Admin. Code tit. 1, r. 6B.0605(b), an easement is required for this project unless respondent has the right to construct a marina pursuant to a riparian right as permitted by subsection (a).

Respondent CRC has narrowly interpreted riparian rights to allow the limited construction of private docks and piers leading to navigable waters. Here, the docks are for commercial use and traverse public trust waters. With regard to littoral property rights, this Court recently stated in *Weeks v. N.C. Dept. of Nat. Resources and Comm. Development*, 97 N.C. App. 215, 388 S.E.2d 228, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990):

[T]he plaintiff's status as a littoral property owner does not guarantee him an absolute right to access over the tidal area . . . because this right is "subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers

or navigable waters." Thus, plaintiff's right in the appurtenant submerged land is subordinate to public trust protections

Id. at 226, 388 S.E.2d at 234 (citation omitted). Furthermore, N.C. Admin. Code tit. 15A, r. 7H.0207(d) (April 1993) reads in part:

In the absence of overriding public benefit, any use which significantly interferes with the public right of navigation or other public trust rights which the public may be found to have in these [public trust] areas shall not be allowed. . . . [T]he building of piers, wharfs, or marinas are examples of uses that may be acceptable within public trust areas, provided that such uses will not be detrimental to the public trust rights and the biological and physical functions of the estuary.

Here, the marina site would "consist of four floating docks (ranging from 375 to 540 feet in length), a fuel dock and a breakwater." The waters of Smith Creek in the vicinity of the project site constitute public trust waters and estuarine waters which are currently areas of environmental concern. Evidence in the record indicates that the construction of the large floating docks would significantly affect the public's right to navigate the waters and would additionally have an impact on the biological and physical functions of the estuary. Accordingly, we hold that Oriental Harbor has no independent riparian or littoral property rights to construct the marina as planned.

We hold that the CRC erred in issuing permit No. 39-90 allowing construction of the marina without the prior granting of an easement by the Department of Administration, subject to approval by the Governor and the Council of State. Other issues raised by petitioner need not be considered here because those issues may not arise when the matter is reconsidered below. The trial court's order affirming CRC's approval of CAMA Major Development/State Dredge and Fill Permit 39-90 is reversed. Permit 39-90 is revoked and the matter is remanded for resubmission to the Department of Administration and any other proceedings as become necessary.

Reversed and remanded.

Judge WYNN concurs.

Judge EAGLES concurs in the result.

DEPT. OF TRANSPORTATION v. OVERTON

[111 N.C. App. 857 (1993)]

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. DOLPH D. OVERTON,
III, AND WIFE, SUE H. OVERTON AND CSX TRANSPORTATION, INC.,
DEFENDANTS

No. 9211SC781

(Filed 7 September 1993)

Eminent Domain § 172 (NCI4th) — condemnation proceeding — safety issue — finding by trial court required

If a condemnation proceeding brought by the DOT is subject to review due to allegations of arbitrary and capricious conduct or abuse of discretion, and if the court finds safety to be of legitimate concern, the trial judge must make a finding of fact on that issue, and, absent such a ruling, an appellate court cannot properly review the trial court's decision as to whether DOT's actions were arbitrary and capricious. In this case where defendant railroad claimed that the DOT's proposed railroad crossing was unsafe, it was error for the trial court to determine that DOT did not act in an arbitrary and capricious manner in choosing this particular route without first finding whether the proposed crossing was unreasonably dangerous.

Am Jur 2d, Eminent Domain § 375 et seq.

Appeal by defendants from judgment entered 13 February 1992 by Judge Robert L. Farmer in Johnston County Superior Court. Heard in the Court of Appeals 10 June 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General Emmett B. Haywood, for the State.

Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr., Gilbert C. Laite, III, and Stephen H. Shook, for defendant CSX Transportation, Inc.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast and T. Michael Lassiter, Jr., for defendants Dolph D. Overton, III and Sue H. Overton.

LEWIS, Judge.

On 8 August 1989 the Department of Transportation (hereafter "DOT") filed complaints and the necessary declarations of taking

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[111 N.C. App. 857 (1993)]

and notices of deposit against Dolph Overton, III, his wife Sue Overton, and CSX Transportation, Inc. (hereafter "CSX"), seeking to condemn a roadway across CSX's main line railroad right of way. Although the Overtons are denominated as defendants in this action, they actually petitioned to have the road built and have fully cooperated with DOT. CSX, however, opposed the roadway. At a hearing held pursuant to N.C.G.S. § 136-108, the trial court dismissed CSX's defenses and objections for insufficient evidence under Rule 41 of the North Carolina Rules of Civil Procedure. CSX now appeals from this dismissal.

According to DOT, the purpose of the condemnation proceeding was to acquire the right of way for the extension of an existing secondary road across CSX's railroad tracks to connect U.S. 301 with Interstate 95. The total length of the proposed extension is approximately .2 miles. The Overtons own Kenly Industrial Park, into which the existing road dead ends and which would benefit from the proposed roadway. DOT emphasizes that the extension would serve the Town of Kenly's water and sewer facility as well as the Kenly Industrial Park. The road would be part of the State's secondary road system. In addition to the petition of the Overtons, DOT points out that the Johnston County Board of Commissioners, the Town of Kenly and the Johnston County School Board also requested the extension.

CSX argues that DOT acted arbitrarily, capriciously and in an abuse of discretion, that the point of crossing is unreasonably dangerous, that the takings are not for a proper public purpose, and that DOT violated State environmental laws. CSX estimates that 10,500 of the 14,700 estimated daily traffic count will be for Kenly Industrial Park. CSX objected to DOT's proposed agreement and plans in September 1987, and continued to object, urging DOT to consider alternative routes due to the hazardous location of the proposed road and crossing. In December 1988 DOT adopted a Resolution and Order requiring CSX to provide a "proper grade crossing." CSX, however, refused to allow DOT to enter its right of way, and advised DOT that it would deny access for the proposed construction and that the Order was invalid. Nevertheless, DOT began construction on the road up to CSX's right of way, and filed the present condemnation proceeding in August 1989. Construction of the crossing was stayed pending the resolution of this case.

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[111 N.C. App. 857 (1993)]

The standard of review of a Rule 41(b) dismissal is whether any evidence supports the findings of the trial judge, notwithstanding evidence to the contrary. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218-19 (1983). If the findings of fact are supported by the evidence and those findings support the conclusions of law, they are binding on appeal. *Id.* at 741-42, 309 S.E.2d at 219.

The power of eminent domain is a prerogative of a sovereign state, limited only by the constitutional requirements of due process and the payment of just compensation for the property. *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). The Department of Transportation possesses the power of eminent domain and has broad discretion in establishing, constructing and maintaining roads and highways for the public use. N.C.G.S. § 136-18 (Cum. Supp. 1992); *State Highway Comm'n v. Batts*, 265 N.C. 346, 356, 144 S.E.2d 126, 133 (1965). Generally, once a public purpose is established the taking is not reviewable by the courts. *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972); Webster, *Real Estate Law in North Carolina*, § 403, p. 524 (3d ed. 1988). However, allegations of arbitrary and capricious conduct or of abuse of discretion on the part of the condemnor render the issue subject to judicial review. *Duke Power Co. v. Ribet*, 25 N.C. App. 87, 89, 212 S.E.2d 182, 183 (1975); *McNeely*, 281 N.C. at 690, 190 S.E.2d at 185. "Exercise of the Board's discretionary authority so conferred upon it by statute is not subject to judicial review, unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse." *Guyton v. North Carolina Bd. of Transp.*, 30 N.C. App. 87, 90, 226 S.E.2d 175, 177 (1976).

We note that either DOT or another party to a condemnation proceeding may request a section 136-108 hearing, at which the judge "shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages . . ." N.C.G.S. § 136-108 (1986). The judge's function at a section 136-108 hearing is to decide all questions of fact other than damages and to adjudicate DOT's right to condemn the specified property. *See North Carolina State Hwy. Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

CSX's main argument on appeal is that DOT acted arbitrarily and capriciously and abused its discretion in selecting the site

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and in choosing to condemn CSX's property for the proposed roadway and crossing. One of the significant factors which renders DOT's decision arbitrary and capricious, according to CSX, is safety. CSX points out that the trial court failed to make a finding regarding safety, however, and that this failure requires reversal. Although the trial court found that the proposed crossing would be "controlled by gates and signals for the safety of the public," the trial court also stated,

The Court cannot rule whether the proposed crossing is safe or dangerous; nor may the Court substitute its judgment for that of the Department of Transportation although the Court can and has considered evidence regarding the safety of the proposed crossing.

The court concluded that DOT's actions were neither arbitrary and capricious nor an abuse of discretion. CSX argues that the court could not properly reach a conclusion regarding whether the condemnation was arbitrary and capricious or an abuse of discretion without first determining whether or not the proposed crossing was safe. Thus, according to CSX the court's conclusion is not supported by the court's findings of fact, and a Rule 41(b) dismissal was therefore improper. CSX asks this Court, among other things, to outline the analysis trial courts should apply to claims of arbitrary and capricious conduct in condemnation proceedings, specifically concerning the treatment of safety issues.

The safety of a proposed condemnation is clearly a factor to be considered in the arbitrary and capricious analysis, but no North Carolina cases discuss whether or not the trial judge must actually make a finding on the issue of safety at a section 136-108 hearing. However, as stated above, the trial judge must resolve all issues other than damages at such hearings. We therefore hold that if condemnation proceedings are subject to review due to allegations of arbitrary and capricious conduct or abuse of discretion, and if the court finds safety to be of legitimate concern as he did here, the trial judge must make a finding of fact on that issue. Absent such a ruling, an appellate court cannot properly review the trial court's decision as to whether or not DOT's actions were arbitrary and capricious.

In the case at hand testimony indicated that all railroad crossings are considered dangerous. In this situation the trial court would have to determine whether or not the proposed crossing

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[111 N.C. App. 861 (1993)]

was unreasonably dangerous. This determination would involve weighing the benefits of the crossing against the potential hazards associated with it. A finding that the crossing would be unreasonably dangerous would certainly affect the court's decision as to whether or not DOT had acted arbitrarily and capriciously. Though not an issue here, quere: If DOT requires CSX to provide a grade crossing despite considerable and significant evidence that the site is unduly dangerous, should the railroad be solely responsible for damages in the event of an accident?

In this case, we cannot determine whether a Rule 41(b) dismissal was appropriate because we cannot determine whether the trial judge's conclusion of law that DOT did not act in an arbitrary and capricious manner was supported by its findings of fact. Thus, it was error for the trial judge to state that he could not rule on whether the proposed crossing was safe or dangerous.

Reversed and remanded.

Judges EAGLES and MCCRODDEN concur.

STATE OF NORTH CAROLINA v. ROY STEVEN WILLIAMS

No. 926SC134

(Filed 7 September 1993)

**Criminal Law § 762 (NCI4th)— reasonable doubt instruction—
reference to moral certainty—violation of due process—
instruction not harmless error**

The trial court's instruction 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; furthermore, a jury instruction on reasonable doubt which violates the Due Process Clause cannot be harmless regardless of how overwhelming the evidence of defendant's guilt.

Am Jur 2d, Trial § 1370 et seq.

STATE v. WILLIAMS

[111 N.C. App. 861 (1993)]

Appeal by defendant from judgment entered 1 July 1991 by Judge William C. Griffin, Jr., in Halifax County Superior Court. Originally heard in the Court of Appeals 3 March 1993.

By order dated 29 July 1993, the North Carolina Supreme Court remanded this case for our reconsideration of the previous opinion reported at 110 N.C. App. 306, 429 S.E.2d 413 (1993), and filed on 18 May 1993, in light of the United States Supreme Court's 1 June 1993 opinion in *Sullivan v. Louisiana*, 508 U.S. ---, 124 L.Ed.2d 182 (1993).

This opinion supersedes our previous opinion in this case.

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.

The evidence at his second trial 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

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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."

At the conclusion of the 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.G.S. § 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.

The sole assignment of error we consider pertains to 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).

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*, 331 N.C. at 570, 417 S.E.2d at 748. 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

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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), *cert. denied*, 506 U.S. ---, 122 L.Ed.2d 136 (1993), 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 instruction 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 State also asks that we consider whether a constitutionally deficient reasonable doubt instruction may be harmless error. In our earlier opinion, we relied upon *Montgomery* in concluding that, although the trial court's instruction defining the term "reasonable doubt" violated the Due Process Clause, defendant was not entitled to a new trial. In *Montgomery*, after finding that the trial court's instruction as to reasonable doubt gave rise to constitutional error,

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our Supreme Court stated that it “must next determine whether the State has met its burden of showing that the error was harmless beyond a reasonable doubt.” *Id.* at 573, 417 S.E.2d at 750. We followed the analysis in *Montgomery* and held in *Williams* that, even though the jury instruction on reasonable doubt was unconstitutional, the evidence against defendant was so substantial that the trial court’s error in its instructions was harmless beyond a reasonable doubt.

Subsequent to our earlier decision in this case, however, the U.S. Supreme Court in *Sullivan* held that a constitutionally deficient jury instruction as to the definition of reasonable doubt is not harmless error and, thus, invalidated the defendant’s conviction. The Court stated that the denial of the right to a jury verdict of guilt beyond a reasonable doubt is a structural error which defies analysis by the harmless error standards. *Sullivan*, 508 U.S. at ---, 124 L.Ed.2d at 190-91. Thus, a jury instruction on reasonable doubt which violates the Due Process Clause cannot be harmless regardless of how overwhelming the evidence of the defendant’s guilt. *Sullivan*, 508 U.S. at ---, 124 L.Ed.2d at 191 (concurring opinion). The U.S. Supreme Court further reasoned that:

[T]he essential connection to a ‘beyond-a-reasonable-doubt’ factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury’s findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant guilty.’

508 U.S. at ---, 124 L.Ed.2d at 190 (quoting *Rose v. Clark*, 478 U.S. 570, 578, 92 L.Ed.2d 460, 471 (1986)).

We follow *Sullivan* and find that the trial court’s instruction on reasonable doubt, which violated the Due Process Clause, was a structural, not harmless, error.

Since we rule that the trial court committed reversible error, we need not address defendant’s remaining assignment of error.

We reverse the judgment of the trial court and remand the case to the trial court for proceedings consistent with this opinion.

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[111 N.C. App. 866 (1993)]

Reversed.

Chief Judge ARNOLD and Judge GREENE concur.

MILNER AIRCO, INC. OF CHARLOTTE, NC v. KENNETH W. MORRIS, MACK
S. LOVE AND WOODS HEATING AND AIR CONDITIONING, INC.

No. 9226SC538

(Filed 7 September 1993)

**Labor and Employment § 84 (NCI4th) — covenants not to compete —
absence of consideration — preliminary injunction improper**

Covenants not to compete signed by two employees of plaintiff heating and air conditioning company were not supported by consideration where the covenants were distributed to all of plaintiff's account managers or potential account managers with an explanation that this was done to make their jobs more secure by preventing a loss of customers; no promotions were anticipated or promised unless and until "the economy improved"; one employee signed the agreement in order to become an account manager when the economy improved; the second employee signed the agreement shortly after a demotion and after being told that he would sign the document or leave; and plaintiff employer made no promise that it was required to keep in return for the promise not to compete. Therefore, the trial court erred in entering a preliminary injunction enforcing the covenants not to compete.

Am Jur 2d, Monopolies, Restraint of Trade, and Unfair Trade Practices §§ 513, 550.

Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment. 51 ALR3d 825.

Appeal by defendants from order entered 17 March 1992 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 1993.

Defendants seek reversal of the trial court's order and dissolution of the injunction. Defendants contend on appeal that the trial

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court erred in granting the preliminary injunction enforcing the covenants not to compete. We agree and therefore order that the injunction be dissolved.

Louis A. Bledsoe, Jr. for plaintiff-appellee.

W. Faison Barnes for defendant-appellants.

ORR, Judge.

Plaintiff Milner-Airco initiated this action against two former employees, defendants Kenneth W. Morris and Mack S. Love, and their current employer, Woods Heating and Air Conditioning, Inc., alleging breach of contract and interference with contract. In his complaint, the plaintiff also sought a temporary and permanent injunction against the defendants, asking the court to enforce the covenant not-to compete provisions of their employment contracts. The trial court granted the temporary injunction on 17 March 1992. All defendants gave notice of appeal.

Defendants Love and Morris were first employed by plaintiff during the 1980's, as an installer helper and installer, respectively. On 21 January 1990, Milner executed an employment contract with Morris. According to the affidavit of Mr. Morris, no specific compensation or promotion was discussed at the time of signing. In April 1990, after an extended lay-off, defendant Love was rehired by Milner as a field supervisor. On or about 1 May 1991, Milner required Love to sign a similar employment contract. According to Love's affidavit, he was required to sign the document even though he had actually just received a demotion. The agreements prohibited defendants from contacting competitors or customers or competing with Milner in ". . . selling, offering for sale or promoting the sales of any product, goods or services [including system design] which is the same as or competes with Milner Airco" from the date of his voluntary or involuntary termination with Milner Airco for a two-year period "within a fifty mile radius of the intersection of Trade and Tryon Streets in Charlotte."

In October 1991, defendants Love and Morris resigned their positions with Milner and went to work for defendant Woods, who had begun a heating and air conditioning business. Shortly thereafter, the evidence indicates that the defendants began calling on customers of Milner.

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Following a hearing upon application for the preliminary injunction on 17 March 1992, the trial judge granted the injunction. In his conclusions of law, the judge stated in relevant part:

1. That the Employment Contract with non-compete clauses executed by Kenneth Morris and Mack S. Love are enforceable in that they are in writing, reasonable as to the terms, time and territory, based on valuable consideration and not against public policy and are a part of the employment contracts; and,
2. The Court concludes that Plaintiff, in all likelihood will be able to obtain success on the merits of its case and Plaintiff is likely to sustain irreparable loss unless the injunction is issued and/or, in the opinion and discretion of this court, issuance is necessary for the protection of plaintiff's rights during the course of litigation.

The trial court then enjoined the defendants from any activity that conflicted with the terms of the employment agreements until final determination of the issues at trial.

In reviewing the denial and/or granting of a preliminary injunction, we are not bound by the trial court's findings, but may review and weigh the evidence and facts for ourselves. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). The purpose of a preliminary injunction is to preserve the *status quo* of the parties pending trial on the merits. *State v. School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807 (1980).

A preliminary injunction is an extraordinary measure, to be issued by the court, in the exercise of its sound discretion, only when plaintiff satisfies a two pronged test: (1) that plaintiff is able to show the likelihood of success on the merits and (2) that plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the court's opinion issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

A trial court's ruling on a party's motion for a preliminary injunction is an interlocutory order. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975). As a general rule, no appeal lies from an interlocutory order unless the order deprives appellant of a

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substantial right which might be lost absent review before final judgment. N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1989).

In this case, plaintiff seeks to enforce the covenants not to compete which, if found valid, would prevent defendants from working on current projects. The record indicates that the defendants will do gross business of "not less than \$1,000,000.00 this year." Since the inability to do business, particularly given the seasonal nature of air-conditioning installation, doubtless involves a substantial right, the threshold question we decide is whether plaintiff has shown a *likelihood* that the covenant will be upheld. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990).

This Court has held that the employment agreement itself must be valid and enforceable in order for the employer to be able to show the requisite likelihood of success on the merits. *Triangle Leasing Co.* at 228, 393 S.E.2d at 856. "To be enforceable, a covenant not to compete must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy." *A.E.P. Industries, Inc.*, 308 N.C. at 402-03, 302 S.E.2d at 760 (1983). It is well established in North Carolina that "the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract." *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 273, 210 S.E.2d 427, 429 (1974), *cert. denied*, 286 N.C. 421, 211 S.E.2d 802 (1975) (citations omitted). However, if an employment relationship already exists without a covenant not to compete, any such future covenant must be based upon new consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964).

The evidence shows that Morris was employed in plaintiff's engineering department when he signed the employment agreement and that he "executed the employment agreement in order to become an account manager when the economy improved." Morris's affidavit shows that he signed the employment contract on 21 January 1990, and that he became account manager on 1 April 1991, almost fifteen months later. Plaintiff argues that the potential to become an account manager served as the supporting consideration for the contract. Defendant Love signed the agreement on 1 May 1991. However, the evidence indicates that Love had recently been given a demotion, and that he was told that

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he would sign the document or leave. The affidavit of William Milner states that these documents were distributed to all account managers or potential account managers in January 1990, and that he

explained that we were doing this to make their jobs more secure, since they dealt with our customers on a daily basis and a loss of these customers would diminish our need for account managers. We explained that we were going to be doing a lot of training in sales and communication skills and did not want to be training future competitors.

The contract itself, while reciting consideration, actually does not bind the employer to any promise. While in a new employment relationship the promise of employment constitutes sufficient consideration, in the case at bar, Milner made no new promise that he was required to keep in return for the promise not to compete. Milner distributed this document to all current account managers as part of a staff meeting in 1990. The primary purpose for the execution of the contract was to prevent future competition from former employees. Unless and until "the economy improved", no promotions were anticipated or promised. The purported consideration was illusory at best.

Without guaranteeing to the defendants one day's work, without the obligation of the appellant to employ them or pay them anything, . . . the appellees are induced to sign a paper which, while it has the general appearance of a contract, but keeps the promise to the ear while it breaks it to the hope. Such a contract, wanting in mutuality, presenting no equitable considerations, a court of equity will not enforce.

Wilmar v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972) (quoting *SuperMaid Cook-Ware Corporation v. Hamil*, 50 F.2d 830 (1931)).

We therefore disagree with the trial court that the plaintiff has shown a *likelihood* of success on the merits, and order that the preliminary injunction be dissolved.

Reversed.

Judge JOHNSON concurs.

Judge MCCRODDEN concurs in the result.

LATHAM v. CHERRY

[111 N.C. App. 871 (1993)]

SALLIE MAE LATHAM v. REATHA CHERRY

No. 932SC251

(Filed 7 September 1993)

Process and Service § 15 (NCI4th)— extension of time to file complaint—no summons—running of statute of limitations

The trial court did not err by dismissing plaintiff's negligence action and denying her motion for a new trial or relief from judgment where plaintiff applied to the Clerk of Superior Court for an order extending time to file a negligence complaint on 1 June 1990; an assistant clerk signed an order extending the time for filing the complaint until 21 June 1990; plaintiff's summons was returned unserved on 19 June 1990; plaintiff timely filed her complaint on 21 June 1990, seeking damages resulting from an automobile accident that occurred on or about 2 June 1987; plaintiff served defendant with the complaint, along with a document entitled "Delayed Service of Complaint," on 27 June 1990; plaintiff voluntarily dismissed the action without prejudice on 20 November 1990; plaintiff refiled her complaint on or about 19 November 1991; and the trial court allowed defendant's motion to dismiss based upon the statute of limitations and subsequently denied plaintiff's motion for a new trial or to grant relief on judgment. The voluntary dismissal of an action based on defective service does not toll the statute of limitations and a new summons issued after the discontinuation of the original action begins a new action. The document entitled "Delayed Service of Complaint," served along with the complaint, does not substitute for a summons. N.C.G.S. § 1A-1, Rule 4.

Am Jur 2d, Limitation of Actions §§ 210, 313.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations. 27 ALR2d 236.

Appeal by plaintiff from orders entered 12 June 1992 and 19 November 1992 by Judge Richard B. Allsbrook in Martin County Superior Court. Heard in the Court of Appeals 16 August 1993.

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[111 N.C. App. 871 (1993)]

Willis A. Talton for plaintiff-appellant.

Herrin & Morano, by Mark R. Morano, for defendant-appellee.

MCCRODDEN, Judge.

The issue posed by this case is whether a voluntary dismissal without prejudice tolls the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, receives an order extending the time for filing a complaint but fails to serve defendant with civil summons and the order, files her complaint within the time allowed by the order, and properly serves defendant with the complaint and a "Delayed Service of Complaint."

The facts of the case are as follows. On 1 June 1990, plaintiff applied to the Clerk of Superior Court, Pitt County, for an order extending time to file a complaint seeking damages allegedly resulting from defendant's negligence. On that same day an assistant clerk signed an order extending the time for filing the complaint until 21 June 1990. Plaintiff was required to serve defendant with a copy of the order extending time to file her complaint and civil summons. However, plaintiff's "Civil Summons to be Served with Order Extending Time to File Complaint," issued on 1 June 1990, was returned unserved on 19 June 1990. On 21 June 1990, plaintiff timely filed her complaint, seeking from defendant damages resulting from an automobile accident that occurred on or about 2 June 1987. She served defendant with the complaint, along with a document entitled "Delayed Service of Complaint," on 27 June 1990. On 20 November 1990, plaintiff voluntarily dismissed the action without prejudice.

On or about 19 November 1991, plaintiff refiled her complaint, this time in Martin County. She served defendant with a summons and a copy of the complaint on 26 November 1991. On 10 December 1991, defendant filed a motion to dismiss based upon the statute of limitations contained in N.C. Gen. Stat. § 1-52(16) (1983). On 12 June 1992, the trial court allowed defendant's motion to dismiss. Plaintiff subsequently filed a "Motion for New Trial or to Grant Relief on Judgment." On 19 November 1992, the trial court denied plaintiff's motion.

By her appeal, plaintiff challenges both the dismissal and the denial of her motion for relief. Specifically, she contends that her

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complaint, filed 19 November 1991, was timely because she filed it less than a year after voluntarily dismissing her first action without prejudice. The crux of the problem in this case, however, lies with the effect of plaintiff's failure to serve defendant with civil summons when she obtained an extension of time in which to file her complaint.

The statute of limitations for personal injury due to negligence is three years. N.C.G.S. § 1-52(16). Under N.C. Gen. Stat. § 1A-1, Rule 3(a) (1990), a plaintiff may commence an action by filing a complaint or by obtaining an extension of time. Rule 3(a) also requires that the summons and the court order extending time be filed in accordance with the provisions of N.C. Gen. Stat. § 1A-1, Rule 4 (1990). This Court has addressed the necessity of a summons:

The summons constitutes the means of obtaining jurisdiction over the defendant. . . . The summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action.

Childress v. Forsyth County Hospital Auth., 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985) (citations omitted).

A party may correct a failed or defective original service by endorsement of the original summons or by application for alias and pluries summons within ninety days of original issue or last endorsement. N.C.G.S. § 1A-1, Rule 4(d); *Johnson v. City of Raleigh*, 98 N.C. App. 147, 389 S.E.2d 849, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). If neither method is used to extend time for service, the action is discontinued and treated as if it had never been filed. N.C.G.S. § 1A-1, Rule 4(e); *Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E.2d 155 (1979), *disc. review denied*, 299 N.C. 330, 265 S.E.2d 395 (1980).

If a plaintiff obtains proper service on a defendant within the time for filing a complaint, a voluntary dismissal of the first action tolls the statute of limitations for one year. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990); *Johnson*, 98 N.C. App. 147, 389 S.E.2d 849. However, the voluntary dismissal of an action based on defective service does not toll the statute of limitations. *Johnson*, 98 N.C. App. 147, 389 S.E.2d 849; *Hall*, 44 N.C. App. 23, 260 S.E.2d 155. A new summons issued after the discontinuation of the original

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action begins a new action. N.C.G.S. § 1A-1, Rule 4(e); *Everhart v. Sowers*, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

In this case, because defendant's alleged negligence occurred 2 June 1987, plaintiff had to file a complaint or seek an extension by 2 June 1990. On 1 June 1990, plaintiff complied with Rule 3(a) by applying for an extension of time. The required summons was issued but was subsequently returned unserved on 19 June 1990; plaintiff took no further action to serve defendant with this summons and order.

Moreover, the document entitled "Delayed Service of Complaint," served along with the complaint, does not substitute for a summons. It does not constitute a link in the chain of process as does a summons. *Childress*, 70 N.C. App. 281, 319 S.E.2d 329. Although the "Delayed Service of Complaint" contains language similar to a summons, the language is insufficient. "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Wearing v. Belk Bros., Inc.*, 38 N.C. App. 375, 376, 248 S.E.2d 90, 90 (1978). Indeed, a summons must "notify each defendant to *appear* and answer within 30 days." N.C.G.S. § 1A-1, Rule 4(b) (emphasis added). The "Delayed Service of Complaint" instructs defendant to answer, but it does not instruct defendant to appear. "In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Everhart*, 63 N.C. App. 747, 750, 306 S.E.2d 472, 474. It is irrelevant that defendant may have had actual or constructive notice of the action since failure to serve a proper summons "makes the service invalid even though a defendant had actual notice of the lawsuit." *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982). The "Delayed Service of Complaint" in this case does not contain the required statutory language and does not serve as proper notification to defendant that she must appear.

The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations.

BRYANT v. STATE BD. OF EXAMINERS OF ELECTRICAL CONTRACTORS

[111 N.C. App. 875 (1993)]

For the foregoing reasons, we affirm the orders of the trial court dismissing plaintiff's action and denying her motion for a new trial or for relief from judgment.

Affirmed.

Judges WELLS and EAGLES concur.

GEORGE A. BRYANT, PLAINTIFF v. NORTH CAROLINA STATE BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS, GARFIELD B. GWYN, WILLIAM T. EASTER, EDWARD H. MARROW, JR., J. MICHAEL SILVER, J. ALAN BARRINGER, WILLIAM H. ROBERTS, AND WILLIAM R. HOKE, DEFENDANTS

No. 9210SC915

(Filed 7 September 1993)

1. Mandamus § 10 (NCI4th) — writ of mandamus to compel Board to hold hearing — no right to contested case hearing — standing

The trial court properly dismissed an action to compel the N.C. State Board of Examiners of Electrical Contractors to apply for an administrative law judge to hear a case which the Board had determined that it was prohibited from hearing due to prior knowledge where plaintiff had filed a complaint with the Board pursuant to N.C.G.S. § 87-47(a3) and Title 21 of the N.C. Administrative Code alleging that another licensee had repeatedly violated Chapter 87 of the North Carolina General Statutes. The agency and the licensee against whom the charges are brought are the proper parties to a contested case and, therefore, the only parties who may insist on a hearing in this case. A writ of mandamus will be granted only to a party having a clear legal right to demand performance of an act and will not be granted to enforce an alleged right which is in doubt.

Am Jur 2d, Mandamus § 162 et seq.

2. Mandamus § 10 (NCI4th) — malfeasance and nonfeasance — not causes of action

The trial court did not err in dismissing causes of action for malfeasance and nonfeasance in an action in which plaintiff

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sought to compel a hearing before an administrative law judge regarding allegations he had brought against another licensee. Nonfeasance and malfeasance are not in themselves recognized causes of action.

Am Jur 2d, Mandamus § 162 et seq.

3. Attorneys at Law § 5 (NCI4th) — judgment of misconduct — claim dismissed

The trial court did not err by dismissing a claim for a “judgment of misconduct” against an attorney based on violations of the Rules of Professional Conduct. Plaintiff’s argument that the court’s general disciplinary power over attorneys creates a cause of action in his favor was rejected.

Am Jur 2d, Attorneys at Law §§ 28, 31.

Appeal by plaintiff from order entered 10 July 1992 by Judge W. Steven Allen in Wake County Superior Court. Heard in the Court of Appeals 8 July 1993.

Plaintiff is licensed by the North Carolina State Board of Examiners of Electrical Contractors (the Board). On 11 January 1991, he filed a complaint with the Board pursuant to N.C. Gen. Stat. § 87-47(a3) and Title 21 of the N.C. Administrative Code alleging that another licensee had repeatedly violated Chapter 87 of the North Carolina General Statutes. The complaint was considered by the Board’s Disciplinary Review Committee at its 6 May 1991 meeting. The Committee announced that it would present its recommendations to the full Board at the Board’s next meeting.

Plaintiff disagreed with the Disciplinary Review Committee’s recommendations and requested that the Board reject them. At its 8 June 1991 meeting, the Board determined that it was prohibited from holding a hearing on the complaint because the members were prejudiced by prior knowledge of the charges. Plaintiff then insisted that the Board apply for an administrative law judge to hear the case, but the Board never made the requested application. Plaintiff filed this action in superior court to compel the Board to apply for an administrative law judge.

Before filing an answer, defendants moved for dismissal. The court granted the motion and dismissed the action pursuant to N.C.R. Civ. P. 12(b)(6). From this order plaintiff appeals.

BRYANT v. STATE BD. OF EXAMINERS OF ELECTRICAL CONTRACTORS

[111 N.C. App. 875 (1993)]

Attorney General Lacy H. Thornburg, by Assistant Attorney General James E. Magner, Jr., for defendants.

George A. Bryant pro se.

ARNOLD, Chief Judge.

[1] Chapter 87, Article 4 of the General Statutes governs electrical contractors in North Carolina and names the Board as the agency responsible for licensing contractors and overseeing the licensees' conduct. Chapter 87 also designates certain conduct which will subject an electrical contractor to penalties if the Board, in its discretion, decides to impose those penalties. N.C. Gen. Stat. § 87-47(a1)–(a2) (1989). The complaint plaintiff filed with the Board alleged that a licensee engaged in conduct proscribed by Chapter 87, and his first cause of action in the superior court complaint was a request for an order to compel the Board to apply for an administrative law judge to hold a hearing on the original complaint. He argues that pursuant to N.C. Gen. Stat. §§ 87-47 and 150B-40(e) he is guaranteed a right to a contested case hearing on those charges.

G.S. § 87-47(a3) provides in pertinent part that “[a]ny person may prefer charges against any applicant, qualified individual, or licensee” When the Board is unable to or declines to hear a contested case, N.C. Gen. Stat. § 150B-40(e) (1991) provides that “the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article.” Plaintiff argues that because G.S. § 150B-40(e) states that the agency “shall” apply for an administrative law judge, his cause of action to compel the Board to apply for an administrative law judge was erroneously dismissed. For the reasons set out below, we conclude that plaintiff lacks standing to bring this action, and we affirm the trial court’s order dismissing this cause of action.

We view this cause of action as a petition for a writ of mandamus through which plaintiff seeks to compel the Board to perform as required by Chapters 87 and 150B. A writ of mandamus will be granted only to a party having a clear legal right to demand performance of an act. *Carter v. State Bd. of Registration for Professional Engineers & Land Surveyors*, 86 N.C. App. 308, 314, 357 S.E.2d 705, 709 (1987). It enforces a legal right; it does not create one. *Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143,

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149 (1964). The writ will not be granted to enforce an alleged right which is in doubt. *Id.* Plaintiff, therefore, must have a legal right to a contested case hearing in order to avoid dismissal of this claim. We hold that he does not have that right.

G.S. § 87-47(a3) provides that any person may file a complaint with the Board, but it does not go so far as to bestow standing on any person to demand a contested case hearing. Plaintiff is not in the class of people which Chapter 150B contemplates bringing a contested case hearing. Contested case is defined as “an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person’s rights, duties, or privileges” N.C. Gen. Stat. § 150B-2(2) (1991). Plaintiff is not a person whose rights, duties, or privileges are at stake, and for that reason, he lacks standing to demand a contested case hearing. *See Carter*, 86 N.C. App. at 312-13, 357 S.E.2d at 708 (complainant who initiates disciplinary hearing against licensee is not an aggrieved party and therefore lacks standing to petition for judicial review of the board’s decision). G.S. § 87-47(a3) only provides an avenue for lodging complaints against other licensees; it does not provide plaintiff the standing he lacks. Here we believe that the agency and the licensee against whom the charges are brought are the proper parties to a contested case and, therefore, the only parties who may insist on a hearing in this case.

This decision follows naturally from our decision in *Carter*. The plaintiff in *Carter* sought judicial review of a licensing board’s decision that the complaint he filed against another licensee was unfounded. We determined that the plaintiff lacked standing to seek judicial review of the agency’s decision because he was not an aggrieved person. Pursuant to *Carter*, plaintiff here would not have standing to seek judicial review of an administrative decision on his complaint, so it would be inconsistent to hold that he nonetheless has a right to demand that an administrative decision be reached. For these reasons, the trial court properly dismissed plaintiff’s first cause of action.

[2] In plaintiff’s second and third arguments, he contends that the court erred in dismissing the claims which he designated as causes of action for nonfeasance and malfeasance. In the complaint plaintiff described certain acts and omissions on the part of the individual defendants and requested, as relief, “judgment of

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nonfeasance” and “judgment of malfeasance.” Nonfeasance and malfeasance are not in themselves recognized causes of action, and plaintiff cites no law in support of his claims aside from the statutes or administrative rules which defendants allegedly ignored. These arguments have no merit.

[3] In his final argument, plaintiff contends that the court erred by dismissing his sixth claim for relief in which he requests “judgment of misconduct” against defendant Hoke, an attorney, for violating the Rules of Professional Conduct. We reject plaintiff’s argument that the court’s general disciplinary power over attorneys creates a cause of action in his favor, and we likewise reject plaintiff’s entire argument on this issue.

The trial court’s order dismissing plaintiff’s complaint is affirmed.

Affirmed.

Judges COZORT and MARTIN concur.

WILLIAM WRAY WHITE, JR., PLAINTIFF-APPELLANT v. FRANKIE C. WILLIAMS,
SHELBY F. NEWCOMB, CHRISTY A. DAVIS, THURMAN B. HAMPTON,
ROBERT F. HODGES, JOHN R. AMAN, DEFENDANT-APPELLEES

No. 9218SC516

(Filed 7 September 1993)

**Public Officers and Employees § 68 (NCI4th) — subpoena returned
“unable to contact” — driver’s license suspended — action against
state employees as individuals**

The trial court did not err by granting a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff appealed to the Rockingham County Superior Court from a judgment against him in a traffic offense; the clerk’s office issued a subpoena for the date of the hearing; the subpoena was returned “unable to contact”; a deputy or assistant clerk communicated to DMV that plaintiff had failed to appear for his hearing; DMV issued an order suspending his license and driving privileges as of 30 July 1991; plaintiff repeatedly met with the clerk of court, the district attorney, an assistant attorney general, and an

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official from DMV in an effort to correct the error; the error was not corrected and plaintiff's license was suspended; and plaintiff brought this action against the state employees involved in their individual capacities seeking compensatory and punitive damages. The district attorney and assistant district attorney are granted absolute immunity for actions taken in their official capacities and the other defendants did what was required of them by law. By notifying DMV that plaintiff had failed to appear, defendants performed a ministerial act as directed by N.C.G.S. § 20-24.2 and the docket entry sheet for the official court file, and, upon receipt of notice from a court, N.C.G.S. § 20-24.1(a)(1) requires DMV to revoke the driver's license. DMV cannot restore the license without notice from the court.

Am Jur 2d, Public Officers and Employees § 358 et seq.

Appeal by plaintiff from orders entered 2 December 1991 and 28 January 1992 by Judge Joseph R. John in Guilford County Superior Court. Heard in the Court of Appeals 26 April 1993.

Plaintiff filed this action seeking compensatory and punitive damages against seven state employees in their individual capacities. The trial judge dismissed the action and plaintiff appeals.

William Wray White, Jr., appearing Pro Se.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Bryan E. Beatty, for defendant appellees Hodges and Aman.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for defendant appellees Williams, Newcomb and Davis.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for defendant appellees Hampton and Hunter.

ARNOLD, Chief Judge.

The sole issue here is was plaintiff's complaint legally sufficient to state a cause of action against seven state employees in their individual capacities. We hold that it was not and affirm the trial court's order.

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The test on a Rule 12(b)(6) motion is whether or not 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 the 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 or not the allegations state a claim for which relief may be granted. *Id.*

Plaintiff alleged the following in his complaint: Plaintiff appealed to the Rockingham County Superior Court from a judgment entered against him for a traffic offense. The clerk's office issued a subpoena for the date of the appeal hearing. The signature of defendant Shelley F. Newcomb, a deputy or assistant clerk, appeared on the subpoena. It was returned and stamped "unable to contact." Defendant Christy A. Davis, a deputy or assistant clerk, communicated to the North Carolina Department of Motor Vehicles (DMV) that plaintiff failed to appear for his hearing.

As a result, DMV issued an order suspending plaintiff's license and driving privileges indefinitely as of 30 July 1991. After plaintiff received the order, he immediately wrote a letter to DMV denying that he ever received notice of the hearing. Soon thereafter, he sent a copy of the subpoena to defendant John R. Aman, an assistant director of DMV, and asked that the suspension be withdrawn. Aman responded that DMV would withdraw the order if the clerk of court would document, before 30 July 1991, that the communication to DMV was in error. Plaintiff went to the office of defendant Frankie Williams, clerk of court, and presented his situation to her. Although she conceded that plaintiff did not receive notice, she refused to send a letter to DMV. Williams then took plaintiff to meet with defendant Thurman B. Hampton, district attorney for Rockingham County. Hampton refused to reopen plaintiff's case which had been "dismissed with leave" by Belinda Foster Hunter, assistant district attorney.

Plaintiff then met with Aman, who advised him to go to the Attorney General's office. After meeting with an assistant attorney general, plaintiff met again with Aman and was led to believe the order would be rescinded. On 26 July 1991, however, a DMV hearing officer advised plaintiff that his license would be suspended on 30 July 1991. Plaintiff then wrote to Aman and again requested that the order be withdrawn. Plaintiff visited Williams and again requested that she communicate with DMV. "She adamantly and

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arrogantly refused to do so, saying 'DMV could read the file as well as she could.' " Plaintiff then visited Hampton's office. He also refused to write to DMV on plaintiff's behalf.

On 29 July 1991, plaintiff filed an action seeking to restrain DMV from enforcing its order suspending his license and driving privileges. On 30 July 1991, DMV suspended his license and driving privileges.

Plaintiff alleged that defendants Hampton and Foster Hunter acted wilfully, intentionally, and in reckless disregard of his rights by entering a dismissal with leave based on his failure to appear, "knowing full well" that he never received notice to appear. Plaintiff further alleged that defendant Hampton acted wilfully, intentionally, and in reckless disregard of plaintiff's rights in failing to correct the error upon which the dismissal with leave was entered after he was aware of the error, and in refusing to put his decision not to reopen the dismissal with leave in writing after he was aware of the need to reopen the case.

Hampton, district attorney, and Foster Hunter, assistant district attorney, are granted absolute immunity for actions taken in their official capacities. *See State ex rel. Jacobs v. Sherard*, 36 N.C. App. 60, 64, 243 S.E.2d 184, 188, *disc. review denied*, 295 N.C. 466, 246 S.E.2d 12 (1978). "Absolute immunity covers even conduct which is corrupt, malicious or intended to do injury." *Id.* Therefore, the trial judge properly dismissed plaintiff's action against these defendants.

It is unnecessary to address whether or not the remaining defendants are entitled to immunity because the complaint fails to state facts which support a viable claim against them. A complaint may be dismissed if the pleadings disclose an insurmountable bar to recovery. *Carolina Wire & Cable, Inc. v. Finnican*, 46 N.C. App. 87, 90, 264 S.E.2d 138, 139 (1980). Here, plaintiff alleges facts that disclose such an insurmountable bar to recovery.

Williams, Newcomb, and Davis did what was required of them by law. N.C. Gen. Stat. § 20-24.2(a)(1) (1989) provides that "[t]he court *must report* to the Division [of Motor Vehicles] the name of any person charged with a motor vehicle offense . . . who . . . [f]ails to appear to answer the charge as scheduled . . ." (Emphasis added.) Williams, Newcomb, and Davis had no discretion in notifying the DMV. By notifying DMV that plaintiff failed to

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appear, defendants performed a ministerial act as directed by G.S. § 20-24.2 and the docket entry sheet for the official court file. Plaintiff states in his complaint that the entry "F.T.A. [Failed to Appear] Notify DMV" appears on the docket entry sheet in the official court file, dated 11 January 1991. Defendants had no authority to disregard the entry sheet.

Similarly, Hodges and Aman had no discretion in revoking plaintiff's license. Upon receipt of notice from a court, N.C. Gen. Stat. § 20-24.1(a)(1) (1989) requires DMV to revoke the driver's license. DMV cannot restore the license without notice from the court. N.C. Gen. Stat. § 20-24.1(b) (1989). Plaintiff alleges in his complaint that DMV suspended his license "after being notified to do so." Aman and Hodges had no discretion in this action.

Because plaintiff alleged facts in his complaint that necessarily defeat his claim, the complaint was properly dismissed by the trial court. The trial court's order is, therefore, affirmed.

Our legal disposition of this case should not hide our feeling that what happened to Mr. White was outrageous and shameful. Mistakes will happen. But in this case someone could have, and someone should have, corrected the mistake. We wonder how quickly the error would have been corrected if the district attorney, assistant district attorney, clerk of court or assistant director of D.M.V. had been in the shoes of William Wray White, Jr.

Affirmed.

Judges COZORT and LEWIS concur.

SWAIN v. LEAHY

[111 N.C. App. 884 (1993)]

ROSA E. SWAIN v. KEVIN M. LEAHY AND CHARLES MOORE, DOING BUSINESS
AS LEAHY & MOORE, ATTORNEYS AT LAW

No. 926SC472

(Filed 7 September 1993)

Election of Remedies § 2 (NCI4th) — three tortfeasors — action against one barred by statute of limitations — settlement with remaining two — malpractice claim against attorneys not barred by doctrine of election of remedies

Plaintiff's malpractice action against defendant attorneys was not barred by the doctrine of election of remedies where plaintiff was injured in an automobile accident; defendants failed to institute suit against one of the tortfeasors within the applicable statute of limitations; plaintiff accepted a settlement from the other two joint tortfeasors and signed a general release; and plaintiff's claims against the tortfeasors for negligence and against defendants for malpractice were not inconsistent, as they were two separate claims. Furthermore, the release signed by plaintiff did not constitute an election of remedies, since she did not sign the release discharging other claims until after her claim against one tortfeasor had already been barred by the statute of limitations, and plaintiff could not have released a claim she was already precluded from bringing by defendant's negligence.

Am Jur 2d, Election of Remedies §§ 8-13.

Appeal by plaintiff from order granting summary judgment entered 27 February 1992 by Judge Steven D. Michael in Hertford County Superior Court. Heard in the Court of Appeals 14 April 1993.

Charles T. Busby for plaintiff.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Roger A. Askew, for defendants.

LEWIS, Judge.

On 18 April 1990 plaintiff filed a complaint against defendants alleging negligence in their representation of plaintiff's personal injury claim. Defendants asserted the doctrine of election of remedies as a defense, and the trial court granted summary judgment for defendants on 27 February 1992.

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[111 N.C. App. 884 (1993)]

On 20 April 1985, plaintiff, a Hertford County, North Carolina resident, was injured in an automobile collision in Chesapeake, Virginia. When the accident occurred plaintiff was a passenger in an automobile driven by Ida M. Allen and owned by Sarah K. Swain, both residents of North Carolina. Clara McDonald, a Virginia resident, was operating the other vehicle.

Sometime prior to 20 May 1985, plaintiff retained Carter W. Jones, an attorney in defendants' law office, Leahy & Moore, to represent her personal injury claim. Mr. Jones died in August 1986, however. At that time Leahy & Moore undertook to continue to represent the plaintiff in a personal injury action against McDonald. On 7 April 1988 they filed a claim against McDonald in North Carolina, but the action was dismissed for lack of personal jurisdiction. By then plaintiff was precluded from bringing suit in Virginia, where McDonald would have been subject to personal jurisdiction, because Virginia's two-year statute of limitations had expired on 20 April 1987.

Defendants then advised plaintiff to retain another attorney, Donnie R. Taylor, to bring an action against Sarah Swain and Ida Allen in North Carolina, explaining that a conflict of interest prohibited their firm from bringing the action. Taylor stated in his affidavit that he had accepted the case without disclosure from defendant regarding the expiration of the applicable statute of limitations or potential problems with election of remedies. After Taylor filed the claim, the insurance adjuster made an offer to settle the case, and plaintiff accepted a \$3,244.04 settlement and executed a general release.

Plaintiff then brought suit against Leahy & Moore, alleging negligence in their representation of her claim against Clara McDonald. Plaintiff now appeals from the trial court's grant of summary judgment as a matter of law in favor of defendants pursuant to N.C.G.S. § 1A-1, Rule 56 (1990).

Plaintiff claims she has a valid case for attorney malpractice and that defendants conceded as much in their answer to the complaint. In paragraph seven of their answer defendants admitted that they failed to institute suit against McDonald within the applicable statute of limitations, and in paragraph nine they admitted that plaintiff "probably would have recovered some sum from either Clara B. McDonald or Ida Mae Allen or both." Defendants contend,

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however, that by accepting a settlement from two of the joint tortfeasors and by signing a general release, plaintiff satisfied her claim and is thereby barred from bringing a legal malpractice claim against them by the doctrine of election of remedies. The only issue on appeal is whether defendants' affirmative defense of the doctrine of election of remedies applies to preclude plaintiff's claim against them. We find that it does not.

The doctrine of election of remedies generally is invoked to estop the plaintiff from suing a second defendant

only if [plaintiff] has sought and obtained final judgment against a first defendant *and* the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action.

McCabe v. Dawkins, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990) (action not barred by doctrine of election of remedies where, following a declaratory judgment action to distribute assets of a will, plaintiff-executor brought a legal malpractice action against defendant-drafter). Inconsistent claims occur when the settlement of or a judgment on a second action would be a continuation of relief sought in the first action. *Id.* The purpose of the doctrine of election of remedies is to prevent double recovery for a single wrong. *Id.*

Defendants contend that plaintiff's settlement of her claim against the other tortfeasors, Ida Allen and Sarah Swain, barred a subsequent malpractice claim against them. According to defendants the claims are inconsistent since plaintiff is "entitled to but one satisfaction on her injury claim and could not pursue both to settlement or judgment." Defendants cite *Douglas v. Parks*, 68 N.C. App. 496, 315 S.E.2d 84, *disc. rev. denied*, 311 N.C. 754, 321 S.E.2d 131 (1984) and *Stewart v. Herring*, 80 N.C. App. 529, 342 S.E.2d 566 (1986) as controlling. *Douglas* and *Stewart* both involve circumstances with a single remedy in an action against a single defendant. The plaintiff in this case had two separate claims. We do not find these cases dispositive under these facts.

Although Rule 20 of the North Carolina Rules of Civil Procedure permits a plaintiff to join defendants in one action when the right to relief arises out of the same action or liability is joint or several, it does not require joinder. N.C.G.S. § 1A-1, Rule 20 (1990). Plaintiff may pursue the tortfeasors in separate suits,

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and by doing so plaintiff does not pursue inconsistent claims. *Pryse v. Strickland Lumber & Bldg. Supply, Inc.*, 66 N.C. App. 361, 363, 311 S.E.2d 598, 600 (1984). Unless and until plaintiff receives full satisfaction of a claim, settlement against two of three joint tortfeasors would not bar a claim against the remaining offender. *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 492, 155 S.E.2d 238, 243 (1967). Plaintiff in this case had cumulative, not inconsistent, remedies. Plaintiff initially had claims against all three joint tortfeasors. Theoretically, settlement with two tortfeasors would not bar a claim against the third. Any judgment subsequently obtained against the third would be reduced by the amount received in settlement. *Surratt v. Newton*, 99 N.C. App. 396, 408-09, 393 S.E.2d 554, 561 (1990). Due to defendants' alleged negligence, however, plaintiff has lost the right to pursue the remaining tortfeasor in this case. We hold that plaintiff may pursue a malpractice action against defendants for the loss of this claim.

Defendants also contend that the release signed by plaintiff constituted an election of remedies because it settled all claims arising out of the accident. We disagree. Plaintiff in the case at hand did not sign the release discharging other claims until after her claim against McDonald had already been barred by the statute of limitations. Plaintiff, therefore, could not have released a claim she was already precluded from bringing by defendants' negligence. See *King v. Jones*, 483 P.2d 815 (1971) (release irrelevant to claim already lost due to statute of limitations, and plaintiffs could sue attorneys for malpractice).

For the reasons stated above, the doctrine of election of remedies is not applicable under the facts of this case. Accordingly, we reverse summary judgment and remand this case for a hearing on the merits.

Reversed and remanded.

Chief Judge ARNOLD and Judge COZORT concur.

STATE v. McDANIEL

[111 N.C. App. 888 (1993)]

STATE OF NORTH CAROLINA v. STEPHEN FLAY McDANIEL; RONALD
EDWARD BROOME

No. 9229SC855

(Filed 7 September 1993)

**Homicide § 334 (NCI4th)— nonfelonious assault—involuntary
manslaughter—insufficient evidence**

The State's evidence was insufficient to support defendants' convictions of involuntary manslaughter based on a nonfelonious assault where it tended to show that decedent was walking along the roadway pushing a moped and carrying a gas can; defendants stopped their car in a parking lot ahead of decedent and began walking along the roadside toward him; when decedent saw them, he made a startled move, dropped the moped, ran directly into the path of a car, and was struck and killed; defendants were not closer than 10 feet to decedent when he dropped the moped; and although one defendant told a witness at the scene that he knew decedent, there was no other testimony of any relationship between defendants and decedent and no evidence of any animosity between them.

Am Jur 2d, Homicide §§ 70, 425 et seq.

Appeal by defendants from judgments entered 5 March 1992, by Judge Julia V. Jones in Rutherford County Superior Court. Heard in the Court of Appeals 9 June 1993.

A Rutherford County grand jury indicted defendants for involuntary manslaughter. At the close of the State's evidence and again at the close of all of the evidence at trial, the defendants moved to dismiss the charges. The trial court denied each of these motions, and the jury convicted defendants of involuntary manslaughter. The trial court then imposed sentences of three years imprisonment which were suspended.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Arlledge, Lane & Rogers, by David W. Rogers, for defendant-appellants.

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[111 N.C. App. 888 (1993)]

MCCRODDEN, Judge.

Defendants present four arguments for review by this Court. Because one of these arguments compels us to reverse the judgment of the trial court, we need not address the other three. The argument in which we find merit is defendants' contention that there was insufficient evidence that they acted in an unlawful or criminally negligent manner, alternative elements of involuntary manslaughter, and that the trial court, therefore, erred in denying their motions to dismiss the charges.

At trial the State's evidence tended to show that on 16 July 1988, Mark Hibbard was driving south at approximately 35 m.p.h. on U.S. 221 near Rutherfordton between 6:00 and 7:00 p.m. As he approached an ABC store on his right, he saw a north-bound, brown Chevrolet Chevette turn left into the parking lot of the ABC store, turn around in the parking lot, and park facing the road, approximately 15 feet from it. The driver and a passenger, later identified as the two defendants, got out of the Chevette. Farther ahead of Hibbard, a young man, J.R. Matheson, was carrying a gas can and pushing a moped up the west side of the road toward the Chevette. The defendants started to walk quickly along the roadside toward Matheson. When Matheson saw the defendants walking toward him he made a startled move, dropped the moped and ran across a drainage ditch and into the road, directly in front of Hibbard's car. Hibbard was unable to avoid hitting him and Matheson died as a result of the injuries he suffered.

Testimony differed as to the distance separating the defendants and Matheson at the time he dropped the moped and started to run. At least one witness estimated that the distance was as great as 40 feet; no witness estimated the distance to be less than 10 feet.

One of Hibbard's passengers testified that after the accident she saw one of the defendants drinking a soda and the other crying. Another passenger asked defendant Broome whether he knew the deceased and he said he did not. However, when she asked him again later, he said that he did know the deceased. There was no other testimony as to any relationship between the defendants and the deceased and there was absolutely no evidence of any animosity among them. Neither defendant testified at trial.

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We believe that this evidence is insufficient as a matter of law to support a judgment of guilty of involuntary manslaughter. When the court is faced with a defendant's motion to dismiss the charges against him, it must consider all the evidence, competent and incompetent, in the light most favorable to the State. The trial court must grant the State the benefit of every reasonable inference and intentment to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). To withstand a motion to dismiss, the State must present substantial evidence demonstrating the existence of each element of the crime charged and showing that the defendant was the perpetrator. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). Substantial evidence is such 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). However, if the evidence only raises a suspicion as to whether the offense charged was committed, then the trial court should allow the motion to dismiss, even though the suspicion roused by the evidence may be strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971).

"Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Although the killing is unintentional, the crime is based on some intentional act. *Id.* at 582, 247 S.E.2d at 918. In this case, the State concedes that there is no evidence in the record that might support a finding that defendants' acts were culpably or criminally negligent and, instead, relies solely on the theory of a non-felonious criminal act, to wit, assault.

There are two ways to show criminal assault in North Carolina. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). The traditional common law definition of criminal assault is an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *Id.* The focus of this definition of assault is the intent of the person accused. *Id.* By contrast, the other rule, the so-called "show of violence" rule, places the emphasis on the reasonable apprehension of the person assailed. To prove

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an assault under this rule, the State must demonstrate some show of violence by the defendant, accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed, which causes him to engage in a course of conduct which he would not otherwise have followed. *Id.*

In this case, the evidence, in the light most favorable to the State, shows no overt act or attempt of violence and certainly no unequivocal appearance of an attempt. The evidence shows at most that the defendants began to walk quickly toward the decedent before he bolted into the road. We find that this evidence is insufficient to raise an inference of criminal assault under the traditional theory.

We further find that the evidence fails under the second theory as well. Obviously, when he ran into the road, the decedent engaged in a course of conduct he would not have followed otherwise. The question here is whether the defendants' actions would have put a person of reasonable firmness in apprehension of immediate bodily injury. We believe that they would not have. There was no evidence of any animosity between the defendants and the decedent. With nothing more appearing, evidence that defendants stopped their car in a parking lot ahead of the decedent and walked quickly toward him along the roadside before he bolted out into the highway and that defendants were not closer than 10 feet to the decedent when he dropped the moped, is not sufficient to raise a reasonable inference that decedent was put into a reasonable apprehension of immediate bodily harm. The best that can be said is that this might raise a suspicion that defendants assaulted the decedent. That is, however, insufficient to justify taking a case to the jury.

Accordingly, we hold that the trial court erred in failing to grant defendants' motion to dismiss at the close of the State's evidence and we reverse its judgment.

Reversed.

Judges EAGLES and LEWIS concur.

HALES v. N.C. INSURANCE GUARANTY ASSN.

[111 N.C. App. 892 (1993)]

WILLIAM BRIAN HALES AND DONNA HALES, PLAINTIFF-APPELLANTS v.
NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION,
DEFENDANT-APPELLEE

No. 9210SC654

(Filed 7 September 1993)

Judgments § 259 (NCI4th)— effectiveness of automobile liability policy—insured and injured passenger in privity—judgment in insured’s action *res judicata* in passenger’s action

Where plaintiff passenger was injured in a 1985 accident due to the negligence of his brother in the operation of their father’s car, a 1985 declaratory judgment in an action instituted by the father found that an automobile liability policy issued to the father was not in effect at the time of the accident, plaintiff obtained a judgment in 1987 against his father and brother awarding him damages for his injuries, and the insurer thereafter became insolvent, plaintiff’s 1991 action against the N.C. Insurance Guaranty Association seeking a judgment declaring that the father’s automobile liability policy was in effect on the date of the accident and that the Association is obligated to pay the policy limits to plaintiff was barred under the doctrine of *res judicata* by the 1986 judgment in the father’s action since the 1986 judgment constituted a determination on the merits of the same claim, *i.e.*, whether the policy was in effect at the time of the accident, and plaintiff is in privity with the father because he is a third-party beneficiary of the father’s automobile policy.

Am Jur 2d, Insurance § 2054; Judgments § 551 et seq.

Appeal by plaintiffs from order entered 20 April 1992 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 24 May 1993.

This is a declaratory judgment action in which plaintiffs seek to recover from the North Carolina Guaranty Association (“the Association”) under an automobile liability insurance policy originally issued by Interstate Casualty Insurance Company (“Interstate”). This suit is one of a series of actions arising from an automobile accident which occurred on 29 May 1985. William Brian Hales (“Brian Hales”) sustained injuries in the accident which allegedly occurred due to negligence on the part of Brian’s brother, Robert Allen

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Hales, who was operating an automobile owned by their father, William I. Hales.

On 21 November 1985, William I. Hales filed an action entitled "William I. Hales v. Interstate Casualty Insurance Company," File No. 85-CVS-2142, in Wayne County Superior Court seeking a declaratory judgment that the Interstate policy was in force on the date of the accident. Interstate defended on the grounds that the policy was not in effect on the date of the accident. On 24 March 1986, summary judgment was granted in favor of Interstate.

Subsequently, on 11 February 1987 an action was brought in Wayne County Superior Court entitled "William Brian Hales, a minor, by and through his Guardian Ad Litem, Marie Davis and Donna Hales, Individually, v. Robert Allen Hales and William Irvin Hales," File No. 87-CVS-269, seeking damages from Robert Hales and William I. Hales for Brian's injuries and medical expenses. On 6 June 1987, a default judgment was entered awarding Brian \$75,000.00 as compensation for his injuries and Donna Hales \$17,758.00 for Brian's medical expenses.

On 25 February 1988, a suit entitled "William Brian Hales, a minor by and through his Guardian Ad Litem, Marie Davis, and Donna Hales, Individually, v. Interstate Casualty Insurance Company, Cotton Insurance and Realty, Inc., and William C. Shackelford," File No. 88-CVS-323, was filed in Wayne County Superior Court. This suit also alleged that the Interstate policy was in effect on the date of the accident and sought to recover the amounts awarded as damages in the action against Robert Hales and William I. Hales. Before this suit was concluded as to Interstate, however, the company was declared insolvent and a liquidation order was entered on 9 April 1990 in Wake County Superior Court. The liquidation order had the effect of staying the suit against Interstate.

The present action was instituted in Wake County Superior Court on 21 November 1991. Plaintiffs again seek a judgment declaring that Interstate's policy was in effect on the date of the accident and, consequently, that the Association is obligated to pay the limits of Interstate's coverage (\$25,000.00) pursuant to the provisions of the North Carolina Insurance Guaranty Association Act, G.S. § 58-48-1, *et seq.* The Association answered, asserting, *inter alia*, that plaintiffs' claims had been determined by the judgment entered in "William I. Hales v. Interstate Casualty Insurance Com-

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pany," Wayne County File No. 85 CvS 2142, and that the judgment was *res judicata* on the issue of coverage.

Both parties moved for summary judgment. The trial court granted the Association's motion for summary judgment on the ground of *res judicata*. Plaintiffs appeal.

Mast, Morris, Schulz & Mast P.A., by Bradley N. Schulz and George B. Mast, for plaintiff-appellants.

Moore & Van Allen, by Joseph W. Eason and Christopher J. Blake, for defendant-appellee.

MARTIN, Judge.

The determinative issue on appeal is whether the 1986 judgment in the declaratory judgment action brought by William I. Hales against Interstate bars plaintiffs' claims against the Association in the present case under the doctrine of *res judicata*. We hold that it does.

The law with respect to summary judgment is well established. "Where a motion for summary judgment is granted, the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Smith v. Jack Eckerd Corp.*, 101 N.C. App. 566, 568, 400 S.E.2d 99, 100 (1991), quoting *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), cert. denied, 276 S.E.2d 283 (1981). To meet this burden, the defendant must show as a matter of law that it is entitled to summary judgment in its favor by showing that there is no genuine issue of material fact concerning an essential element of the plaintiff's claim for relief and that the plaintiff cannot prove the existence of that element. N.C. Gen. Stat. § 1A-1, Rule 56 (1990); *Blue Ridge Sport-cycle Co. v. Schroader*, 60 N.C. App. 578, 299 S.E.2d 303 (1983). Also, a defendant is entitled to summary judgment if he can show that no claim for relief exists or that the plaintiff cannot overcome an affirmative defense or legal bar to a claim. *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

When a court of competent jurisdiction has entered a final judgment on the merits in an action, the doctrine of *res judicata* bars subsequent litigation of the same claim by the original parties or their privies. *York v. Northern Hospital District*, 96 N.C. App.

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456, 386 S.E.2d 99 (1989), *disc. review denied*, 326 N.C. 601, 393 S.E.2d 892 (1990). To prevail on the doctrine of *res judicata*, a party must show the following: (1) a previous suit resulted in a final judgment on the merits, (2) the present suit involves the same cause of action, and is (3) between the same parties or those in privity with them. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986).

A declaratory judgment has the force and effect of a final judgment or decree. *McCabe v. Dawkins*, 97 N.C. App. 447, 388 S.E.2d 571, *disc. review denied*, 326 N.C. 597, 393 S.E.2d 880 (1990); N.C. Gen. Stat. § 1-253 (1983). William I. Hales' complaint for declaratory relief filed in 1985 involves the same cause of action as plaintiff's complaint for declaratory judgment filed in 1991 as both actions seek to have the insurance policy at issue declared effective on 29 May 1985. The declaratory judgment in favor of Interstate in the earlier action constitutes a determination on the merits of the same claim, i.e., whether the policy was in effect on 29 May 1985. The first two requirements for application of the doctrine of *res judicata* are clearly met in this case.

With respect to the requirement that the present action must involve the same parties as the previous action, or those in privity with them, a court will place substance over form and look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest. *King v. Grindstaff*, 284 N.C. 348, 357, 200 S.E.2d 799, 806 (1973). Privity exists where there is a mutual or successive relationship to the same property rights. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962); *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 367 S.E.2d 335, *disc. review denied*, 323 N.C. 173, 373 S.E.2d 108 (1988). A party is privity if their interest has been legally represented in the prior proceeding. *Masters*, at 526, 124 S.E.2d at 578.

In the present case, plaintiffs are in privity with William Hales. Plaintiffs have judicially admitted in prior pleadings, contained in the record in this case, that they are third party beneficiaries under the Interstate policy issued to Mr. Hales. The law implies privity of contract between the intended third-party beneficiary and the contracting party. *Coastal Leasing Corp v. O'Neal*, 103 N.C. App. 230, 405 S.E.2d 208 (1991); *Johnson v. Wall*, 38 N.C. App. 406, 248 S.E.2d 571 (1978). This privity of contract between

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William Hales and plaintiffs at bar indicates a mutual or successive relationship to the same rights under the Interstate insurance policy. With respect to these rights, in his declaratory judgment action in 1985, William Hales sought to have the trial court declare his Interstate policy to be in effect on 29 May 1985 and to recover damages for Brian's injuries. Thus, plaintiffs' interests were legally represented in the 1985 action. G.S. § 58-48-35(a)(2) provides that defendant Association "shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Accordingly, all requirements for privity are satisfied.

Therefore, plaintiffs' claims are barred by *res judicata* and the trial court properly granted the Association's motion for summary judgment.

Affirmed.

Chief Judge ARNOLD and Judge ORR concur.

HEART OF THE VALLEY MOTEL, INC., PLAINTIFF v. KYLE EDWARDS AND
WIFE, MARY SUE EDWARDS, DEFENDANTS

No. 9230SC866

(Filed 7 September 1993)

**Payment or Tender § 27 (NCI4th)— action to set aside deed—
payment—burden of proof**

The trial court erred by placing the burden of proof to show payment, if any, on plaintiff in an action claiming that defendants have not paid any part of the purchase price of a tract of land and seeking to set aside the deed to defendants where defendants admit in their answer that they agreed to pay \$26,000 for title to the property and assert that they paid money to the plaintiff and paid consideration to plaintiff. Payment is an affirmative defense, N.C.G.S. § 1A-1, Rule 8(c) (1990), and the general rule places the burden of proving payment upon the party asserting it.

Am Jur 2d, Payment § 171.

Judge GREENE dissenting.

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[111 N.C. App. 896 (1993)]

Appeal by plaintiff from Judgment entered 11 May 1992 by Judge C. Walter Allen in Haywood County Superior Court. Heard in the Court of Appeals 18 June 1993.

Roberts Stevens & Cogburn, P.A., by Max O. Cogburn and Vernon S. Pulliam, for plaintiff-appellant.

Russell L. McLean, III for defendants-appellees.

LEWIS, Judge.

Plaintiff Heart of the Valley Motel, Inc. filed a complaint against defendants on 11 September 1990, claiming defendants have not paid any part of the purchase price of a tract of land and seeking to set aside the deed to defendants. A jury decided in favor of defendants, and plaintiff now appeals, alleging the court erred in denying its motion for a new trial due to errors in the jury instructions.

In late December 1986, plaintiff orally agreed to sell to defendants Kyle and Mary Sue Edwards a tract of land in Haywood County, North Carolina. Plaintiff contends the agreed consideration was \$28,000, but defendants contend the amount was \$26,000. Plaintiff alleges defendants have not paid any consideration at all, while defendants claim they have.

According to plaintiff the first step in the procedure would be to prepare and record the deed conveying the property to Edwards. Edwards then would transfer \$20,000 to Branch Banking and Trust Company (hereafter "BB&T") to release the first mortgage on the property, and would pay the remaining \$8,000 directly to plaintiff. Accordingly, after reaching the agreement with Edwards, Charles Spann, president of the plaintiff corporation, directed the corporation's attorney Gavin Brown to prepare a deed to convey the land. Spann signed the deed on 22 December 1986. Before the closing was held or any closing statement was prepared, Brown recorded the deed on 30 December 1986 in the Haywood County Register of Deeds office.

Defendant Kyle Edwards testified that although Spann asked for \$28,000 initially, they agreed on a price of \$26,000. He also testified that he offered Spann a check for \$10,000 payable to BB&T, but that Spann asked for cash instead, which Edwards paid. Edwards testified he gave Spann two more payments totalling \$7,000 but did not keep receipts for his payments to plaintiff. In his deposition

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Edwards stated that he had the cancelled \$10,000 check and would produce it, but never did. He also testified that the check had been torn up. Other conflicting evidence about the alleged delivery of the check was admitted.

At trial six issues were submitted to the jury. On the issue of payment, the trial judge instructed the jury that the burden of proof was on plaintiff to show by the greater weight of the evidence how much money, if any, was paid to plaintiff. Before the jury retired for deliberations, counsel for plaintiff requested a restatement on the burden of proof regarding payment, claiming that the burden should be on defendants. The court refused to withdraw or revise the instruction. After return of the verdict, plaintiff filed a motion for a new trial on the basis that the trial court erred in placing the burden of proving payment upon plaintiff. The court denied the motion.

According to Rule 59 of the North Carolina Rules of Civil Procedure, a new trial may be granted for an “[e]rror in law occurring at the trial and objected to by the party making the motion.” N.C.G.S. § 1A-1, Rule 59(a)(8) (1990). Although a trial court’s ruling on a motion for a new trial is usually subject to an abuse of discretion standard, *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982), if that motion is based upon an error of law the discretionary standard does not apply. *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 611 (1977). The trial court is required to grant the motion for a new trial based on errors of law. *Eason v. Barber*, 89 N.C. App. 294, 297, 365 S.E.2d 672, 674 (1988). Because we find an error of law occurred at the trial in the case at hand, we conclude the trial court should have granted the motion for a new trial.

Payment is an affirmative defense, N.C.G.S. § 1A-1, Rule 8(c) (1990), and the general rule places the burden of proving payment upon the party asserting it. *Shaw v. Shaw*, 63 N.C. App. 775, 777-78, 306 S.E.2d 506, 507 (1983); *Isenhour v. Icenhour*, 71 N.C. App. 762, 764, 323 S.E.2d 369, 371 (1984). In their Answer defendants admit they agreed to pay \$26,000 for title to the property. They also assert they “paid money to the Plaintiff[,]” and “paid consideration to Plaintiff.”

In its instructions to the jury the trial judge stated “[t]he burden of proof on this issue is . . . on the plaintiffs to prove by the greater weight of the evidence the amount of money, if

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any, that has been paid by the defendants to the plaintiffs." In response to plaintiff's request for reinstruction, the court stated "I thought about that but I think the burden is on the plaintiff on that issue . . . [t]o show the lack of payment, not that anything had been paid."

It is clear that the trial court erred in placing the burden of proof on plaintiff to show nonpayment. Due to this error of law, the trial court should have granted plaintiff's motion for a new trial.

Reversed and remanded.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not agree with the majority "that the trial court erred in placing the burden of proof on plaintiff to show nonpayment." The general rule placing the burden of proving payment upon the party asserting payment does not apply in this case because the plaintiff seeks rescision of the deed transfer on the grounds of nonpayment. See 70 C.J.S. *Payment* § 62 (1987). As such, nonpayment is an essential element of the plaintiff's case and the plaintiff has the burden of proof on this issue. 70 C.J.S. *Payment* § 69, at 58 (1987) ("in a contract action, plaintiff has the burden of proving the nonpayment where the nonpayment is the very breach alleged"). Accordingly, the trial court correctly instructed the jury and did not err in denying plaintiff's motion for a new trial.

OWENS v. W. K. DEAL PRINTING, INC.

[111 N.C. App. 900 (1993)]

VALLEREE L. OWENS, PLAINTIFF v. W. K. DEAL PRINTING, INC.,
DEFENDANT

No. 9227SC845

(Filed 7 September 1993)

Master and Servant § 87 (NCI3d) — workers' compensation — clincher agreement — personal injury action — summary judgment

The trial court did not err by granting defendant's motion for summary judgment on a personal injury claim arising from an injury in plaintiff's place of employment where plaintiff had already filed a workers' compensation claim and signed an agreement for final compromise settlement and release of that claim. Although plaintiff is correct in her argument that *Woodson v. Rowland*, 329 N.C. 330, is to be applied retroactively under *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, the facts in the present case and the facts in *Woodson* and *Dunleavy* are distinguishable. The plaintiffs in *Woodson* and *Dunleavy* filed their claims for workers' compensation benefits and their civil actions against the respective defendants simultaneously, never signed any forms settling their cases, and did not sign any forms relinquishing their rights to recover further monies from the incident.

Am Jur 2d, Workers' Compensation § 64.

Appeal by plaintiff from judgment entered 13 May 1992 by Judge Loto Caviness in Gaston County Superior Court. Heard in the Court of Appeals 17 June 1993.

Frederick R. Stann for plaintiff.

Alala, Mullen, Holland & Cooper, P. A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant.

JOHNSON, Judge.

On 15 December 1988, plaintiff Valleree L. Owens suffered an accidental injury when her hand was crushed in a hydraulic press at her place of employment, W. K. Deal Printing, Inc. Plaintiff suffered 60% permanent disability to the right hand. As a result, plaintiff filed a claim for workers' compensation benefits with the North Carolina Industrial Commission (hereafter Industrial Com-

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mission) and on 20 August 1991, plaintiff signed an agreement for "final compromise settlement and release," a clincher agreement.

Plaintiff submitted the clincher agreement to the Industrial Commission who approved the agreement on 26 August 1991. After plaintiff had entered into an agreement with the Industrial Commission, plaintiff filed a claim for personal injury against the defendant employer on 13 December 1991 pursuant to a case decided by the Supreme Court of North Carolina on 14 August 1991, *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Defendant filed an answer 21 January 1992 pleading the clincher agreement as a bar to plaintiff's cause of action. The motion was heard on 11 May 1992 by Judge Caviness who granted defendant's summary judgment as a matter of law. Plaintiff gave timely notice of appeal.

The dispositive issue before this Court is whether the trial judge erred by granting summary judgment as a matter of law against plaintiff.

Summary judgment is appropriately granted only where no disputed issues of genuine fact have been presented and the undisputed facts show that a party is entitled to judgment as a matter of law. *Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984). A defending party is entitled to summary judgment if the defendant can show that the claimant cannot prove the existence of an essential element of the claim or cannot surmount an affirmative defense which would bar the claim. *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Plaintiff in this action has filed a complaint alleging rights as set out in *Woodson*, 329 N.C. 330, 407 S.E.2d 222. In order to dispose of this case, we now consider *Woodson*. *Woodson* involved a wrongful death action arising from a work-related cave-in which killed Thomas Alfred Sprouse. The plaintiff in that case was the administrator of Sprouse's estate. The plaintiff in *Woodson* filed a workers' compensation claim with the North Carolina Industrial Commission and civil claims against the employer and general contractor, simultaneously. The defendants filed a summary judgment motion on the theory that the Workers' Compensation Act shielded the employer from civil liability for intentional tort. On

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appeal, the Court of Appeals affirmed the decision of the trial court. The Supreme Court, however, upon review of the matter opined:

that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery. . . .

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228.

Plaintiff argues that *Woodson* is to be applied retroactively and as such, plaintiff should not be foreclosed from pursuing an intentional tort claim against defendant.

Although plaintiff is correct in her argument that *Woodson* is to be applied retroactively if the facts are applicable, *Dunleavy v. Yates Construction Company, Inc.*, 106 N.C. App. 146, 416 S.E.2d 193, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992), the facts in the present case and the facts in *Woodson* and *Dunleavy* are distinguishable. The plaintiffs in *Woodson* and *Dunleavy* filed their claims for workers' compensation benefits and their civil actions against the respective defendants simultaneously. The plaintiffs never signed any forms settling their cases nor did the plaintiffs sign any forms relinquishing their rights to recover further monies from the incident.

In the case *sub judice*, plaintiff filed a civil action against defendant after settlement of the workers' compensation claim. On 20 August 1991, plaintiff entered into an agreement for "final compromise settlement and release." The agreement stated in pertinent part:

This instrument contains the entire agreement between the parties hereto and the terms of this release and agreement are contractual and not mere recitals, and the sum of money recited in this agreement to be paid upon order of the In-

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[111 N.C. App. 903 (1993)]

dustrial Commission is all that the said Employee-Plaintiff will ever receive for any alleged injury described herein.

On 13 December 1991, plaintiff filed a claim for personal injuries suffered as a result of the accident.

As *Woodson* clearly stated there can only be one recovery and we find that plaintiff made an election of remedies by pursuing her workers' compensation action to a final award. North Carolina law states that once a person signs a release relinquishing all of his rights, he shall have no further claims as a result of that action. *Sherill v. Little*, 193 N.C. 736, 738, 138 S.E. 14, 15 (1927).

Accordingly, the decision of the trial court is affirmed.

Judges WYNN and JOHN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, THE PUBLIC STAFF OF THE UTILITIES COMMISSION, METRO MOBILE CTS OF CHARLOTTE, INC., GTE MOBILE COMMUNICATIONS INC., CONTEL CELLULAR COMPANY, GENERAL CELLULAR CORPORATION, BLUE RIDGE CELLULAR TELEPHONE COMPANY, G.M.D. LIMITED PARTNERSHIP, CENTEL CELLULAR COMPANY, N.C. RSA 2 CELLULAR TELEPHONE COMPANY, N.C. RSA 3 CELLULAR TELEPHONE COMPANY, CELLCOM OF HICKORY, INC., ALLTEL MOBILE COMMUNICATIONS, INC., UNITED STATES CELLULAR CORPORATION, N.C. CELLULAR ASSOCIATION, INC., CAROLINA TELEPHONE & TELEGRAPH COMPANY, INC., AND EASTERN RADIO SERVICE, APPELLEES v. ATTORNEY GENERAL LACY H. THORNBURG, INTERVENOR APPELLANT

No. 9210UC652

(Filed 7 September 1993)

1. Telecommunications § 1.1 (NCI3d)— cellular telephone service—competitiveness

There was no merit to appellant's contention that cellular service could not, by definition, be competitive over the entire state because only one carrier was in operation in some RSAs, since 70% of North Carolina was served by two carriers at the time of the hearing and two carriers would soon be operating in every area; there was no requirement that every RSA contain two carriers before the Utilities Commission could find that cellular service was competitive in the state as a whole;

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and the Commission could properly view North Carolina as one market, not as the sum of many smaller markets.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 37.

2. Telecommunications § 1.1 (NCI3d)— deregulation of cellular service in public interest—no error of law

The finding by the Utilities Commission that deregulating cellular service was in the public interest was not an error of law.

Am Jur 2d, Administrative Law § 657.

Appeal by intervenor from order entered 14 February 1992 by the North Carolina Utilities Commission. Heard in the Court of Appeals 24 May 1993.

The facts of this case are identical to those in the companion case *State ex rel. Utilities Comm'n v. North Carolina Cellular Ass'n, Inc.*, 111 N.C. App. 801 (1993), which is filed simultaneously with this opinion. We need not repeat those facts here.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, intervenor appellant.

Parker, Poe, Adams & Bernstein, by Henry C. Campen, Jr., for petitioner appellees GTE Mobile Communications, Inc., Centel Cellular Corporation, General Cellular Corporation, Blue Ridge Cellular Company, and G.M.D. Limited Partnership.

Crisp, Davis, Schwentker, Page, Currin & Nichols, by Robert F. Page, for petitioner appellees Centel Cellular Company, N.C. RSA 2 Cellular Telephone Company, and N.C. RSA 3 Cellular Telephone Company.

Public Staff/Utilities Commission, by Staff Attorney Robert B. Cauthen, Jr., appellee.

Bode, Call & Green, by Robert W. Kaylor, for petitioner appellee Metro Mobile CTS of Charlotte, Inc.

Burns, Day & Presnell, by F. Kent Burns, for petitioner appellees ALLTEL Mobile Communications, Inc. and United States Cellular Corporation.

Kennedy, Covington, Lobdell & Hickman, by James P. Cooney, III, for petitioner appellee Cellcom of Hickory, Inc.

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[111 N.C. App. 903 (1993)]

ARNOLD, Chief Judge.

[1] Appellant first argues that (1) the Commission exceeded its statutory authority when it found that the provision of cellular service in North Carolina is competitive and (2) the Commission's finding of competition is an error of law. Essentially the argument is that cellular service cannot, by definition, be competitive over the entire state because only one carrier is in operation in some RSAs, so the Commission's finding of competition and its order deregulating cellular service throughout the entire state should be reversed. Presented this way the question becomes, was the status of the cellular telephone service market at the time of the hearing sufficient to constitute competition within the meaning of N.C. Gen. Stat. § 62-125 (Cum. Supp. 1992)? We believe it was.

As discussed in the *Cellular Ass'n* case, there was evidence that seventy percent of North Carolina was served by two carriers at the time of the hearing and that two carriers soon will be operating in every area. The evidence also showed that the impending presence of a second carrier made an existing carrier behave competitively.

There is no requirement that every RSA contain two carriers before the Commission may find that cellular service is competitive in the state as a whole. The statute only requires a finding that cellular service is competitive in North Carolina. The Commission viewed North Carolina as one market, not as the sum of many smaller markets. In light of the imminent presence of two carriers in each RSA, and the influence of competition in those RSAs with only one carrier, we find no error in this approach, and we believe the statute requires nothing more. The Commission did not, therefore, exceed its statutory authority, nor did it commit an error of law in finding that the provision of cellular service in North Carolina is competitive.

Appellant also argues that the Commission's finding that cellular service is competitive is not supported by substantial and competent evidence. We decided this issue in *Cellular Ass'n*, so there is no need to address it here.

[2] Appellant next argues that the Commission's finding that deregulation is in the public interest is an error of law. Although the alleged error is designated an "error of law," appellant's argument seems to be that the finding is not supported by substantial

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and competent evidence. No matter how we view the argument though, we do not agree with appellant. We held in *Cellular Ass'n* that this finding was supported by substantial and competent evidence. We now hold that the finding is not an error of law. The weighing of evidence and judgment thereon, as to questions within the scope of its powers, are for the Commission. See *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 54, 132 S.E.2d 249, 257 (1963). This includes the determination of what is in the public interest. See *id.* at 52, 132 S.E.2d at 255 (what constitutes "public convenience and necessity" is primarily an administrative question). After weighing the evidence, the Commission determined that deregulation is in the public interest. We see no reason to disturb this finding.

Next, appellant argues that this finding was arbitrary and capricious. In its order, after reciting many aspects of deregulation which are in the public interest, the Commission addressed one of appellant's main concerns—the handling of consumer complaints in the absence of regulation. The Commission set out several alternatives to the current scheme and finally stated that "consumers of cellular service will have available to them a remedy not available to consumers of monopoly services, they may choose another service provider." Appellant argues that this reasoning is arbitrary and capricious because, at the time of the hearing, some RSAs were served by only one provider. Assuming this particular reasoning is arbitrary and capricious, it does not affect the soundness of the Commission's finding. The Commission's finding is fully supported with additional substantial and competent evidence that deregulation is in the public interest. It is evident from the record, especially in the Commission's detailed description of the evidence it relied upon in making the finding, that the Commission gave this question careful consideration and displayed a reasoned judgment.

We reviewed appellant's remaining argument and are not persuaded by it. That part of the order appealed by intervenor appellant is

Affirmed.

Judges ORR and MARTIN concur.

STATE v. TUCKER

[111 N.C. App. 907 (1993)]

STATE OF NORTH CAROLINA v. CORNELIUS TUCKER

No. 9221SC906

(Filed 7 September 1993)

Criminal Law § 1540 (NCI4th) — probation revocation — withdrawal of counsel — failure to appoint substitute counsel

Where an indigent defendant's counsel moved at defendant's request to withdraw as counsel for defendant's probation revocation hearing, and the record does not disclose that original counsel was incompetent to represent defendant, the trial court did not err in allowing defendant's counsel to withdraw without appointing substitute counsel. Furthermore, defendant was not prejudiced by the trial court's failure to appoint substitute counsel where defendant thoroughly cross-examined the probation officer, and he made a strong argument and closing statement on his own behalf.

Am Jur 2d, Criminal Law § 579.**Right to assistance of counsel at proceedings to revoke probation. 44 ALR3d 306.**

Appeal by defendant from order entered 21 May 1992 by Judge Lester P. Martin, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 6 July 1993.

On 26 August 1991, a Forsyth County grand jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury, a violation of N.C. Gen. Stat. § 14-32 (1986). After defendant entered a plea of guilty, the trial court sentenced him to a term of six years imprisonment, suspended the sentence, and placed defendant on intensive probation.

On 27 March 1992, defendant's probation officer filed a report claiming that defendant had violated the conditions of his probation. On 21 May 1992, at the beginning of defendant's probation revocation hearing, his counsel moved, at defendant's request, to withdraw as counsel. The court allowed the motion to withdraw but denied defendant's motion to appoint substitute counsel. Over defendant's objection, the court continued with the hearing. Following direct examination of the probation officer by the State's attorney, defendant strenuously cross-examined the witness and made a statement

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on his own behalf. The court entered an order revoking defendant's probation and activating the sentence. From this order, defendant appeals.

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

L. Todd Burke for defendant-appellant.

MCCRODDEN, Judge.

In his appeal, defendant presents one argument based upon one assignment of error. He argues that the trial court violated his constitutional right to counsel when it refused to appoint substitute counsel at his probation revocation hearing. We disagree.

An indigent defendant has no absolute constitutional right to appointed counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed.2d 656 (1973). *Gagnon* recognized, as did our Court in *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974), that probation revocation hearings are, by their nature, informal affairs, not true criminal prosecutions. The formal rules of evidence do not apply to such hearings. N.C. Gen. Stat. § 15A-1345(e) (1988). On a constitutional level, the trial court must make a determination as to the need for counsel on a case by case basis. *Gagnon*, 411 U.S. at 790, 36 L.Ed.2d at 666. *Gagnon*, however, did not specify guidelines for determining when circumstances invoked a constitutional requirement of counsel, much less a need for substitute counsel when an accused is responsible for the withdrawal of his court-appointed attorney.

In North Carolina, in addition to the constitutional right, there is a statutorily recognized right to counsel at probation revocation hearings. N.C.G.S. § 15A-1345(e). This is a right which a defendant may knowingly, intelligently, and voluntarily relinquish. *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986).

Although the right of an indigent defendant to have competent counsel is unquestionable, *cf. State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976), an accused does not have the right to have the counsel of his choice appointed for him, nor the right to insist that his attorney be dismissed and new counsel appointed merely because the defendant becomes dissatisfied with the attorney's services. *Id.*

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[111 N.C. App. 907 (1993)]

A trial judge is only constitutionally required to appoint substitute counsel when the initial appointment has not afforded defendant his constitutional right to counsel. *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). Thus, when it appears to the trial court that the original counsel is reasonably competent to represent defendant's case and "the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper." *Id.* Defendant has not argued and the record does not disclose that original counsel was incompetent to represent defendant. Counsel withdrew at defendant's request, presumably because *defendant* was not satisfied with her. Under the circumstances of this case, we find that the trial court's denial of substitute counsel was entirely appropriate.

After the trial court allowed counsel to withdraw, the following exchange took place:

[Prosecutor]: Are you ready to proceed?

[Defendant]: No. I will fill out the report for the indigency screeners in reference to getting a new appointment of counsel.

The Court: Motion denied.

[Prosecutor]: Are you ready to proceed?

[Defendant]: There were documents that needed to be subpoenaed and other records. That was the case last time—

The Court: —Are you in violation of your probationary judgment or are you not?

[Defendant]: Those are the allegations but they're not true and if I had my medical records subpoenaed, I would have—

The Court: —Be sworn and testify. Have a seat.

[Defendant]: Your Honor, how can I be tried without appointment of counsel? This is the same thing I tried to tell them last time. I need an attorney.

The Court: You just fired your lawyer. You're not going to have your choice of choosing lawyers every time you want to fire one.

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[111 N.C. App. 910 (1993)]

While we cannot condone the inadequacy of the trial court's inquiry into this issue, this exchange indicates that this was not the first instance in which defendant had rejected one attorney and sought another. The record reflects that defendant had a pattern of trying to delay the probation hearings and that the trial court had simply lost patience with the defendant's antics. His repeated references to "last time" support this belief, and his statement that he "will fill out the report for the indigency screeners in reference to getting a new appointment of counsel" indicates that he was well aware of the procedure for appointment of counsel and the necessary resulting delay. When this tactic failed, defendant requested that his "medical records" be subpoenaed, knowing that, if allowed, this request would further delay the hearing.

Finally, we cannot find that defendant suffered any prejudice by the court's failure to appoint substitute counsel. Defendant thoroughly cross-examined the probation officer, and he made a strong argument and a closing statement on his own behalf. He has failed to carry his burden of showing exactly how the absence of counsel prejudiced his case, as required by N.C. Gen. Stat. § 15A-1443 (1988).

Defendant's probation revocation hearing was fair and free of prejudicial error.

Affirmed.

Judges WELLS and ORR concur.

COBLE CRANES & EQUIPMENT CO. v. B & W UTILITIES, INC., THOMAS
GRAY BODFORD, MICHELLE BREWER BODFORD, AND DEBORAH
WALTERS

No. 9218DC844

(Filed 7 September 1993)

1. Rules of Civil Procedure § 15 (NCI3d)— grant of summary judgment—failure to rule on motion to amend answer—harmless error

Although the trial court erred by failing to rule on defendant's motion to amend her answer prior to granting summary

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judgment for plaintiff, defendant was not prejudiced by this error because defendant had not verified her answer and the trial court would thus not have been able to consider it when ruling upon plaintiff's motion for summary judgment.

Am Jur 2d, Appeal and Error §§ 668, 669, 713, 715, 795, 796.

2. Appeal and Error § 147 (NCI4th)— summary judgment while discovery pending—failure to preserve question for appeal

Defendant failed to preserve for appellate review the question of whether the trial court erred in allowing plaintiff's motion for summary judgment when discovery procedures were still pending where there was nothing in the record to indicate that defendant requested that the trial court continue the hearing because discovery was pending or that defendant moved to compel plaintiff's responses to the discovery.

Am Jur 2d, Appeal and Error § 545 et seq.

Appeal by defendant from order entered 18 May 1992, by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 17 June 1993.

Plaintiff instituted this action by filing a complaint alleging, *inter alia*, that defendants were jointly and severally liable to it for the amount of \$4,309.93 plus interest due on a contract and open account. The complaint averred that the liability of defendant Deborah Walters (hereinafter referred to as the defendant) was based upon her unconditional guaranty of payment of all sums due plaintiff by B&W Utilities, Inc. (B&W). On 16 April 1992, defendant filed an answer denying the substantive allegations of the complaint, after which, on 22 April 1992, plaintiff filed a motion for summary judgment supported by affidavit. Within 30 days of filing her answer, defendant filed a motion for leave to amend the answer and attached to it an amended answer and a cross-claim. In the amended answer, defendant asserted, *inter alia*, that all payments personally guaranteed by her prior to 24 November 1989 had been paid in full, that defendant had revoked her guaranty of payment on or about 24 November 1989, and that she was not liable for extensions of credit made to B&W subsequent to the later date. At approximately the time she filed the motion to amend the answer, defendant also served plaintiff with interrogatories, requests for admissions, and requests for production of documents.

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At a hearing on 18 May 1992, the trial court did not rule on defendant's motion to amend her answer. It did, however, grant plaintiff's motion for summary judgment from which defendant appeals.

Tuggle Duggins & Meschan, P.A., by Thomas S. Thornton and Jonathon S. Dills, for plaintiff-appellee.

Robert A. Lauver P.A., by Robert A. Lauver, for defendant-appellant.

MCCRODDEN, Judge.

In this appeal, defendant contends that the trial court erred, first, when it failed to rule upon defendant's motion to amend her answer prior to granting summary judgment, second, in granting summary judgment for plaintiff when defendant's amended answer raised genuine issues of material fact, and, third, in allowing plaintiff's motion for summary judgment before defendant had completed discovery. After carefully reviewing defendant's assignments of error, we find no basis for reversing the trial court's order.

[1] Defendant assigns error to the trial court's failure to rule on her motion to amend the answer and to the trial court's granting summary judgment without first ruling on the motion. She contends that the trial court should have granted her motion since it was properly filed, calendared, and before the court. We agree that the trial court's failure to rule on the motion was error, but we find this error to be harmless. In the case of *Carolina Builders v. Gelder & Associates*, 56 N.C. App. 638, 289 S.E.2d 628 (1982), this Court found that the trial court committed error as a matter of law when it ruled upon the defendant's motion for summary judgment without considering the plaintiff's motion to amend the complaint. The Court stated that "[t]he Rules of Civil Procedure achieve their purpose of insuring a speedy trial by providing for and encouraging liberal amendments to pleadings under Rule 15. Failure to rule on a motion to amend contravenes this purpose by inviting piecemeal litigation and preventing consideration of the merits of the action on all the evidence available." *Id.* at 640, 289 S.E.2d at 629 (citation omitted). Specifically, Rule 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). The motion to amend is properly addressed to the discretion of the trial judge who must weigh the motion in light of all circumstances. *Gladstein*

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v. South Square Assoc., 39 N.C. App. 171, 177, 249 S.E.2d 827, 830 (1978), *disc. review denied*, 296 N.C. 736, 254 S.E.2d 178 (1979). However, the outright refusal to grant leave to amend without any justifying reason is an abuse, not an exercise, of discretion. *Id.* at 178, 249 S.E.2d at 831 (citing *Fomen v. David*, 371 U.S. 178, 182, 9 L.Ed.2d 222, 226 (1962)).

We can detect in the record before us no reason the trial court should not have allowed defendant's motion to amend. The defendant filed the motion in a timely manner, and plaintiff would not have suffered any discernible prejudice by the judge's allowance of the motion. Indeed, we agree with plaintiff's argument that, since defendant filed her motion within thirty days after serving the original answer and since the case had not been placed on the trial calendar, she had an absolute right to amend and thus did not need to file a motion. N.C.G.S. § 1A-1, Rule 15(a). We do not, however, accept plaintiff's unsupported argument that this right justified the trial court's action with regard to defendant's motion.

The trial court's failure to allow defendant's motion to amend, however, did not prejudice the defendant, because the defendant had not verified the amended answer, and, thus, the trial court would not have been able to consider it when ruling upon plaintiff's motion for summary judgment. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). We, therefore, overrule defendant's first two assignments of error.

[2] Defendant's final argument is that the trial court erred in allowing plaintiff's motion for summary judgment when discovery procedures were still pending. We find nothing in the record to indicate, however, that defendant requested that the trial court continue the hearing because discovery was still pending or that defendant moved to compel plaintiff's responses to the discovery. Because defendant failed to request a continuance at the hearing, she has failed to preserve this question for appellate review. N.C.R. App. P. 10(b). We overrule this assignment of error.

We affirm the trial court's entry of summary judgment.

Affirmed.

Judges WELLS and ORR concur.

HUFFAKER v. HOLLEY

[111 N.C. App. 914 (1993)]

WILLIAM MICHAEL HUFFAKER v. AUGUSTUS HOLLEY AND WIFE, HAZEL T. HOLLEY, INDIVIDUALLY AND AS ATTORNEY IN FACT FOR WILLIAM B. LOTT AND WIFE, FANNIE T. LOTT, AND WILLIAM HENRY TERRY AND WIFE, DOROTHY B. TERRY; AND WILLIAM B. LOTT AND WIFE, FANNIE T. LOTT, AND WILLIAM HENRY TERRY AND WIFE, DOROTHY B. TERRY

No. 929SC789

(Filed 7 September 1993)

Courts § 84 (NCI4th) — denial of summary judgment by one judge — rehearing by another judge — absence of authority to rule on motions

A superior court judge had no authority to enter partial summary judgment for plaintiff on one issue and summary judgment for defendants on all other issues in an action to compel specific performance of a contract for the sale of land after another superior court judge had denied summary judgment for both parties and the parties brought the same matter, with no new or additional issues, before the second judge. It is irrelevant that the parties “stipulated and agreed” that the second judge could rehear the motions since their consent could not bestow authority the judge did not otherwise have.

Am Jur 2d, Courts § 87 et seq.

Appeal by plaintiff from order entered 27 April 1992 by Judge Robert H. Hobgood in the Vance County Superior Court. Heard in the Court of Appeals 10 June 1993.

Plaintiff instituted this action by complaint filed 7 June 1989, alleging, *inter alia*, that defendants had agreed to sell a parcel of land located in Williamsboro Township, Vance County to plaintiff. Plaintiff sought to compel specific performance of the alleged contract for the sale of land. On 6 September 1989, defendants filed answers and counterclaims which alleged, *inter alia*, that the contract for the sale of land was void and unenforceable under N.C. Gen. Stat. § 22-2 (1986), the statute of frauds, and that plaintiff had engaged in unfair and deceptive trade practices as defined by N.C. Gen. Stat. § 75-1.1 (1988).

On 23 January 1990, defendants filed motions for summary judgment, alleging that the statute of frauds barred any recovery by plaintiff. On 9 April 1991, plaintiff filed a motion for partial summary judgment on the ground that there was no genuine issue

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of material fact as to plaintiff's entitlement to specific performance of the contract. On 18 June 1991, Judge Robert L. Farmer (Judge Farmer) entered an order denying summary judgment for both parties. Thereafter, with the consent of both parties, Judge Robert H. Hobgood (Judge Hobgood) heard the motions for summary judgment again and, on 27 April 1992, granted summary judgment for plaintiff on defendants' allegation of unfair and deceptive trade practices, granted summary judgment in favor of defendants on all other issues, and dismissed the action. From this order, plaintiff appeals.

Perry, Kittrell, Blackburn & Blackburn, by William L. Griffin, Jr., for plaintiff-appellant.

C.C. Malone, Jr. for defendants-appellees.

MCCRODDEN, Judge.

In plaintiff's appeal, he contends that Judge Hobgood erred in awarding summary judgment for defendants and in denying his motion for partial summary judgment. The decisive question of the appeal, however, is whether, after Judge Farmer had denied the parties' respective motions for summary judgment, Judge Hobgood had the authority to grant partial summary judgment for plaintiff on the issue of unfair and deceptive trade practices and summary judgment for defendants on all other issues. We find that he did not.

North Carolina adheres to the rule that one superior court judge may not overrule the order of another superior court judge previously made in the same case on the same issue. *Carr v. Carbon Corp.*, 49 N.C. App. 631, 632-33, 272 S.E.2d 374, 376 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). In ruling on a motion for summary judgment, the court must decide as a matter of law whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law, N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990), and such ruling is determinative as to the issue presented. *Carr*, 49 N.C. App. at 633, 272 S.E.2d at 376. There may be more than one motion for summary judgment in a lawsuit, but the second motion will be appropriate only if it presents legal issues that are different from those raised in the earlier motion. *Id.* at 635, 272 S.E.2d at 377. This Court has previously stated that "[t]he conservation of judicial manpower and the prompt disposition of cases are strong arguments against allow-

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[111 N.C. App. 916 (1993)]

ing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge." *Id.* at 636, 272 S.E.2d at 378.

In the instant case, by order dated 18 June 1991, Judge Farmer denied both plaintiff's motion for partial summary judgment and defendants' motions for summary judgment. Thereafter, the parties brought the same matter, with no new or additional issues, before Judge Hobgood. Under these circumstances, we are compelled to find that Judge Hobgood had no authority to rule on these motions. It is irrelevant that plaintiff and defendants "stipulated and agreed" that Judge Hobgood could rehear the motions; their consent cannot bestow authority the judge does not otherwise have.

Accordingly, we vacate the 27 April 1992 order of summary judgment and remand this case to Vance County Superior Court.

Vacated and remanded.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. MARY ELIZABETH WHITLEY

No. 9310SC281

(Filed 7 September 1993)

Criminal Law § 1098 (NCI4th)— accessory after the fact to murder—aggravating factor—offense committed to hinder enforcement of laws—same evidence

The trial court erred when sentencing defendant as an accessory after the fact to murder by finding in aggravation that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws. The evidence tending to prove the second element of the crime charged, that the accomplice personally aided the principal in an attempt to avoid criminal liability, is the same evidence the court used to find the aggravating factor that defendant committed the offense to hinder the lawful enforcement of laws. It has been clearly established that evidence necessary

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to prove an element of the offense may not be used to prove any factor in aggravation. N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 16 November 1992 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 16 August 1993.

Defendant entered a plea of guilty to the charge of accessory after the fact of murder. After finding two factors in aggravation and two factors in mitigation, the trial court sentenced defendant to ten years active imprisonment, a sentence in excess of the presumptive. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, Jr., for the State.

E. Ray Briggs and Allen W. Powell for defendant appellant.

MCCRODDEN, Judge.

On 13 November 1992, Cornelia Whitley, daughter of defendant in the instant case, pleaded guilty to the murder of Lisa D. Crews. Whitley and Crews had been involved in a relationship for a period of eight years prior to the murder. The two women shared the parenting responsibilities of Crews's two-year-old son, Joshua Michael Bradley. On 16 November 1992, defendant entered a plea of guilty to the charge of accessory after the fact, admitting the allegation in the indictment that, following the murder, she helped her daughter dispose of Crews's body. At the sentencing hearing, Cornelia Whitley testified that the decision to dispose of the body and all attendant decisions thereto, including both the manner of disposal and the location, were defendant's.

Based upon the evidence presented at the sentencing hearing, the trial court found the following factors in aggravation: (1) the defendant induced others to participate in the commission of the offense, N.C. Gen. Stat. § 15A-1340.4(a)(1)(a) (Supp. 1992); and (2) the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws, N.C.G.S. § 15A-1340.4(a)(1)(d). The trial court found the following factors in mitigation: (1) the defendant has no record of criminal convictions, N.C.G.S. § 15A-1340.4(a)(2)(a); and (2) the defendant has been a person of good character or has had a good reputation in the

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community in which she lives, N.C.G.S. § 15A-1340.4(a)(2)(m). The trial court found the factors in aggravation to outweigh those in mitigation and sentenced defendant to ten years active imprisonment, the maximum term allowed under N.C. Gen. Stat. § 14-1.1(8) (1986) for a Class H felony.

Defendant presents three arguments on appeal. Because we find merit to defendant's second argument warranting remand for a new sentencing hearing, we will limit our review to that assignment of error. Defendant contends the trial court erred in finding as a factor in aggravation of sentencing that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws. We agree with defendant's argument that that factor is based on evidence necessary to prove an element of the offense and thus was applied in error.

To convict a defendant of the charge of being an accessory after the fact, the State must show: (1) that the principal committed a felony; (2) that the accomplice personally aided the principal in an attempt to avoid criminal liability; and (3) that the accomplice gave assistance with knowledge that the principal had committed the felony. *State v. Fearing*, 304 N.C. 499, 504, 284 S.E.2d 479, 483 (1981). By entering a plea of guilty to the offense, defendant provided the State with sufficient evidence to prove that she personally assisted the principal in her attempts to avoid criminal liability with full knowledge that the principal had committed murder.

It has been clearly established that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . ." N.C.G.S. § 15A-1340.4(a)(1) (1992); *State v. Manning*, 327 N.C. 608, 614, 398 S.E.2d 319, 322 (1990). We find that in the instant case, the evidence tending to prove the second element of the crime charged, that the accomplice personally aided the principal in an attempt to avoid criminal liability, is the same evidence the court used to find the aggravating factor that defendant committed the offense to hinder the lawful enforcement of laws. Under N.C.G.S. § 15A-1340.4(a)(1), the trial court improperly applied this aggravating factor.

"When an aggravating factor is incorrect, the trial judge cannot properly balance the aggravating and mitigating factors, and therefore the case must be remanded for resentencing." *State v. Davy*, 100 N.C. App. 551, 560, 397 S.E.2d 634, 639, *disc. review denied*, 327 N.C. 638, 398 S.E.2d 871 (1990), *citing State v. Taylor*,

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[111 N.C. App. 919 (1993)]

74 N.C. App. 326, 328, 328 S.E.2d 27, 29, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985). Defendant, therefore, must receive a new sentencing hearing.

Remanded for sentencing.

Judges WELLS and EAGLES concur.

VULCAN MATERIALS COMPANY, OUTER BANKS CONTRACTORS, INC., S. T. WOOTEN CONSTRUCTION CO., INC., AND GREYSTONE CONCRETE PRODUCTS, INC. v. FOWLER CONTRACTING CORPORATION, COMMERCIAL GRADING, INC. AND MARKETPLACE ASSOCIATES, LIMITED PARTNERSHIP

No. 929SC823

(Filed 7 September 1993)

Liens § 32 (NCI4th) – subcontractors liens – limited to amount remaining on prime contract

The trial court correctly ordered defendant Marketplace to deposit \$42,000 with the clerk of court so that it could be divided among the plaintiffs and granted Marketplace's motions to have all claims and claims of lien dismissed where defendant Marketplace had contracted with defendant Fowler to build a shopping center on Marketplace's property; Fowler subcontracted with defendant Commercial Grading; Commercial Grading subcontracted with plaintiff Outer Banks Contractors for asphalt; Fowler subcontracted with plaintiff Vulcan Materials for stone; liens and actions were eventually filed and all plaintiffs were joined; Marketplace owed approximately \$42,000 on the contract with Fowler when it received notice of the liens; plaintiffs' claims far exceeded \$42,000; and Marketplace conceded its liability for the \$42,000 and moved for the relief granted. Because plaintiffs are subrogated to the rights of the general contractor, they may assert only the lien rights which the general contractor has in the project and the general contractor can enforce the lien only for the amount due on the contract. Plaintiffs are, therefore, similarly limited. N.C.G.S. § 44A-23.

Am Jur 2d, Mechanics' Liens § 242.

VULCAN MATERIALS CO. v. FOWLER CONTRACTING CORP.

[111 N.C. App. 919 (1993)]

Appeal by plaintiffs from order entered 21 May 1992 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 16 June 1993.

Marketplace Associates (Marketplace) contracted with Fowler Contracting Corporation (Fowler) to build a shopping center on Marketplace's property. Fowler, the general contractor, subcontracted with Commercial Grading which in turn subcontracted with Outer Banks Contractors (Outer Banks) to supply asphalt for the project. Fowler also subcontracted with Vulcan Materials Company (Vulcan) for the stone to be used on the project.

On 23 January 1991, Outer Banks filed a claim of lien with the Clerk of Vance County Superior Court. Outer Banks also notified Marketplace of the lien. Outer Banks filed a complaint against Commercial Grading and Marketplace on 14 March 1991. Commercial Grading subsequently filed for bankruptcy. Each of the remaining plaintiffs filed separate lawsuits against either Marketplace, Fowler, Commercial Grading, or all three, and all plaintiffs were eventually joined in this action.

Marketplace owed approximately \$42,000.00 on the contract with Fowler (the contract) when it received notice of the liens. Marketplace retained those funds for disbursement to the plaintiffs, but plaintiffs' claims far exceeded \$42,000.00. Marketplace conceded its liability for the \$42,000.00 and moved for relief under N.C.R. Civ. P. 22 and 56 to have all claims and claims of lien dismissed. The court granted the motions and ordered Marketplace to deposit \$42,000.00 with the clerk of court so that it could be divided among the plaintiffs. From this order plaintiffs Outer Banks and Vulcan appeal.

Robert Tally, P.C., by Robert Tally, for plaintiff appellant Vulcan Materials Company.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr. and David J. Irvine, Jr., for plaintiff appellant Outer Banks Contractors, Inc.

Perry, Kittrell, Blackburn & Blackburn, by Bennett H. Perry, Jr., for defendant appellee Marketplace Associates.

ARNOLD, Chief Judge.

Plaintiffs argue that their liens on Marketplace's real property are not limited by the amount remaining due on the contract. They

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[111 N.C. App. 919 (1993)]

contend that under *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991), they are permitted to assert liens on the improved property for the full amount of their claims even though that amount greatly exceeds the amount due on the contract. We disagree.

The relevant statute, N.C. Gen. Stat. § 44A-23 (1989), reads in pertinent part:

A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16.

Our Supreme Court in *Swain* determined that this statute provides "first-, second-, and third-tier subcontractors a separate right of subrogation to the lien of the contractor who deals with the owner, distinct from the rights contained in N.C.G.S. § 44A-18." *Swain*, 328 N.C. at 660, 403 S.E.2d at 297.

As for the extent of the lien, the Supreme Court held that:

[T]he subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project. Therefore, even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project.

Id. at 661, 403 S.E.2d at 297 (citation omitted).

Swain permits a subcontractor to assert the general contractor's lien even though the owner has already paid the general contractor specifically for the subcontractor's labor or materials. That right is limited, however, by the lien rights the contractor has in the property. *Id.* Plaintiffs are necessarily limited in this way by the nature of the right they assert.

The subcontractor's right to assert a lien pursuant to G.S. § 44A-23 arises by way of subrogation, *Mace v. Bryant Constr. Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980), and "it is firmly established that '[a] party can acquire no better right by subrogation than that of the principle.'" *Thomas v. Ray*, 69 N.C. App.

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[111 N.C. App. 922 (1993)]

412, 420-21, 317 S.E.2d 53, 58 (1984) (quoting *Dowdy v. Southern Ry. Co.*, 237 N.C. 519, 525, 75 S.E.2d 639, 643 (1953)). Because plaintiffs are subrogated to the rights of the general contractor, they may assert only the lien rights which the general contractor has in the project. *Swain*, 328 N.C. at 661, 403 S.E.2d at 297. The general contractor can enforce the lien only for the amount due on the contract, and plaintiffs are, therefore, similarly limited. The trial court's order is affirmed.

Affirmed.

Judges COZORT and MARTIN concur.

ROBERT L. QUINN v. LEO G. QUINN

No. 9213SC770

(Filed 7 September 1993)

Lis Pendens § 2 (NCI4th)— improperly filed notice—claim for money damages—no basis

The trial court erred by entering judgment for defendant on his counterclaim for monetary damages arising from plaintiff's *lis pendens* filing where plaintiff filed an action alleging that defendant had obtained lot 9 in a subdivision and a house allegedly on lot 9 by fraud, plaintiff filed a notice of *lis pendens* on lot 9, the parties subsequently learned that the house was on lot 8 and amended the complaint and answer, the notice of *lis pendens* was cancelled, defendant filed a claim for supplemental special damages, and a judgment was entered for defendant after a nonjury trial. North Carolina case law does not support the position that evidence that plaintiff filed the *lis pendens* on the wrong lot, that plaintiff filed the *lis pendens* to stop the sale of the property, and that defendant suffered damages as a result is enough to support the conclusion that plaintiff is liable for damages. N.C.G.S. § 1-116(a)(1) and (d).

Am Jur 2d, Lis Pendens § 1 et seq.

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[111 N.C. App. 922 (1993)]

Appeal by plaintiff from judgment entered 28 January 1992 by Judge B. Craig Ellis in Brunswick County Superior Court. Heard in the Court of Appeals 10 June 1993.

Upon learning that defendant had listed for sale two contiguous lots, Lots 8 and 9, Howells' Point Development in Sunset Harbor, plaintiff instituted this action on 28 August 1987, alleging, *inter alia*, that defendant, his father, had obtained Lot 9 and a house allegedly located on the lot from him by fraud. He sought sole title to Lot 9. Based upon his claim of ownership, plaintiff filed a notice of *lis pendens* on Lot 9.

On 2 November 1987, defendant filed an answer and counterclaim. Thereafter, the parties learned that the frame house was located on Lot 8, rather than on Lot 9. Both plaintiff and defendant filed amendments to the complaint and answer. By order dated 21 June 1989, and filed thereafter on 10 July 1989, Judge D. B. Herring, Jr. (Judge Herring) ordered that the notice of *lis pendens* against Lot 9 be cancelled.

On 10 October 1990, defendant then filed a claim for supplemental special damages, and on 16 May 1991, Judge Gregory A. Weeks entered an order allowing defendant to file such claim. After pretrial rulings on 15 May 1991, plaintiff took a voluntary dismissal of his claims in open court. On 22 August 1991, he filed a reply to the counterclaim in which he included a Rule 12(b)(6) motion to dismiss for failure of the counterclaim to state a claim upon which relief could be granted. During the nonjury trial on 22 August 1991, Judge Ellis entered judgment on defendant's counterclaim and awarded damages in the amount of \$11,700.75. From the denial of his motion to dismiss and from the award of damages, plaintiff appeals.

Frink, Foy, Gainey & Yount, P.A., by Stephen B. Yount, for plaintiff-appellant.

Michael A. Swann, Esquire, for defendant-appellee.

MCCRODDEN, Judge.

We limit our review of plaintiff's assignments of error to his challenge to Judge Ellis's conclusion of law that defendant was entitled to monetary damages as a result of plaintiff's filing of the *lis pendens*. We agree with plaintiff that defendant failed to

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[111 N.C. App. 922 (1993)]

prove a basis upon which to recover for damages allegedly resulting from an improperly filed *lis pendens*.

N.C. Gen. Stat. § 1-116(a)(1) and (d) (1983) require that anyone wishing to give constructive notice of pending litigation affecting title to real property file a separate, independent notice with the clerk of superior court in the county or counties in which the property is located. The complaint is the underlying claim, not the *lis pendens*. *Whyburn v. Norwood*, 47 N.C. App. 310, 267 S.E.2d 374 (1980). If one "wantonly, maliciously, [and] without cause, commences a civil action and puts upon record a complaint and *lis pendens* for the purpose of injuring and destroying the credit and business of another, whereby that other suffers damage [he] must be liable for the legal consequences." *Chatham Estates v. Banks*, 171 N.C. 579, 582, 88 S.E. 783, 784 (1916).

Defendant argued at trial that he was entitled to damages because of plaintiff's negligence in filing the *lis pendens*. He has failed, however, to provide any authority to support his contention that plaintiff should be held liable for negligently filing the *lis pendens*, and we can find no such authority.

In *Whyburn*, as in the case at hand, the defendants did not specify upon which legal theory they were proceeding, and the Court discussed three claims, abuse of process, malicious prosecution, and slander of title, which could arise from an allegedly illegal, unreasonable, and false *lis pendens*. As discussed in *Whyburn*, malice is an essential element of each of the tort claims. In the instant case, defendant has failed to allege any malicious intent on the part of plaintiff, and we find no evidence of malice in the record. Defendant argues that evidence that plaintiff filed the *lis pendens* on the wrong lot, that plaintiff filed the *lis pendens* to stop the sale of the property, and that defendant suffered damages as a result thereof, is enough to support the conclusion that plaintiff is liable for damages. North Carolina caselaw does not support this position, and we decline to adopt it.

Based upon the foregoing analysis, we find the trial court erred in entering judgment for defendant on his counterclaim, and we reverse.

Reversed.

Judges EAGLES and LEWIS concur.

GUILFORD CO. DEPT. OF EMERGENCY SERV. v. SEABOARD CHEM. CORP.

[111 N.C. App. 925 (1993)]

GUILFORD COUNTY DEPARTMENT OF EMERGENCY SERVICES, GUILFORD COUNTY PLANNING AND DEVELOPMENT DEPARTMENT, GUILFORD COUNTY DEPARTMENT OF HEALTH AND GUILFORD COUNTY v. SEABOARD CHEMICAL CORPORATION AND SCC OF GUILFORD, INC.

No. 9318SC419

(Filed 23 September 1993)

ORDER

On 2 August 1993, this Court entered an order allowing a motion to amend the record on appeal in the case whose caption appears above. However, the motion was erroneously filed by defendants-appellants under the docket number 9318SC484. The order entered by this Court allowing the motion was likewise filed under the erroneous docket number. The order is hereby rescinded, and upon reconsideration of the motion, this Court enters the following order:

On 30 July 1993, defendants-appellants filed a motion to amend the record on appeal to include the certificate of service of the notice of appeal. The defendants-appellants' motion is dismissed. Pursuant to a decision made by this Court in conference, the appeal taken in this case shall be treated as a petition for writ of certiorari which shall be ruled upon by the panel assigned to hear the case.

This the 23rd day of September, 1993.

s/ JOHN H. CONNELL

Clerk of the Court of Appeals

JOHNSON v. STANDARD SUNCO, INC.

[111 N.C. App. 926 (1993)]

JAMES JOHNSON, PLAINTIFF, PETITIONER v. STANDARD SUNCO, INC., EMPLOYER,
AND TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 93IC334PM

(Filed 8 October 1993)

ORDER

On 7 September 1993 plaintiff filed a petition for a writ of mandamus, pursuant to Rule 22 of the North Carolina Rules of Appellate Procedure, to compel compliance by the North Carolina Industrial Commission with two previously entered decisions by the North Carolina Court of Appeals in this case. The record reveals that this Court has twice remanded this matter to the Industrial Commission for findings of fact and conclusions of law. In an Opinion and Award filed 31 August 1993, the Industrial Commission failed to make any findings of fact or conclusions of law as this Court mandated in an opinion filed 7 July 1992.

The Industrial Commission habitually ignores clear mandates from this Court. *See, e.g., Hardin v. Venture Constr. Co.*, 107 N.C. App. 758, 421 S.E.2d 601 (1992); *Faircloth v. N.C. Dep't. of Transp.*, 106 N.C. App. 303, 416 S.E.2d 409 (1992); *Braswell v. Pitt County Memorial Hosp.*, 106 N.C. App. 1, 415 S.E.2d 86 (1992); *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 414 S.E.2d 771 (1992); *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988). Other Industrial Commission cases currently pending in this Court, with the Industrial Commission's decision coming long after clear directives from this Court, evidence an intentional and willful disregard for this Court's mandates. *See, e.g., Lancaster v. G & M Masonry, Inc.*, (No. 9210IC1029, heard 28 September 1993); *Radica v. Carolina Mills*, (No. 9210IC1239, calendared for 26 October 1993); and *Baynard v. H-Hamrick & Haynes Auto Sales, Inc.* (No. 9210IC1244, calendared for 26 October 1993). As Chief Judge Hedrick observed in *Hardin*, "[t]he 'yo-yo' procedure, up and down, up and down, in which the full Commission engages works to defeat the very purpose of the Workers' Compensation Act." *Hardin*, 107 N.C. App. at 761, 421 S.E.2d at 602-03.

Furthermore, the Industrial Commission's obvious disregard of mandates from the appellate courts disrupts the efficiency of our judicial system. As our Supreme Court has observed, "Upon appeal our mandate is binding upon [a lower court] and must be

JOHNSON v. STANDARD SUNCO, INC.

[111 N.C. App. 926 (1993)]

strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. 'Otherwise, litigation would never be ended'" *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). See also *Severance v. Ford Motor Co.*, 105 N.C. App. 98, 100-01, 411 S.E.2d 618, 620 (1992).

The plaintiff's petition for writ of mandamus is allowed. Within 14 days of the date of this writ, the Industrial Commission shall issue an Opinion and Award in Industrial Commission Case No. I.C. 033019, fully complying with this Court's mandate in its opinion of 7 July 1992 (Court of Appeals Docket No. 9110IC711), and shall cause a copy of said Opinion and Award to be filed with the Clerk of the Court of Appeals within 14 days of the date of this writ.

This the 8th day of October, 1993.

The foregoing order is therefore certified to the Executive Secretary North Carolina Industrial Commission.

Witness my hand and official seal this the 8th day of October, 1993.

s/ JOHN H. CONNELL
Clerk of the Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 7 SEPTEMBER 1993

ALPHIN v. SENAY No. 928SC865	Lenoir (91CVS1348)	Vacated
ARNETTE v. U.S. FIDELITY & GUARANTY CO. No. 925SC69	New Hanover (90CVS1181)	Affirmed
BAILEY v. JORDAN No. 9120SC1230	Anson (89CVS415)	Reverse & remand for new trial
BELL v. HICKORY FENCE CO. No. 9222SC985	Iredell (91CVS1142)	No Error
COLEMAN v. GLOVER No. 9228SC1269	Buncombe (91CVS4425)	Affirmed
CRAFTON v. STC DISTRIBUTING, INC. No. 9210IC761	Ind. Comm. (931132)	Affirmed
FIELDS v. FARMER BOY, AG, INC. No. 923SC455	Pitt (91CVS189)	Affirmed
FOSTER v. CEDARALE HOMES, INC. No. 9218SC543	Guilford (90CVS4986)	Appeal of New England Log Homes, Inc.— Reversed. Plaintiff's appeal—vacated & remanded
HALIFAX COUNTY DEPT. OF SOCIAL SERVICES v. ALSTON No. 926DC651	Halifax (83CVD837)	Vacated & Remanded
IN RE CRAIG No. 9224DC768	Mitchell (91J24)	Affirmed
IN RE WEDDINGTON No. 9226DC599	Mecklenburg (90J256) (90J257) (90J515)	Affirmed
KRAFT FOODSERVICE, INC. v. HARDEE No. 937SC297	Nash (92CVS256)	Appeal Dismissed

LOCUS v. FAYETTEVILLE STATE UNIVERSITY No. 9212SC111	Cumberland (88CVS4691)	Affirmed
MACO HOMES v. CHARLOTTE ZONING BD. OF ADJUSTMENT No. 9226SC246	Mecklenburg (91CVS6374)	Affirmed
MECHANICAL SUPPLY CO. v. DAVIDSON No. 9226SC830	Mecklenburg (90CVS6943)	New Trial
MILLER v. NU-WRAY, INC. No. 9224SC846	Yancey (91CVS37)	Affirmed
NASH COUNTY DEPT. OF SOCIAL SERVICES v. FARMER No. 927DC721	Nash (92CVD222)	Vacated & Remanded
NORMAN v. NORFOLK SOUTHERN RAILWAY CO. No. 9217SC990	Surry (92CVS53)	Affirmed
PANEL v. WALLACE No. 9210SC884	Wake (90CVS5549)	Affirmed
ROBERTSON v. HUNSINGER No. 9228DC335	Buncombe (91CVD68)	Vacated & Remanded
SOUTHWEST MODULARS, INC. v. HAYES No. 9226SC804	Mecklenburg (90CVS18792)	Dismissed
STANSBURY v. TOWN & COUNTRY FORD No. 9226DC807	Mecklenburg (91CVD10862) (HBM)	Affirmed
STATE v. DEESE No. 9216SC1107	Robeson (91CRS18123) (91CRS18124)	No Error
STATE v. FREEMAN No. 9212SC872	Cumberland (91CRS26971) (91CRS34239)	Affirmed
STATE v. FRYE No. 9221SC1101	Forsyth (92CRS14242)	No Error
STATE v. GOMILLION No. 9226SC1116	Mecklenburg (91CRS28091)	No Error

STATE v. HAMILTON No. 9227SC938	Gaston (91CRS20457) (91CRS20848) (91CRS20849) (91CRS22190)	No Error
STATE v. HARPER No. 9322SC252	Davidson (91CRS19122) (91CRS19126)	No Error
STATE v. HARRIS No. 9214SC1135	Durham (88CRS09536)	Remanded for resentencing
STATE v. HASTY No. 925SC974	New Hanover (91CRS11291) (91CRS11292)	No Error
STATE v. HENDERSON No. 927SC1077	Nash (91CRS17455)	Remanded for resentencing
STATE v. HOLLOWAY No. 9214SC1073	Durham (90CRS14077) (90CRS14079)	No Error
STATE v. HUGGINS No. 9216SC1103	Robeson (90CRS20845) (90CRS20846) (90CRS20847) (90CRS23130)	No Error
STATE v. HYDE No. 927SC1056	Nash (91CRS13739)	No Error
STATE v. JOHNSON No. 9218SC671	Guilford (90CRS75350) (90CRS75351)	Vacated in part
STATE v. JONES No. 9216SC1123	Robeson (90CRS22297) (90CRS22298) (90CRS22743) (91CRS22605) (91CRS22638) (92CRS4792) (92CRS4793)	Affirmed
STATE v. JUDD No. 9210SC942	Wake (91CRS11339) (91CRS11342)	No Error
STATE v. KENNEDY & STATE v. HARRIS No. 9220SC859	Moore (91CRS9099) (91CRS9360)	No Error

STATE v. KORNEGAY No. 938SC176	Wayne (91CRS16650)	No Error
STATE v. MAGEE No. 931SC285	Dare (91CRS13676)	Affirmed
STATE v. McMURRAY No. 9226SC1066	Rutherford (91CRS9059)	No Error
STATE v. MOORE No. 9228SC898	Buncombe (91CRS18782) (91CRS52580)	No Error
STATE v. NEWKIRK No. 9213SC1050	Bladen (91CRS2753) (91CRS2754)	No Error
STATE v. OAKLEY No. 9318SC156	Guilford (92CRS50869) (92CRS50870) (92CRS50871)	As to 92CRS50870 & 92CRS50871— appeal dismissed. As to 92CRS50869— no error
STATE v. OVERBY No. 9214SC1084	Durham (87CRS22997) (88CRS27639) (88CRS10192) (88CRS10193)	No Error
STATE v. OWENS No. 9210SC1039	Wake (91CRS44711)	No Error
STATE v. PENDLEY No. 9124SC847	Mitchell (90CRS414) (90CRS415)	No Error
STATE v. PHILLIPS No. 9218SC754	Guilford (90CRS76601)	No Error
STATE v. POWELL No. 915SC1044	New Hanover (90CRS25473) (90CRS25474) (90CRS25481)	Affirmed
STATE v. PRINCE No. 9319SC250	Cabarrus (90CRS12146) (90CRS12147)	No Error
STATE v. SHERLOCK No. 9212SC856	Cumberland (90CRS44257) (90CRS44258) (90CRS44255) (90CRS44245) (90CRS44256) (90CRS44252)	Affirmed

STATE v. SPEED No. 9226SC665	Mecklenburg (91CRS062243) (91CRS062246) (91CRS062247) (91CRS062248) (91CRS062249) (91CRS062250) (91CRS062251)	As a result of our review of defendant's first assignment of error, we arrest judgment on his conviction for first degree sexual offense (91CRS062248). Otherwise, we find no error in the trial court's rulings.
STATE v. STEPHENS No. 9327SC239	Lincoln (91CRS2971)	No Error
STATE v. THACKER No. 9318SC324	Guilford (91CRS48309) (91CRS48310) (91CRS48311) (92CRS20241) (92CRS20260)	No Error
STATE v. USSERY No. 9225SC720	Catawba (91CRS1817) (91CRS13886)	No Error
STATE v. WARD No. 923SC1109	Pitt (91CRS7863)	No Error
STATE v. WILSON No. 9214SC1183	Durham (89CRS32252) (90CRS17195) (90CRS2188)	Affirmed
WARREN v. INVESTMENT PROPERTIES, INC. No. 9210SC806	Wake (91CVS1637)	Dismissed
WILLIAMSON & WALTON v. HAMMOND No. 9213DC212	Columbus (89CVD944)	Reversed & Remanded

APPENDIX

REVISED RULES OF MEDIATED SETTLEMENT CONFERENCES

IN THE SUPREME COURT OF NORTH CAROLINA

**ORDER ADOPTING REVISED RULES OF
MEDIATED SETTLEMENT CONFERENCES**

WHEREAS, section 7A-38 of the North Carolina General Statutes provides a means for establishing a pilot program of mediated settlement conferences in superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38 enables this Court to implement section 7A-38 by adopting rules and amendments to rules concerning said mediated conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38(d), Rules 1,2,3,6,7 and 8 of the Rules of Mediated Settlement Conferences, 329 N.C. 795, are hereby amended to read as in the following pages. The Amended Rules shall be effective the 1st day of December, 1993.

Adopted by the Court in conference the 9th day of September, 1993. The Appellate Court Reporter shall publish the Rules of Mediated Settlement Conferences in their entirety, as amended through this action, at the earliest practicable time.

Parker, J.
For the Court

**RULE 1. ORDER FOR MEDIATED SETTLEMENT
CONFERENCE**

- (a) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any civil action except habeas corpus proceedings or other actions for extraordinary writs;
- (b) Timing of the Order. The Senior Resident Superior Court Judge may issue the order at any time after the time for the filing of answers has expired. Rules 1(c) and 3(b) herein shall govern the content of the order and the date of completion of the conference.
- (c) Content of Order. The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.
- (d) Motion to Dispense With Mediated Settlement Conference. A party may move the Senior Resident Superior Court Judge, within 10 days after the court's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.
- (e) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any or all parties may move the Senior Resident Superior Court Judge to order such a conference. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge

shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

- (f) Exemption from Mediated Settlement Conferences. In order to evaluate the pilot program of mediated settlement conferences, the Senior Resident Superior Court Judge may be required by the Administrative Office of the Courts to exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

RULE 2. SELECTION OF MEDIATOR

- (a) Selection of Certified Mediator by Agreement of Parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts.
- (b) Nomination and Court Approval of a Non-Certified Mediator. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's

REVISED RULES OF
MEDIATED SETTLEMENT CONFERENCES

decision. The nomination and approval or disapproval of the court shall be on a form prepared and distributed by the Administrative Office of the Courts.

- (c) Appointment of Mediator by the Court. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Administrative Office of the Courts shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

- (d) Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Administrative Office of the Courts and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.
- (e) Disqualification of Mediator. Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For

good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1(b) shall clearly state a date of completion for the conference. Said date shall not be less than 90 days nor more than 180 days after the issuance of the court's order.

(c) Request to Extend Date of Completion. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator.

The Senior Resident Superior Court Judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. Said order shall be served upon the parties and the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(e) The Mediated Settlement Conference is Not to Delay Other Proceedings. It shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the

REVISED RULES OF
MEDIATED SETTLEMENT CONFERENCES

filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

- (a) Attendance. The following persons shall physically attend a mediated settlement conference:
- (1) All individual parties; or an officer, director or employee having authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision making body of the agency; and
 - (2) The party's counsel of record, if any; and
 - (3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle the claim.
- (b) Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.
- (c) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a person fails to attend a duly ordered mediated settlement conference without good cause, a Resident or Presiding Judge may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys fees, mediator fees and expenses incurred by persons attending the conference; contempt; or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.

- (1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.
- (2) Private Consultation. The mediator may meet and consult privately with any party or parties or their counsel during the conference.
- (3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the parties, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

- (1) The mediator shall define and describe the following to the parties at the beginning of the conference:
 - (a) The process of mediation;
 - (b) The differences between mediation and other forms of conflict resolution;
 - (c) The costs of the mediated settlement conference;
 - (d) The facts that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;
 - (e) The circumstances under which the mediator may meet alone with either of the parties or with any other person;
 - (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (g) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code;
 - (h) The duties and responsibilities of the mediator and the parties; and
 - (i) The fact that any agreement reached will be reached by mutual consent of the parties.
- (2) Disclosure. The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

REVISED RULES OF
MEDIATED SETTLEMENT CONFERENCES

- (3) Declaring Impasse. It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.
- (4) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.
- (5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

- (a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.
- (b) By Court Order. When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the Senior Resident Superior Court Judge for all court appointed mediators in the district, upon consultation with the Administrative Office of the Courts.
- (c) Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator appointed or selected pursuant to these rules. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of its obligation to pay its share of the mediator's compensation. Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subse-

quent to the trial of the action. The Judge may take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

- (d) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid: one share by the plaintiffs, one share by the defendants and one share by third-party defendants. Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Administrative Office of the Courts may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

- (a) Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Administrative Office of the Courts;
- (b) Be a member in good standing of the North Carolina State Bar and have at least five years experience as a judge, practicing attorney, law professor, or mediator, or equivalent experience;
- (c) Observe two civil trial court mediated settlement conferences conducted by a mediator certified either in the State of North Carolina or in any other state with comparable certification requirements to those outlined in these rules;
- (d) Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;
- (e) Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;
- (f) Submit proof of qualifications set out in this section on a form provided by the Administrative Office of the Courts;
- (g) Pay all administrative fees established by the Administrative Office of the Courts; and
- (h) Agree to mediate indigent cases without pay.

REVISED RULES OF
MEDIATED SETTLEMENT CONFERENCES

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Director of the Administrative Office of the Courts that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

**RULE 9. CERTIFICATION OF MEDIATION
TRAINING PROGRAMS**

- (a) Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:
- (1) Conflict resolution and mediation theory;
 - (2) Mediation process and techniques, including the process and techniques of trial court mediation;
 - (3) Standards of conduct for mediators;
 - (4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;
 - (5) Demonstrations of mediated settlement conferences;
 - (6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and
 - (7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.
- (b) A training program must be certified by the Director of the Administrative Office of the Courts before attendance at such program may be used for compliance with Rule 8(a). Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Director of the Administrative Office of the Courts if they are in substantial compliance with the standards set forth in this rule.

- (c) Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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APPEAL AND ERROR

§ 99 (NCI4th). Self-defense; situations in which instruction required

The trial court erred in failing to instruct on self-defense where there was evidence that the victim charged at defendant with a hammer and defendant was able to obtain control of the hammer and to use it to resist the victim's attack. **State v. Moore**, 649.

§ 109 (NCI4th). Preliminary injunctions and restraining orders; appeal allowed

An appeal was allowed from a preliminary injunction restricting abortion picketing at a doctor's residence. **Kaplan v. Prolife Action League of Greensboro**, 1.

§ 118 (NCI4th). Appealability of denial of summary judgment

Plaintiffs' automobile insurer, an unnamed party, had no right to immediately appeal the denial of its motion for summary judgment made on the ground that plaintiffs' uninsured motorist coverage had been exhausted since no substantial right of the insurer was affected. **Cagle v. Teachy**, 244.

The denial of a motion for summary judgment is not a final judgment and is not immediately appealable even if the trial court has attempted to certify it for appeal under Rule 54(b). **Ibid.**

Defendant's appeal from the denial of summary judgment was dismissed because the denial of a motion for summary judgment is interlocutory, does not affect a substantial right, and is nonappealable. **Thrift v. Food Lion**, 758.

§ 119 (NCI4th). Appealability of grant of summary judgment

An appeal was dismissed as interlocutory where a partial summary judgment was granted for plaintiff on the issue on uninsured motorist coverage and the trial judge certified his order for immediate appeal. Such certification is not dispositional when the order appealed from is interlocutory. **McNeil v. Hicks**, 262.

An appeal by plaintiff and defendant Food Lion from the granting of summary judgment for defendant Triangle Ice was considered on its merits where dismissing the appeal against Triangle could result in two trials on the same factual issues and would consequently deprive plaintiff and Food Lion of a substantial right. **Thrift v. Food Lion**, 758.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Defendant failed to preserve for appellate review the question of whether the trial court erred in allowing plaintiff's motion for summary judgment when discovery procedures were still pending where defendant made no request that the trial court continue the hearing because discovery was pending. **Coble Cranes & Equipment Co. v. B & W Utilities, Inc.**, 910.

§ 168 (NCI4th). Mootness of questions involving statutes or ordinances

Defendant's contention that the 1991 amendment to the statutes pertaining to commitment and recommitment of an insanity acquittee violated due process and equal protection is moot since the statutes have again been amended in response to a U. S. Supreme Court decision and defendant has since had an opportunity to be heard under the new statute. **In re Hayes**, 384.

§ 205 (NCI4th). Time for appeal

An appeal was dismissed where a judgment was signed on 13 December 1991 following a trial, that judgment contained a clerical error and reflected entry of judgment on 2 October 1991, the trial court sought to correct the judgment on

APPEAL AND ERROR — Continued

its own initiative and modified the original judgment on 10 February 1992 to reflect judgment being entered on 21 January 1992, and plaintiff filed notice of appeal on 19 February 1992. Plaintiff's notice of appeal was dismissed as untimely because the trial court lacked the authority to modify its judgment to reflect a date of entry other than 13 December 1991. **Food Service Specialists v. Atlas Restaurant Management**, 257.

§ 340 (NCI4th). Assignments of error generally

It was assumed on appeal that there was sufficient evidence presented at trial to establish a duty and a breach of that duty where the hospital assigned error only to the sufficiency of evidence as to proximate causation. **Dixon v. Taylor**, 97.

ASSAULT AND BATTERY**§ 100 (NCI4th). Self-defense; situations in which instruction not required**

Defendant was not entitled to an instruction on self-defense when he entered the victims' house and bedroom without permission and was thus at fault in starting the conflict. **State v. Owen**, 300.

§ 116 (NCI4th). Particular circumstances not requiring submission of lesser degrees of offenses

The evidence of intent to kill was uncontroverted in a prosecution for assault with a deadly weapon with intent to kill so that the trial court did not err in failing to submit the lesser-included offense of assault with a deadly weapon. **State v. Owen**, 300.

ATTORNEYS AT LAW**§ 5 (NCI4th). Inherent power of court**

The trial court did not err by dismissing a claim for a "judgment of misconduct" against an attorney based on violations of the Rules of Professional Conduct. **Bryant v. State Bd. of Examiners of Electrical Contractors**, 875.

§ 55 (NCI4th). Reasonableness of fee; burden of proof

The trial court did not err in awarding attorney's fees to plaintiff in an action for breach of a lease agreement without considering whether the amount allowed was reasonable where the lease provided for the payment of reasonable fees but did not refer to any specific percentage, and G.S. 6-21.2(2) therefore applied so that the amount of attorney's fees should be 15% of the outstanding balance owing on the evidence of indebtedness. **RC Associates v. Regency Ventures, Inc.**, 367.

AUTOMOBILES AND OTHER VEHICLES**§ 87 (NCI4th). Grounds for mandatory suspension of license; alcohol or drug-related offenses generally**

G.S. 20-19(j) authorizes the Division of Motor Vehicles to amend its G.S. 20-19(d) revocation orders for driving while impaired when the convictions occur in reverse order than the offenses so as to allow the intended four-year revocation of the offender's driver's license. **Wagoner v. Hiatt**, 448.

AUTOMOBILES AND OTHER VEHICLES — Continued**§ 187 (NCI4th). Changing location of dealership**

The trial court's application of the amended version of G.S. 20-305(4) in an action involving the relocation of an automobile dealership was not retroactive where defendant did not present its written proposal until after 1 October 1991, the effective date of the amendments, although plaintiff was aware that defendant had been negotiating the relocation. **Nissan Motor Corp. v. Fred Anderson Nissan**, 748.

The amendments to G.S. 20-305(4), providing for administrative review of an automobile manufacturer's or distributor's refusal to approve a dealer's relocation of its facilities, are not an unconstitutional impairment of the parties' right to contract. **Ibid.**

§ 528 (NCI4th). Condition of highway; wet pavement

The trial court properly denied plaintiff's motion for a directed verdict where plaintiff argued that defendant was exceeding a safe speed under the existing hazardous road conditions but the evidence permitted the jury to reasonably conclude that defendant was not driving at an excessive speed, or if he was, that his negligence was not a proximate cause of plaintiff's injuries because a small crest in the road prevented defendant from seeing a puddle in the road in sufficient time to react to avoid the puddle and thus avoid skidding out of control. **Moreau v. Hill**, 679.

§ 536 (NCI4th). Condition of driver; illness or loss of consciousness

A genuine issue of material fact existed as to whether defendant suffered a sudden medical emergency, a stroke, at or immediately prior to the accident and whether this emergency was foreseeable to defendant. **Mobley v. Estate of Johnson**, 422.

§ 716 (NCI4th). Instructions to jury; last clear chance

The trial court erred in failing to instruct on last clear chance where defendant had the time and means, by staying in his own lane of travel, to avoid the accident. **Hales v. Thompson**, 350.

§ 765 (NCI4th). Instructions to jury; sudden emergency and unavoidable accident generally

The trial court erred in instructing on sudden emergency where there was no allegation or evidence that, after defendant's vehicle hit a puddle of water in the road, defendant acted in a negligent manner. **Moreau v. Hill**, 679.

§ 822 (NCI4th). Impaired driving; level of punishment; particular aggravating factors

The evidence was sufficient to support the sentencing judge's findings of the aggravating factors of an alcohol concentration of .20 or more, especially reckless or dangerous driving, and negligent driving that led to an accident causing property damage in excess of \$500. **State v. Gunter**, 621.

§ 823 (NCI4th). Impaired driving; level of punishment; mitigating factors

The trial court did not err in failing to find as a statutory mitigating factor that defendant received a substance abuse assessment after being charged and prior to sentencing where defendant did not go for assessment until the day before sentencing and he had not yet participated in his treatment. **State v. Gunter**, 621.

BROKERS AND FACTORS

§ 31 (NCI4th). **Right to commission or compensation; seller's conduct resulting in nonperformance**

Plaintiff real estate broker could not collect a commission where he procured a buyer at a price acceptable to the seller, the seller refused to make repairs after the buyer's inspection, and the buyer terminated the agreement. **Allman v. Charles**, 673.

BURGLARY AND UNLAWFUL BREAKINGS

§ 164 (NCI4th). **Nonfelonious or misdemeanor breaking or entering as lesser included offenses of first-degree burglary; instruction required**

The trial court in a first-degree burglary case erred in refusing to instruct on misdemeanor breaking and entering where there was substantial evidence to support defendant's contention that he did not have the intent to commit larceny but broke and entered with the intent to retrieve his shotgun which he had earlier seen in the victims' house. **State v. Owen**, 300.

CONSPIRACY

§ 40 (NCI4th). **Instructions as to requisite elements, generally**

The trial court erred by instructing the jury that it could find defendant guilty of conspiracy to traffic in cocaine "if defendant agreed with one other person" rather than limiting the conspiracy to one with the co-conspirator named in the indictment. **State v. Minter**, 40.

CONSTITUTIONAL LAW

§ 85 (NCI4th). **Other rights and liberties**

The drug testing policy implemented by defendant airport authority was constitutional when applied to a plaintiff who was authorized to drive a vehicle on the apron of the flight area of the airport. **Boesche v. Raleigh-Durham Airport Authority**, 149.

§ 126 (NCI4th). **Parades, picketing, and public demonstrations**

There was sufficient competent evidence in an action for a preliminary injunction to support the trial court's finding that defendants had engaged in targeted residential picketing. **Kaplan v. Prolife Action League of Greensboro**, 1.

The trial court did not err by finding that defendants' conduct was coercive in granting a preliminary injunction against abortion picketing at a doctor's residence. **Ibid.**

Restrictions on abortion picketing at a doctor's house in a preliminary injunction were content-neutral where the trial court did not focus on the effect or impact of defendants' message on potential users, but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home. **Ibid.**

A preliminary injunction against abortion picketing at a doctor's residence met the constitutionally mandated requirement that the injunctive relief be narrowly tailored and left open ample alternate channels of communication. **Ibid.**

§ 129 (NCI4th). **Right to jury trial in civil action or proceeding**

There is no right to a jury trial of a claim for remission of forfeiture of a vehicle used in violation of the controlled substances laws. **State v. Honaker**, 216.

CONSTITUTIONAL LAW — Continued**§ 165 (NCI4th). Ex post facto laws; sentencing laws**

Application of the statutory amendments shifting the burden of proof in a recommitment hearing for an insanity acquittee and opening the hearing to the public after respondent was acquitted by reason of insanity and was involuntarily committed did not violate the Ex Post Facto Clause. *In re Hayes*, 384.

§ 262 (NCI4th). Right to counsel generally

Article I, § 23 of the N. C. Constitution does not provide broader protection than the U. S. Constitution with regard to a defendant's right to counsel. *State v. Harris*, 58.

§ 295 (NCI4th). What constitutes denial of effective assistance of counsel; miscellaneous circumstances

An attorney's dual representation of defendant and a key prosecution witness in a second-degree murder prosecution established a conflict of interest wherein the attorney could not effectively represent defendant even though the representation of the witness took place during concurrent criminal charges not related to this case. *State v. James*, 785.

§ 325 (NCI4th). What constitutes violation of speedy trial right generally

Defendant was not denied due process by the prosecutor's calendaring of her murder case for trial ten times before it actually went to trial. *State v. Webster*, 72.

§ 327 (NCI4th). Speedy trial; requirement that delay be negligent or willful and prejudicial; particular circumstances

Defendant's constitutional right to a speedy trial was not violated by a delay of sixteen months between her arrest and her trial for murder. *State v. Webster*, 72.

§ 345 (NCI4th). Presence of defendant at pronouncement of verdict, sentence or judgment

Any violation of defendant's right to be present at every stage of her trial by the court's acceptance of the jury's verdict in a second-degree murder case in the absence of defendant was not prejudicial where the court explained that defendant was absent for good cause shown. *State v. Webster*, 72.

§ 352 (NCI4th). Self-incrimination generally

Article I, § 23 of the N. C. Constitution does not provide broader protection than the U. S. Constitution with regard to defendant's right not to be compelled to give self-incriminating evidence. *State v. Harris*, 58.

§ 367 (NCI4th). Prohibition of cruel and unusual punishment; consecutive sentences

The trial court's imposition of consecutive maximum sentences for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, based upon a finding of the aggravating factor that defendant had a prior conviction punishable by imprisonment for more than sixty days, did not constitute cruel and unusual punishment. *State v. Harris*, 58.

CONTRACTS**§ 82 (NCI4th). Excuses for nonperformance; frustration of purpose doctrine**

Performance of a contract to convey an easement was excused under the doctrine of impossibility of performance where the county condemned the property. *UNCC Properties, Inc. v. Green*, 391.

CONTRACTS — Continued**§ 148 (NCI4th). Sufficiency of evidence as to breach of contract; other miscellaneous contracts**

The trial court in an action arising from the financing of a time share resort appropriately granted summary judgment for plaintiff on promissory obligations evidenced by settlement notes executed by First Resort and Ranch Resorts and a credit and guaranty agreement executed by Horizon and Foxfire Resorts where First Resort and Ranch Resorts agreed to compromise and settle their outstanding indebtedness to plaintiff under the original financing agreement by executing the promissory notes. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

The trial court did not err by granting summary judgment for plaintiff on defendants' counterclaims for breach of contract arising from the financing of a time share resort where defendants contend that plaintiff "impliedly" promised to foreclose on the properties within 90 days of the execution of the workout agreements, but their forecast of evidence failed to raise a genuine issue of fact concerning the "implied" promise. **Ibid.**

CORPORATIONS**§ 16.1 (NCI3d). Federal and state regulation of sale of securities**

Defendant securities brokerage firm made a valid rescission offer to plaintiff investor for fraud by its broker pursuant to G.S. 78A-56(g)(1) so that plaintiff is precluded by her acceptance of the amount offered from maintaining an action against the brokerage firm. **Mashburn v. First Investors Corp.**, 398.

Defendant did not actually "transact business" so as to come within the purview of the N. C. Securities Act by misrepresenting to his victims that he had invested their money in stock options where defendant gave victims the false impression that he was a licensed broker. **State v. Clemmons**, 569.

§ 208 (NCI4th). Claims against dissolved corporation as consequence of entire asset purchase

In an action to recover for damages to goods during delivery by defendant carrier, there was a genuine issue of material fact as to whether an existing corporation should be liable for such claim on the ground that it purchased the carrier for grossly inadequate consideration and is a mere continuation of the carrier. **L. J. Best Furniture Distributors v. Capital Delivery Service**, 405.

A genuine issue of material fact existed as to whether defendant Cavalier Acquisition Corporation was a successor corporation and therefore responsible for products liability claims against Cavalier Corporation, which manufactured the drink vending machine involved in the products liability case. **Morgan v. Cavalier Acquisition Corp.**, 420.

COSTS**§ 36 (NCI4th). Attorney's fees; nonjusticiable cases**

Even though plaintiffs were barred from bringing a medical malpractice action by the three-year statute of limitation, plaintiffs advanced their claim in good faith for an extension or modification of the existing law, and the trial court properly denied defendants' motions for attorney's fees pursuant to G.S. 6-21.5. **Brittain v. Cinnoca**, 656.

COSTS — Continued

§ 37 (NCI4th). Attorney's fees in other particular actions or proceedings

The trial court had jurisdiction to rule on petitioner's motion for attorney's fees against a State agency pursuant to G.S. 6-19.1 which was filed well before final judgment. **Whiteco Industries, Inc. v. Harrelson**, 815; **Whiteco Industries, Inc. v. Harrington**, 839.

The DOT had substantial justification to revoke petitioner's outdoor advertising permit and to defend petitioner's action contesting the revocation so that the trial court erred in awarding attorney's fees to petitioner under G.S. 6-19.1 where petitioner's billboard lessee hired a landscaping company to cut limbs and trees on the highway right of way in front of the billboard in violation of DOT regulations. **Whiteco Industries, Inc. v. Harrelson**, 815.

The DOT had substantial justification to revoke petitioner's outdoor advertising permit so that the trial court erred in awarding attorney's fees to petitioner under G.S. 6-19.1 where an employee of petitioner's billboard lessee crossed the control of access fence for the interstate to move his vehicle. **Whiteco Industries, Inc. v. Harrington**, 839.

COURTS

§ 16 (NCI4th). Personal jurisdiction; goods shipped from, or received in, state

Defendant Nebraska company which sent a shipment of its butter to a North Carolina buyer was not subject to personal jurisdiction in North Carolina in a personal injury action based on alleged negligent loading of the butter onto a truck since the "stream of commerce" theory applies only to products liability cases and defendant had insufficient contacts with North Carolina to permit personal jurisdiction. **Considine v. West Point Dairy Products**, 427.

§ 84 (NCI4th). Jurisdiction to review rulings of another superior court judge; motion for summary judgment or judgment on pleadings

A superior court judge had no authority to reconsider motions for summary judgment which had been denied by another superior court judge even though the parties stipulated and agreed that the second judge could rehear the motions. **Huffaker v. Holley**, 914.

CRIMINAL LAW

§ 67 (NCI4th). Jurisdiction of superior courts, generally

Although the district court had jurisdiction of a driving while impaired case when a citation for that offense was issued, the superior court acquired jurisdiction when the grand jury issued a presentment which was the first accusation of the offense within the superior court. **State v. Gunter**, 621.

§ 76 (NCI4th). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

The trial court did not abuse its discretion in denying defendant's motion for a change of venue or special venire where results of a poll of former jurors taken by a university student failed to demonstrate that the jurors who sat in defendant's trial based their decision on any pretrial publicity. **State v. Pendergrass**, 310.

CRIMINAL LAW — Continued

§ 113 (NCI4th). Regulation of discovery; failure to comply

The trial court did not err in a robbery prosecution by denying defendant's motion for a mistrial based on the State offering a statement by defendant which was not disclosed pursuant to discovery where the State informed defendant of its intention to use the statement and any error in the failure of the State to comply with discovery was harmless beyond a reasonable doubt. *State v. Everette*, 775.

§ 124 (NCI4th). Plea arrangements relating to sentence

The prosecutor took a position with regard to sentencing in violation of a plea agreement by noting for the trial judge certain available nonstatutory aggravating factors applicable to defendant's case, and failure of the trial court to find any of the aggravating factors suggested by the prosecutor did not render the error harmless. *State v. Rodriguez*, 141.

§ 333 (NCI4th). Severance of offenses; miscellaneous applications

The trial court did not err in denying defendant's motion to sever his trial from that of his codefendant where the codefendant's testimony merely corroborated the State's evidence and the codefendant did not testify with regard to any crimes with which defendant but not the codefendant was charged. *State v. Pendergrass*, 310.

§ 400 (NCI4th). Miscellaneous remarks or actions by court

The trial judge's interruption of the trial to introduce the district attorney to the jury and the colloquy between the judge and the district attorney did not constitute an expression of opinion on the evidence. *State v. Alston*, 416.

§ 571 (NCI4th). Mistrial; physical necessity; illness, disability or death of judge, jury, or other parties

The trial court did not err by failing to declare a mistrial when defendant was absent during the final two hours of the jury deliberations because her son had been killed in an automobile accident. *State v. Webster*, 72.

§ 648 (NCI4th). Motion for dismissal for insufficiency of evidence; waiver of right to make motion

Where defendant introduced evidence after the State rested its case, he waived his motion for dismissal of a first-degree burglary charge made at the close of the State's evidence. *State v. Owen*, 300.

§ 692 (NCI4th). Oral or written instruction

A trial court has inherent authority to submit its instructions on the law to the jury in writing. *State v. Hester*, 110.

§ 762 (NCI4th). Instruction on reasonable doubt omitting or including phrase "to a moral certainty"

The trial court's instruction 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. *State v. Williams*, 861.

§ 830 (NCI4th). Accomplices; when instruction should be given or refused

If a cautionary instruction on accomplice testimony was required upon defendant's request, the inclusion of that instruction in the final charge to the jury rather than prior to the accomplice's testimony was sufficient to meet that requirement. *State v. Garcia*, 636.

CRIMINAL LAW — Continued

§ 880 (NCI4th). Additional instructions; instructing jury on cost involved should not return a verdict

The trial court's instruction that the jury should try to reconcile its differences because of the expense of a retrial constituted prejudicial error. *State v. Buckom*, 240.

§ 1085 (NCI4th). Required findings of aggravating and mitigating factors where presumptive term imposed

The trial court is not required to make findings of aggravating and mitigating factors when the presumptive sentence is imposed. *State v. Webster*, 72.

§ 1098 (NCI4th). Aggravating factors under Fair Sentencing Act; prohibition on use of evidence of element of offense

The trial court erred when sentencing defendant as an accessory after the fact to murder by finding in aggravation that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws. *State v. Whitley*, 916.

§ 1185 (NCI4th). Aggravating factors; what constitutes a prior conviction

The State was not required to prove that defendant's plea of guilty was voluntarily and understandingly entered in a prior criminal case in order to use it to aggravate defendant's sentence where defendant was represented by counsel at the time he pled guilty. *State v. Hester*, 110.

§ 1226 (NCI4th). Mitigating factors under Fair Sentencing Act; alcoholism or intoxication

The trial court did not err in failing to find as a mitigating factor for armed robbery that defendant was suffering from intoxication where the evidence showed defendant to be under the influence of alcohol after the crime but not at the time of the crime. *State v. Austin*, 590.

§ 1280 (NCI4th). Repeat or habitual offender generally; nature of habitual felon classification

When the State attempts to elevate a misdemeanor charge of breaking into a coin-operated machine to felony status, a special indictment charging defendant as being an habitual felon may not properly serve as a substitute for the special indictment required under G.S. 15A-928. *State v. Sullivan*, 441.

§ 1442 (NCI4th). Credit allowed against sentence, generally

A defendant who has served an active ninety-day sentence as a condition of special probation is entitled to credit for that time on the sentence imposed upon revocation of his probation. *State v. Farris*, 254.

§ 1463 (NCI4th). Supervised and unsupervised probation

The sentencing judge did not err by placing defendant on supervised probation where the judge indicated on the judgment form that he received evidence and found that supervised probation was necessary. *State v. Gunter*, 621.

§ 1540 (NCI4th). Revocation of probation; right to counsel

Where an indigent defendant's counsel moved at defendant's request to withdraw as counsel for defendant's probation revocation hearing, and the record does not disclose that the original counsel was incompetent to represent defendant, the trial court did not err in allowing defendant's counsel to withdraw without appointing substitute counsel. *State v. Tucker*, 907.

CRIMINAL LAW — Continued**§ 1648 (NCI4th). Crime Victims Compensation Commission; procedure for award of claims**

Where the Crime Victims Compensation Commission adopted findings by the administrative law judge that there was no evidence that the victim had failed to cooperate with the police department, the Commission could not then find that the victim had not fully cooperated as a matter of law because she refused to prosecute the man who assaulted her. **Ellis v. N.C. Crime Victims Compensation Comm.**, 157.

§ 1653 (NCI4th). Effect of prosecution or conviction of offender

The Crime Victims Compensation Act does not impose an affirmative obligation upon crime victims to pursue prosecutions as a prerequisite to compensation under the Act. **Ellis v. N.C. Crime Victims Compensation Comm.**, 157.

DAMAGES**§ 51 (NCI4th). Sufficiency of evidence to establish mitigation**

A genuine issue of material fact existed as to whether plaintiff made a reasonable attempt to mitigate damages as required by the parties' lease agreement and by law. **RC Associates v. Regency Ventures, Inc.**, 367.

DISCOVERY AND DEPOSITIONS**§ 8 (NCI4th). Scope of discovery; limitation by the court**

The trial court did not abuse its discretion in setting a time limit for completion of discovery. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

DIVORCE AND SEPARATION**§ 20 (NCI4th). Rights and duties which may be affected by separation agreement; rights under insurance policy or pension plan**

A provision in a 1981 separation agreement incorporated into a consent judgment requiring the husband to pay to the wife as alimony thirty percent of his pension benefits upon his retirement was not void on the date the agreement was entered under the anti-alienation and preemption clauses of the Employment Retirement Income Security Act of 1972. **Evans v. Evans**, 792.

A provision in a 1981 separation agreement incorporated into a consent judgment requiring the husband to pay to the wife as alimony thirty percent of his social security benefits was not void under the anti-alienation and preemption clauses of the Social Security Act because this provision comes within an exception to the anti-alienation clause enacted in 1975. **Ibid.**

§ 27 (NCI4th). Modification of separation agreements; agreements providing for alimony; prior law

The trial court properly denied defendant's motion in the cause requesting a modification of the parties' separation agreement where the agreement was an integrated property settlement with support provisions and provisions for property division constituting reciprocal consideration for each other. **Rogers v. Rogers**, 606.

§ 117 (NCI4th). Court's duty to classify property

If an asset is characterized as separate property that has increased in value during the marriage, the court's focus is on the appreciation occurring during

DIVORCE AND SEPARATION — Continued

the marriage and whether that appreciation was active or passive, but if an asset is characterized as marital property to which a contribution of separate property was made, the primary focus is on acquisition, not appreciation. **Smith v. Smith**, 460.

The trial court erred in characterizing a holding company for defendant's various business interests as defendant's separate property which appreciated in value during the marriage since the company did not come into existence until after the parties had been married fifteen years and the property owned by defendant prior to the marriage was only a small part of what eventually became the company. **Ibid**.

Although part of the payment for the redemption of stock was made after the date of the parties' separation, the proceeds received after the separation were marital property where they were from the sale of stock acquired during the marriage and sold prior to the date of separation and were received in exchange for marital property. **Ibid**.

§ 121 (NCI4th). Distribution of marital property; inheritances and gifts

The trial court properly classified certain assets, including brokerage accounts initially funded with inherited stocks, checking accounts, and other investments, as marital property since defendant could not trace funds which might have been separate property initially but which became commingled with marital property. **Minter v. Minter**, 321.

§ 123 (NCI4th). Increase in value of separate property

While defendant's interest in a holding company for defendant's various business interests had both marital and separate property components, defendant was entitled only to a return of the base amount of his contribution of separate property with no appreciation where defendant failed to show what amount of the increase in the value of his investment of separate property occurring during the marriage was attributable to passive appreciation. **Smith v. Smith**, 460.

§ 136 (NCI4th). Measure of value

Evidence of the comparable range of values utilized by defendant's expert was sufficient to support the trial court's finding that the fair market value of a parcel of real estate remained constant from the date of separation to the date of trial. **Smith v. Smith**, 460.

The trial court did not err in placing a value on the marital home which was \$25,000 higher than that placed on the home by defendant's expert after an adjustment for needed repairs. **Ibid**.

§ 141 (NCI4th). Valuation of stock in closely-held corporation

The trial court did not err in its valuation of the Charlotte Motor Speedway, a wholly-owned subsidiary of defendant's holding company, by use of the excess earnings approach. **Smith v. Smith**, 460.

Adjustments made by the court concerning valuation of an insurance company which was a wholly-owned subsidiary of defendant's holding company were not improper. **Ibid**.

The trial court did not err in its valuation of an automobile dealership which was a wholly-owned subsidiary of defendant's holding company by use of the industry standard approach. **Ibid**.

DIVORCE AND SEPARATION – Continued**§ 142 (NCI4th). Valuation of pension and retirement benefits**

In determining the present value of plaintiff's retirement plans, the trial court erred in relying on hypothetical tax consequences arising from speculative early withdrawals, most of which defendant could not have made at the date of separation under the terms of the plans. **Wilkins v. Wilkins**, 541.

§ 144 (NCI4th). Distribution factors generally

The trial court did not err in an equitable distribution action which resulted in an unequal distribution of property by making findings regarding only one factor because the trial court was only required to consider factors relevant to the evidence presented by the parties. **Gilbert v. Gilbert**, 233.

The trial court erred in failing to include in the marital estate dividend income received by defendant after the date of separation, but the court should have considered defendants' receipt of this income as a distributional factor. **Smith v. Smith**, 460.

The trial court properly considered evidence of plaintiff's lack of homemaker contributions and did not abuse its discretion in choosing not to give this factor any weight. **Ibid.**

The trial court did not err in failing to consider evidence of plaintiff's alleged economic misconduct where the offer of proof did not show that the misconduct dissipated or reduced the value of marital assets or was related to the economic condition of the marriage. **Ibid.**

Although it is appropriate for the trial court to take into consideration whether the post-separation appreciation of the marital property is passive or resulted from the efforts of one or both spouses, the court is not required to make specific findings of fact classifying the appreciation as either passive or active. **Ibid.**

§ 147 (NCI4th). Distribution factors; liabilities

The trial court did not err in distributing all of the marital debts to defendant since defendant was also awarded all of the property to which the debts were attached. **Smith v. Smith**, 460.

§ 148 (NCI4th). Distribution factors; postseparation payments on marital debts

The trial court did not err in failing to include payments made by defendant toward the first mortgage on the marital home in the postseparation appreciation of the home where the court gave defendant credit for those mortgage payments at another point in its calculations. **Smith v. Smith**, 460.

§ 149 (NCI4th). Distribution factors; alimony or support

The trial court erred by considering an ancillary order for alimony pendente lite in rendering an equitable distribution award. **Wilkins v. Wilkins**, 541.

§ 151 (NCI4th). Distribution factors; contributions to acquisition of marital property

Separate property investments which defendant contributed to the marital estate during his twenty-five-year marriage to plaintiff should have been considered by the trial court as a distributional factor. **Minter v. Minter**, 321.

§ 154 (NCI4th). Distribution factors; tax consequences

The trial court did not err in failing to consider the adverse tax consequences to defendant which defendant alleged were inherent in the distributive award. **Smith v. Smith**, 460.

DIVORCE AND SEPARATION — Continued

The trial court in an equitable distribution action erred in considering hypothetical tax consequences with regard to plaintiff's pension plans as a distributive factor in favor of plaintiff if the retirement plans' net present value as of the date of separation could not be discounted by the amount of the tax consequences. **Wilkins v. Wilkins**, 541.

§ 155 (NCI4th). Distribution factors; maintenance or development of property after separation

The trial court properly refused to give defendant a credit or reimbursement for the interest portion of his mortgage payments and did not err in reimbursing defendant in full, by way of a credit, for his payment of the property taxes due on the marital home. **Smith v. Smith**, 460.

§ 161 (NCI4th). Distribution factors; application of factors in particular cases

The trial court erred in distributing part of the postseparation appreciation of the marital property to plaintiff, but this appreciation should have been considered as a distributional factor. **Smith v. Smith**, 460.

The trial court could properly consider defendant's share of the rental value of the marital residence as a distributional factor only if use of the residence was not awarded to defendant as part of the ancillary order for alimony pendente lite. **Wilkins v. Wilkins**, 541.

§ 165 (NCI4th). Distributive awards generally

The trial court in an equitable distribution action did not err in ordering defendant to pay a distributive award of more than \$15 million over a period of ten years. **Smith v. Smith**, 460.

§ 172 (NCI4th). Filing of equitable distribution action; effect of decree of absolute divorce

The issue of equitable distribution was not preserved by the wording of a complaint or by the judgment where it was undisputed that defendant did not file any claim, counterclaim, motion, or separate action for equitable distribution before the judgment of absolute divorce. **Gilbert v. Gilbert**, 233.

Equitable estoppel applied to preclude a plaintiff from objecting to defendant's assertion of a claim for equitable distribution. **Ibid**.

§ 173 (NCI4th). Hearing and testimony in equitable distribution proceeding

There was no error in an equitable distribution hearing where plaintiff contends that he was not permitted to present any evidence but it must be presumed that the trial judge acted correctly and permitted plaintiff, who was without counsel, to present evidence. **Gilbert v. Gilbert**, 233.

§ 189 (NCI4th). Effect of divorce decree; right to equitable distribution

Plaintiff's failure to specifically apply for equitable distribution prior to a judgment of absolute divorce destroyed her statutory right to equitable distribution even though the divorce judgment contained a statement that "all matters of . . . Equitable Distribution of property are reserved for future disposition in a separate pending action." **Lockamy v. Lockamy**, 260.

§ 392.1 (NCI4th). Child support guidelines

While the trial court is allowed by statute to deviate from the child support guidelines only if a party requests with notice that the court take evidence relating

DIVORCE AND SEPARATION — Continued

to the reasonable needs of the child for support and the relative ability of each parent to provide support, both parties waived their right to notice of a request and the trial court was free to deviate from the guidelines where both parties introduced evidence of the child's needs and the parents' ability to pay support. **Gowing v. Gowing**, 613.

§ 394 (NCI4th). Child support; consideration of, and findings as to, particular matters generally

The trial court in a child support action erred in failing to make adequate findings as to the reasonable needs of the child, the earning capacity or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of plaintiff mother. **Gowing v. Gowing**, 613.

§ 406 (NCI4th). Child support; consideration of minor's property

The trial court erred in denying plaintiff mother child support because the child was the beneficiary of a structured settlement from a medical malpractice claim which was to pay \$2,000 per month for his entire life. **Gowing v. Gowing**, 613.

§ 447 (NCI4th). Modification of child support; sufficiency of evidence of changed circumstances; miscellaneous circumstances

There was competent evidence to support the trial court's finding that defendant had not met his burden of showing substantial changed circumstances in a child custody proceeding where the court found, in effect, that the changes which have occurred have not adversely affected the welfare of the child. **Dobos v. Dobos**, 222.

§ 460 (NCI4th). Notice and service of process generally

The trial court properly denied defendant's motion under G.S. 1A-1, Rule 60(b) to set aside a child custody order on the ground that defendant did not receive proper notice of the hearing where defendant's attorney was present and participated in the hearing and the record contains no indication that defendant's attorney either objected to the introduction of plaintiff's evidence of changed circumstances or sought a continuance of the matter. **Dobos v. Dobos**, 222.

§ 526 (NCI4th). Counsel fees and costs; effect of absolute divorce

The trial court was not without authority to award attorney's fees to defendant as the dependent spouse in an alimony action after a divorce had been entered and defendant was no longer plaintiff's wife. **Evans v. Evans**, 792.

§ 551 (NCI4th). Counsel fees and costs; sufficiency of evidence and findings to support award generally

The trial court erred in failing to make adequate findings to support its denial of attorney's fees in a child support action. **Gowing v. Gowing**, 613.

EASEMENTS**§ 9 (NCI4th). Creation by deed or agreement generally**

An agreement not under seal could not create an easement but was effective as a contract to convey an easement. **UNCC Properties, Inc. v. Green**, 391.

ELECTION OF REMEDIES

§ 2 (NCI4th). When doctrine is not applicable

Plaintiff's malpractice action against defendant attorneys was not barred by the doctrine of election of remedies where plaintiff was injured in an automobile accident, defendants failed to institute suit against one of the tortfeasors within the applicable statute of limitations, and plaintiff accepted a settlement from the other two joint tortfeasors and signed a general release. **Swain v. Leahy**, 884.

EMINENT DOMAIN

§ 172 (NCI4th). Condemnation proceedings generally

Where defendant railroad claimed that the DOT's proposed railroad crossing was unsafe, it was error for the trial court to determine that the DOT did not act in an arbitrary and capricious manner in choosing this particular route without first finding whether the proposed crossing was unreasonably dangerous. **Dept. of Transportation v. Overton**, 857.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 45 (NCI4th). Dredging, filling, or altering of bodies of water; permits

The Coastal Resources Commission erred in issuing a CAMA major development/dredge and fill permit allowing construction of a marina by a private developer over public trust waters without the prior granting of an easement by the Department of Administration, subject to approval by the Governor and the Council of State. **Walker v. N.C. Dept. of E.H.N.R.**, 851.

§ 84 (NCI4th). Hazardous or toxic substances, in general; liability; damages caused by statutory violation; penalties

A superior court judgment was reversed and a penalty of \$30,862.22 imposed by the North Carolina Environmental Management Commission was reinstated where the Court of Appeals recognized that a person who intentionally fails to adhere to the mandates of the regulatory scheme thereby gains an economic advantage over others who comply with the law by expending funds to follow the regulations. **Chesapeake Microfilm v. N.C. Dept. of E.H.N.R.**, 851.

EVIDENCE AND WITNESSES

§ 22 (NCI4th). Matters judicially noticed; judicial composition, organization, and records

The Court of Appeals may take judicial notice of superior court assignments. **Nationwide Mutual Ins. Co. v. Anderson**, 248.

§ 120 (NCI4th). Rape victim's sexual behavior generally; purpose of Rape Shield Statute

The trial court properly applied the Rape Shield Statute in refusing to permit defendant to cross-examine one victim concerning whether she had previously engaged in sexual intercourse with two specific persons where the victim testified at the in camera hearing that she had not had sex with either person, and no evidence was offered to contradict her testimony. **State v. Black**, 284.

EVIDENCE AND WITNESSES — Continued**§ 239 (NCI4th). Monetary value of decedent**

Evidence pertaining to deceased's leukemia and the effect it had on his relationship with his parents was admissible to prove the extent of damages which were in controversy in the case. **Hales v. Thompson**, 350.

§ 263 (NCI4th). Character or reputation of persons other than witness; defendant

Defendant was not prejudiced by the trial court's erroneous admission of evidence of defendant's reputation in the community as a drug dealer when defendant had not offered character evidence. **State v. Morgan**, 662.

§ 346 (NCI4th). Evidence of other crimes, wrongs, or acts; drug offenses

Evidence that defendant had sold cocaine to a confidential informant, that officers found an arrest warrant bearing defendant's name with a wallet containing a large amount of cash, and that a witness had seen defendant sell drugs was admissible in a prosecution for trafficking in cocaine to prove intent, plan, or knowledge. **State v. Morgan**, 662.

§ 368 (NCI4th). Admissibility of other crimes, wrongs, or acts to show common plan, scheme, or design; theft offenses generally

The trial court did not err in a prosecution for armed robbery and common law robbery by allowing a codefendant to testify as to a subsequent crime for which the defendant was not charged where the evidence tends to show a common scheme or plan on the part of defendant and his cohorts. **State v. Everett**, 775.

§ 373 (NCI4th). Admissibility of other crimes, wrongs, or acts; rape and other sex offenses involving defendant's stepchildren or adopted children

Testimony by an alleged indecent liberties and sexual offense victim that her stepfather put her on the kitchen counter, took out a knife and sharpened it, and was going to kill her except that her mother walked into the room was admissible to explain the victim's hesitancy in telling her mother of the alleged abuse. **State v. Bynum**, 845.

§ 374 (NCI4th). Admissibility of other offenses to show common plan, scheme, or design; sex offenses involving other's children

Testimony concerning an uncharged prior sexual act between defendant and the victim was properly allowed to show intent and plan or scheme where the prior act happened within one year of the charged offenses. **State v. Harris**, 445.

§ 621 (NCI4th). Suppression of evidence; motion in superior court

The trial court did not err in denying, on the basis of untimeliness, defendant's motion to suppress an in-court identification and the use of a jacket as evidence where defendant had both sufficient time to make his motion prior to trial and ample notice of the State's intention to use the in-court identification and jacket as evidence. **State v. Austin**, 590.

§ 755 (NCI4th). Cure of prejudicial error by other evidence; other offenses committed by defendant

Any error in allowing a doctor who examined a sexual assault victim to testify that the victim told her that defendant used marijuana was cured when defendant subsequently testified about his addiction to marijuana. **State v. Black**, 284.

EVIDENCE AND WITNESSES — Continued

§ 1099 (NCI4th). Competency of statements made in pleadings as admissions; allegations in adversary's pleadings

Defendants' answer in a condemnation proceeding admitting that plaintiff had an easement in their property, which was incorporated in their answer in a subsequent action, did not constitute an admission that was conclusive in the subsequent action. **UNCC Properties, Inc. v. Green**, 391.

§ 1123 (NCI4th). When acts and declarations of co-conspirator are competent

The State's evidence was sufficient to show a conspiracy by rescue squad members to unlawfully possess property taken from a residence destroyed by a tornado so that testimony by one conspirator with respect to the statements of co-conspirators was properly admitted. **State v. Withers**, 340.

§ 1227 (NCI4th). Impropriety of prior or subsequent confession

Although defendant's first statement to police should have been excluded because officers continued to question defendant after he indicated his desire to cut off questioning, the admission of this statement was harmless error where defendant again made a statement to officers the following day, no promises or threats were made to induce defendant to make either the first or second statement, and the second statement was not tainted by the first. **State v. Gish**, 165.

§ 1252 (NCI4th). What constitutes invocation of right to counsel at interrogation; extent of invocation

Invocation of the Sixth Amendment right to counsel acts only to prevent subsequent interrogation of a defendant on the same offense for which he has invoked his right to counsel and does not work to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel has not attached. **State v. Harris**, 58.

Once a suspect invokes his Fifth Amendment right to counsel for custodial interrogation regarding one offense, he may not be interrogated regarding any offense unless counsel is present. Defendant's invocation of his Sixth Amendment right to appointed counsel in one case was not an invocation of his Fifth Amendment right to counsel during custodial interrogation in another case. **Ibid.**

§ 1262 (NCI4th). Waiver of constitutional rights generally

Defendant knowingly and voluntarily waived his Fifth Amendment right to have counsel present during custodial interrogation. **State v. Harris**, 58.

§ 1274 (NCI4th). Waiver of constitutional rights; defendant's mental capacity

The evidence was sufficient to support the trial court's findings that defendant understandingly waived his constitutional rights before making an incriminating statement and that he had the mental capacity to waive his rights even though he had been hospitalized numerous times for mental problems. **State v. Owen**, 300.

§ 1617 (NCI4th). Audio tape recordings generally

The trial court erred by excluding a tape recording of a State's witness based on improper foundation but properly excluded the tape recording because it posed a danger of misleading the jury, causing undue delay and being cumulative. **State v. Withers**, 340.

EVIDENCE AND WITNESSES — Continued

§ 1823 (NCI4th). Showing intoxication by chemical analysis; who may request that accused submit to test

Results of a test determining defendant's blood alcohol concentration were not inadmissible because the charging officer who requested the blood test on the night of an accident was not the officer who charged him in the superior court action on which he was tried, and the district court action which arose from a citation issued by the charging officer who requested the blood test was not the superior court action on which he was tried. **State v. Gunter**, 621.

§ 1994 (NCI4th). Parol or extrinsic evidence affecting writings; contracts, leases, and agreements generally

The trial court did not err by granting a motion in limine by defendant Outer Banks Financial Services (OBFS) to prohibit introduction of alleged misrepresentations by a director and officer of OBFS because the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, as codified at 12 U.S.C.A. § 1823(e), bars any outside agreement the director-officer may have made with plaintiff. **Outer Banks Contractors v. Daniels & Daniels Construction**, 725.

§ 2180 (NCI4th). Statement of underlying facts before or after giving opinion

The trial court did not err in refusing to allow defendant to utilize a sexual assault victim's prior medical records in cross-examination of the State's expert medical witness where the witness did not use the records in formulating his opinion. **State v. Black**, 284.

§ 2331 (NCI4th). Testimony relating to physical examination of alleged victim; remoteness in time as affecting relevancy

The trial court erred in allowing an expert medical witness to testify that in his opinion the victim had been sexually abused based on his interview with the victim in which she related a history of sexual abuse and the fact that his examination of her revealed that her hymenal ring was not intact. **State v. Parker**, 359.

§ 2333 (NCI4th). Qualification of particular witnesses as experts in child sexual abuse

The trial court did not err in qualifying a pediatrician as an expert in the area of the detection of child abuse and trauma. **State v. Parker**, 359.

§ 2411 (NCI4th). Number of character witnesses

The trial court did not err in limiting the number of defense character witnesses to eight in a prosecution of defendant for the murder of her husband. **State v. Webster**, 72.

§ 2593 (NCI4th). Persons presented as witnesses; attorney generally

The trial court did not abuse its discretion by denying defendants' motion to disqualify plaintiff's attorney from further representation of plaintiff where the judge found that the evidence presented was insufficient to establish that the attorney ought to or would be called as a witness by either party. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

§ 2973 (NCI4th). Impeachment; character for truthfulness or untruthfulness

The trial court's error in refusing to permit defendant to cross-examine sexual offense victims' mother concerning alleged fraud in her dealings with government assistance programs was not prejudicial although the proffered evidence appeared to have been probative of the witness's truthfulness. **State v. Black**, 284.

EVIDENCE AND WITNESSES — Continued

§ 3072 (NCI4th). Basis for impeachment; particular examples of inconsistent statements

Once a hostile State's witness refused to testify or claimed that parts of his earlier, sworn statements before the grand jury were false, the State could properly use his grand jury testimony for the limited purpose of impeachment. **State v. Minter**, 40.

§ 3106 (NCI4th). Corroboration; inclusion of new facts

The trial court did not err by allowing a detective to read a statement given by assault victims' brother for the purpose of corroborating the brother's testimony even though the statement may have included new information giving a further description of one victim's appearance at the time of two incidents involving defendant. **State v. Black**, 284.

FALSE PRETENSES

§ 37 (NCI4th). Inconsistency between jury charge and indictment

There was no fatal variance between the indictment, proof, and instructions in a prosecution for obtaining property by false pretenses although the trial court's instructions failed to mention the exact misrepresentation alleged in the indictment. **State v. Clemmons**, 569.

§ 45 (NCI4th). Sentence and punishment generally

The trial court in a prosecution for obtaining property by false pretenses erred in ordering defendant to sign confessions of judgment in favor of the five victims as a condition of probation. **State v. Clemmons**, 569.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 17 (NCI4th). Intent to deceive

The trial court properly granted summary judgment for plaintiff on defendants' counterclaim for fraudulent misrepresentation arising from the financing of a time share resort where defendants' counterclaims were based upon an "implied" promise to foreclose but there was no evidence before the trial court indicating that at the time of the execution of the agreements plaintiff did not intend to foreclose on the properties if acquired. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

GIFTS OR DONATIONS

§ 11 (NCI4th). Inter vivos gifts of stock

Plaintiff's gift of stock to a hospital was not made contingent upon the hospital's naming its charitable foundation after her grandfather. **Courts v. Annie Penn Memorial Hospital**, 134.

GUARANTY

§ 13 (NCI4th). Construction of guaranty agreements, generally

The trial court did not err in awarding attorney's fees against the guarantor of a lease. **RC Associates v. Regency Ventures, Inc.**, 367.

HANDICAPPED PERSONS**§ 5 (NCI4th). Particular rights; housing**

The Fair Housing Act did not prevent a town from prohibiting defendants from locating a mobile home for their mentally ill daughter on their property zoned central business district. **Town of Newton Grove v. Sutton**, 376.

HIGHWAYS, STREETS, AND ROADS**§ 33 (NCI4th). Outdoor Advertising Control Act; revocation of permit**

The DOT had substantial justification to revoke petitioner's outdoor advertising permit and to defend petitioner's action contesting the revocation so that the trial court erred in awarding attorney's fees to petitioner under G.S. 6-19.1 where petitioner's billboard lessee hired a landscaping company to cut limbs and trees on the highway right of way in front of the billboard in violation of DOT regulations. **Whiteco Industries, Inc. v. Harrelson**, 815.

The DOT had substantial justification to revoke petitioner's outdoor advertising permit so that the trial court erred in awarding attorney's fees to petitioner under G.S. 6-19.1 where an employee of petitioner's billboard lessee crossed the control of access fence for the interstate to move his vehicle. **Whiteco Industries, Inc. v. Harrington**, 839.

HOMICIDE**§ 287 (NCI4th). Second-degree murder; killing during course of altercation, argument, and the like**

The evidence was sufficient for submission to the jury of an issue of defendant's guilt of second-degree murder by shooting the victim as he attempted to leave a party. **State v. Hester**, 110.

§ 300 (NCI4th). Second-degree murder; circumstantial evidence along with inculpatory statements by defendant

The evidence, including defendant's confession, was sufficient to support defendant's conviction of second-degree murder where it tended to show that defendant struck the victim during an argument and that she fell and hit her head. **State v. Gish**, 165.

§ 304 (NCI4th). Second-degree murder of spouse

The evidence supported the trial court's submission to the jury of a charge against defendant of second-degree murder of her husband by shooting him at close range after the court dismissed the charge of first-degree murder. **State v. Webster**, 72.

§ 334 (NCI4th). Involuntary manslaughter; death resulting from assault, beating, and the like

The State's evidence was insufficient to support defendants' convictions of involuntary manslaughter based on a nonfelonious assault where decedent made a startled move when he saw defendants approaching him, ran directly into the path of a car, and was struck and killed. **State v. McDaniel**, 888.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS**§ 60 (NCI4th). Release of respondent found not guilty by reason of insanity or incapable of proceeding**

An insanity acquittee's equal protection rights are not violated because commitment rehearings take place in the trial division in which the criminal trial was held and the rehearings are open to the public while hearings involving other involuntarily committed persons are closed and confidential. *In re Hayes*, 384.

Application of the statutory amendments shifting the burden of proof in a recommitment hearing for an insanity acquittee and opening the hearing to the public after respondent was acquitted by reason of insanity and was involuntarily committed did not violate the Ex Post Facto Clause. *Ibid*.

§ 66 (NCI4th). Condition of equipment or premises; standard of care

The trial court correctly denied a hospital's motions for a directed verdict and judgment notwithstanding the verdict where the evidence establishes that the hospital's breach of duty in not having the Code cart properly restocked resulted in a three-minute delay in the intubation of the victim which was the proximate cause of the victim's brain death. *Dixon v. Taylor*, 97.

HUSBAND AND WIFE**§ 25 (NCI4th). Contracts and conveyances between spouses, generally**

The trial court erred in directing a verdict for plaintiff, defendant's former wife, in an action to partition property owned by defendant prior to the parties' marriage and subsequently conveyed by him to himself and plaintiff where there was evidence that the parties signed a post-nuptial contract providing that each party should retain sole ownership of any property owned prior to the marriage, and that for eleven years following execution of the contract, plaintiff's conduct would allow the reasonable inference that plaintiff intended to disavow any ownership in the subject property. *McDonald v. Medford*, 643.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS**§ 6 (NCI4th). Return of valid indictment by duly constituted grand jury; evidence before grand jury**

Assuming that the grand jury testimony of a co-conspirator was perjured and that this would render the witness incompetent to testify within the meaning of G.S. 15A-955(3), the trial court properly refused to dismiss the indictment where the record failed to show that all of the witnesses were incompetent to testify before the grand jury. *State v. Minter*, 40.

§ 56 (NCI4th). Variance between averment and proof; other allegations

Any variance between the indictment charging that defendant assaulted his victim with a butcher knife and the evidence showing that defendant assaulted his victim with a hammer was harmless error where defendant was convicted only of assault inflicting serious injury. *State v. Moore*, 649.

INJUNCTIONS**§ 5 (NCI4th). Principles governing issuance or denial; grounds; generally**

In determining whether a preliminary injunction was properly issued, the appellate court must examine the trial court's two stage inquiry: whether the

INJUNCTIONS — Continued

plaintiff is able to show likelihood of success on the merits and whether plaintiff is likely to sustain irreparable loss or whether issuance is necessary for the protection of plaintiff's rights during litigation. **Kaplan v. Prolife Action League of Greensboro**, 1.

§ 32 (NCI4th). Practice and procedure generally

The trial court did not err by enjoining the Prolife Action League even though defendants argued that the League is not an entity subject to injunction. **Kaplan v. Prolife Action League of Greensboro**, 1.

The trial court did not err by enjoining defendants from engaging in threatening conduct in an action arising from abortion picketing at a doctor's residence. **Ibid**.

§ 45 (NCI4th). Appeals of temporary orders; stays

The decision of a trial court to issue an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence is conflicting. **Kaplan v. Prolife Action League of Greensboro**, 1.

INSURANCE

§ 530 (NCI4th). Underinsured motorist coverage; reduction of insurer's liability

Defendant underinsured motorist carrier was not entitled to reduce its coverage by the amount of workers' compensation benefits it had paid to plaintiff. **Brantley v. Starling**, 669.

INTEREST AND USURY

§ 5 (NCI4th). Time from which interest runs

Where defendants executed promissory notes in 1986 in exchange for release of judgment liens on real property which defendants wanted to sell, and they agreed to pay the face amount of the notes "with interest from date" at the rate of six percent, the trial court erred in awarding interest from the date from which the original judgments calculated interest. **Sam Stockton Grading Co. v. Hall**, 630.

JUDGES, JUSTICES, AND MAGISTRATES

§ 26 (NCI4th). Disqualification from proceedings generally

The trial judge did not err by failing to recuse himself from an automobile forfeiture hearing where defendant produced no evidence of bias other than her attorney's recollection that the judge had made the statement "that car is gone" when the State moved for forfeiture. **State v. Honaker**, 216.

JUDGMENTS

§ 40 (NCI4th). Consent to judgment rendered out of term and out of county generally

A summary judgment order signed by the trial judge after his commission to hold court in the county expired was void where the record reveals no consent by the parties to entry of the order out of session. **Nationwide Mutual Ins. Co. v. Anderson**, 248.

JUDGMENTS — Continued**§ 104 (NCI4th). Modifying and correcting judgments in trial court for clerical error; change granting substantive relief**

Where defendant's 1989 North Carolina income tax refund was garnished due to his child support arrearage, and the trial court entered an order which granted defendant a credit on his child support arrearage for the amount garnished but which had no effect on plaintiff mother's collection of the arrearage, the trial court erred by granting defendant's Rule 60(a) motion to amend the original order by adding language suspending his arrearage payments until plaintiff stopped seeking garnishment since the amendment was a substantive change and not a mere correction of a clerical error. **Buncombe County ex rel. Andres v. Newburn**, 822.

§ 259 (NCI4th). Conclusiveness of judgments between contracting parties; insured and insurer generally

Plaintiff passenger's 1991 action against the N.C. Insurance Guaranty Association seeking a judgment declaring that the owner's automobile liability policy was in effect on the date of an accident in which plaintiff was injured and that the Association is obligated to pay the policy limits to plaintiff was barred under the doctrine of res judicata by a 1986 declaratory judgment in an action instituted by the owner finding that the liability policy issued to the owner was not in effect at the time of the accident. **Hales v. N.C. Insurance Guaranty Assn.**, 892.

JURY**§ 248 (NCI4th). Use of peremptory challenge to exclude on basis of race generally**

The State's peremptory challenge of one black juror from an otherwise white venire did not violate defendant's constitutional right to a trial by a jury of his peers where the State articulated race-neutral grounds for excusing the juror, including the juror's acquaintance with defense counsel, friendship with defendant, and desire not to serve on the jury. **State v. Austin**, 590.

The trial court did not place an unfair burden on defendant by requiring him to articulate race-neutral grounds for excusing white jurors from the jury. **Ibid.**

KIDNAPPING AND FELONIOUS RESTRAINT**§ 20 (NCI4th). Confinement, restraint, or removal for purpose of facilitating felony or flight**

The evidence was sufficient for the jury in a prosecution for second-degree kidnapping of an infant by confining or restraining the infant for the purpose of facilitating the commission of a sexual assault against the infant's mother. **State v. Pendergrass**, 310.

The evidence was sufficient to support charges of first-degree kidnapping of two women for the purpose of facilitating first-degree sexual offenses. **Ibid.**

LABOR AND EMPLOYMENT**§ 63 (NCI4th). Termination of employment; employment terminable at will**

North Carolina does not recognize an independent tort claim for wrongful discharge under the bad faith exception. **Boesche v. Raleigh-Durham Airport Authority**, 149.

LABOR AND EMPLOYMENT — Continued

§ 66 (NCI4th). Grounds for discharge from employment

The drug testing policy implemented by defendant airport authority was constitutional when applied to a plaintiff who was authorized to drive a vehicle on the apron of the flight area of the airport. **Boesche v. Raleigh-Durham Airport Authority**, 149.

§ 84 (NCI4th). Requirement that covenant not to compete be based on adequate consideration

Covenants not to compete signed by two employees of plaintiff heating and air conditioning company were not supported by consideration where the covenants were distributed to all of plaintiff's potential account managers with an explanation that this was done to make their jobs more secure by preventing a loss of customers and plaintiff employer made no promise that it was required to keep in return for the promise not to compete. **Milner Airco, Inc. v. Morris**, 866.

§ 137 (NCI4th). Unemployment Insurance Fund; exemptions from contribution liability

An employer must pay unemployment taxes on his alien farm workers who are Seasonal Agricultural Workers admitted to the United States under a federal statute. **In re State ex rel. Employment Security Comm. v. Hopkins**, 437.

§ 152 (NCI4th). What constitutes leaving work voluntarily without good cause attributable to employer generally

The ESC erred in disqualifying petitioner from receiving unemployment benefits where petitioner left her job after her employer moved its plant from Charlotte to Mooresville because she had no reliable means of transportation to work every day of the week. **Watson v. Employment Security Comm.**, 410.

§ 187 (NCI4th). Liability of independent contractor for injuries to third persons

The trial court properly granted summary judgment for Triangle Ice where plaintiff slipped and fell in the area of a Food Lion where the ice bin was located, Food Lion had received an ice delivery from Triangle Ice Co., a Food Lion employee had supervised the delivery and noticed a puddle on the floor after the Triangle Ice employee left the store, a stock boy was sent to get a cloth and dry the floor, and plaintiff entered the area and fell. **Thrift v. Food Lion**, 758.

LARCENY

§ 154 (NCI4th). Larceny of firearm

The State's evidence was sufficient to show that defendant rescue squad member possessed with a dishonest purpose a pistol found in a home destroyed by a tornado so as to support defendant's conviction of possession of a stolen firearm. **State v. Withers**, 340.

§ 200 (NCI4th). Verdict, judgment, and sentence generally

The jury's verdicts of not guilty of felonious larceny of a firearm and guilty of felonious possession of a stolen firearm were not inconsistent as a matter of law. **State v. Withers**, 340.

LIBEL AND SLANDER

§ 13 (NCI4th). Statements as actionable per se; statements tending to subject one to ridicule, contempt, or disgrace

A document prepared by the individual defendant with regard to the conditional nature of plaintiff's permits to construct a quarry and the special treatment defendant felt plaintiff had received as compared to the treatment that defendant corporation had received when it applied for permits did not constitute libel per se. **Martin Marietta Corp. v. Wake Stone Corp.**, 269.

LIENS

§ 32 (NCI4th). Liens of mechanics, laborers, and materialmen; grant of lien; subrogation and perfection

The trial court correctly ordered defendant Marketplace to deposit \$42,000 with the clerk of court so that it could be divided among the plaintiffs and granted Marketplace's motions to have all claims and claims of lien dismissed; because plaintiffs are subrogated to the rights of the general contractor, they may assert only the lien rights which the general contractor has in the project and the general contractor can enforce the lien only for the amount due on the contract. **Vulcan Materials Co. v. Fowler Contracting Corp.**, 919.

LIMITATIONS, REPOSE, AND LACHES

§ 5 (NCI4th). Applicability to sovereign

The State was acting in its governmental capacity in constructing an art museum, and no time limitation applied to preclude an action by the State against defendant surety to recover on a performance bond. **State ex rel. Art Museum Bldg. Comm. v. Travelers Indemnity Co.**, 330.

§ 22 (NCI4th). Medical malpractice

Plaintiffs' medical malpractice claim was barred by the three-year statute of limitations where the last act or omission by defendant was on 17 March 1988, the discovery of the injury was made within two years of the last act or omission, and the action was not filed within three years from 17 March 1988. **Britain v. Cinnoca**, 656.

§ 26 (NCI4th). Attorney and accountant malpractice

The statute of limitations and the statute of repose did not begin to run on an action for negligently drafting a will until the testator's death. Beneficiaries, as potential plaintiffs, would not realize any injury until the testator's death and the defendant attorney's last act was his failure to fulfill his continuing duty to prepare a will properly reflecting the client's testamentary directions. **Hargett v. Holland**, 200.

§ 32 (NCI4th). Improvements to real property; knowledge of person in possession or control

The trial court erred in finding that the six-year limitation of G.S. 1-50(5)(a) barred plaintiff's action to recover for damages to plaintiff's home resulting from defendant's allegedly negligent construction where defendant builder was in actual possession and the owner of the home at the time it was constructed and at the time the defective condition causing the damage was constructed, the ten-year statute of repose set out in G.S. 1-52(16) thus applied, and plaintiff's suit was

LIMITATIONS, REPOSE, AND LACHES — Continued

filed within three years after physical damage to the house became apparent and within the ten-year statute of repose. **Cage v. Colonial Building Co.**, 828.

§ 126 (NCI4th). Postponement or suspension of statute; death of party

Plaintiff's personal injury claim against a deceased driver's estate was not barred by the three-year statute of limitations of G.S. 1-52 where it was filed more than three years after the cause of action accrued but no notice to creditors of the estate had been published at the time plaintiff's action was commenced. **Lassiter v. Faison**, 206.

LIS PENDENS**§ 2 (NCI4th). Lis pendens as malicious prosecution or the like**

The trial court erred by entering judgment for defendant on his counterclaim for monetary damages arising from plaintiff's lis pendens filing; North Carolina case law does not support the position that evidence that plaintiff filed the lis pendens on the wrong lot, that plaintiff filed the lis pendens to stop the sale of the property, and that defendant suffered damages as a result is enough to support the conclusion that plaintiff is liable for damages. **Quinn v. Quinn**, 922.

MANDAMUS**§ 10 (NCI4th). Duties of administrative bodies**

The trial court properly dismissed an action to compel the N.C. State Board of Examiners of Electrical Contractors to apply for an administrative law judge to hear a case which the Board had determined that it was prohibited from hearing due to prior knowledge because the agency and the licensee against whom the charges are brought are the proper parties to a contested case and, therefore, the only parties who may insist on a hearing in this case. **Bryant v. State Bd. of Examiners of Electrical Contractors**, 875.

The trial court did not err in dismissing causes of action for malfeasance and nonfeasance in an action in which plaintiff sought to compel a hearing before an administrative law judge because nonfeasance and malfeasance are not in themselves recognized causes of action. **Ibid.**

MASTER AND SERVANT**§ 71.1 (NCI3d). Computation of average weekly wage under exceptional circumstances; particular cases**

Where plaintiff, an independent contractor who performed work as a subcontractor for other contractors as well as for defendant employer, was injured while working as a subcontractor for defendant, the Industrial Commission properly calculated plaintiff's average weekly wage on the basis of his total net income from his subcontracting business for the two previous years rather than on the basis of his earnings from work only for defendant. **Holloway v. T. A. Mebane, Inc.**, 194.

§ 87 (NCI3d). Claim under Compensation Act as precluding common-law action

The trial court did not err by granting defendant's motion for summary judgment on a personal injury claim arising from an injury in plaintiff's place of employment where plaintiff had already filed a workers' compensation claim and signed an agreement for final compromise settlement and release of that claim. **Owens v. W. K. Deal Printing, Inc.**, 900.

MASTER AND SERVANT — Continued

§ 89 (NCI3d). Remedies against third-person tortfeasors generally

The employer and its workers' compensation carrier did not waive their right to consent to an employee's settlement of his personal injury claim against a third party by indicating to the court that the amount of the settlement was sufficient. **Fogleman v. D&J Equipment Rentals**, 228.

§ 89.4 (NCI3d). Distribution of recovery of damages at common law

Where plaintiff worker was injured and compensation benefits were paid to him prior to the effective date of the 1991 amendments to subsections (h) and (j) of G.S. 97-10.2, the subrogation lien of the employer and its insurance carrier against the proceeds of a settlement with a third party vested prior to the amendments, and the trial court's modification of the amount of the lien pursuant to the amendments was an unconstitutional retroactive application of the statute. **Fogleman v. D&J Equipment Rentals**, 228.

MORTGAGES AND DEEDS OF TRUST

§ 22 (NCI4th). Priorities; instruments securing future obligations

Where defendant's loan agreement obligated it to make cumulative advances to the borrower in a certain amount, and plaintiff gave defendant notice that it had perfected a lien on the secured property, future advances made by defendant to the borrower in excess of the cumulative amount did not take priority over plaintiff's lien. **Richardson Corp. v. Barclays American/Mortgage Corp.**, 432.

MUNICIPAL CORPORATIONS

§ 30.12 (NCI3d). Zoning; particular requirements and restrictions; mobile homes

The trial court properly found that plaintiff town's ordinances prohibited defendants from placing a mobile home for their mentally ill daughter on their property which was zoned central business district because defendants' house was a nonconforming use and the mobile home would extend this nonconforming residential use. **Town of Newton Grove v. Sutton**, 376.

§ 31 (NCI3d). Zoning ordinances; judicial review in general; methods of review

Defendant did not properly raise defenses to plaintiff's assessment of fees for violating plaintiff's zoning ordinance with regard to signs when he failed to appeal the assessment to the Board of Adjustment. **Grandfather Village v. Worsley**, 686.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 42 (NCI4th). Property subject to forfeiture

The evidence supported the trial court's determination that defendant's vehicle was used in a felony violation of the Controlled Substances Act by defendant's husband and was subject to forfeiture under G.S. 90-112. **State v. Honaker**, 216.

The trial court's findings in a vehicle forfeiture proceeding were an adequate substitute for the simple required finding on whether defendant had knowledge or reason to believe that her vehicle was being used or would be used in violation of the controlled substances laws. **Ibid.**

**NARCOTICS, CONTROLLED SUBSTANCES, AND
PARAPHERNALIA — Continued**

§ 48 (NCI4th). Forfeitures; recovery of property

There is no right to a jury trial of a claim for remission of forfeiture of a vehicle used in violation of the controlled substances laws. **State v. Honaker**, 216.

§ 120 (NCI4th). Sufficiency of evidence of sale of cocaine

The evidence was sufficient to show that a sale of crack cocaine took place within 300 feet of a middle school boundary. **State v. Alston**, 416.

§ 124 (NCI4th). Trafficking in cocaine

The evidence was sufficient for the jury in a prosecution for trafficking in cocaine by possession and by transportation where defendant and a woman were traveling together on a bus and defendant planned to pay the woman for carrying the cocaine. **State v. Garcia**, 636.

§ 144 (NCI4th). Constructive possession based on defendant's relationship to premises; effect of defendant not being present at time drugs were seized

The evidence was sufficient for the jury to find that defendant had constructive possession of crack cocaine found during search of an apartment although defendant was not present at the time of the search. **State v. Morgan**, 662.

§ 207 (NCI4th). Double jeopardy; multiple convictions based on single transaction generally

Defendant could not be convicted of sale of cocaine and sale of cocaine on school property where only one sale was made. **State v. Alston**, 416.

§ 220 (NCI4th). Sentences for trafficking

The trial court did not violate public policy by sentencing an illegal alien to two consecutive thirty-five-year terms for trafficking in cocaine by possession of 400 grams or more and trafficking in cocaine by transportation of 400 grams or more. **State v. Garcia**, 636.

NEGLIGENCE

§ 78 (NCI4th). Sufficiency of particular claims, allegations, or theories of liability; breach of contractual duties

The trial court did not err by granting summary judgment for plaintiff on defendants' counterclaims based on negligence, gross negligence, breach of fiduciary duty and vicarious liability arising from the financing of a time share resort. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 29 (NCI4th). Consideration generally

The execution of a promissory note is supported by consideration if given in exchange for the release of a lien on real property. **Sam Stockton Grading Co. v. Hall**, 630.

NOTICE

§ 4 (NCI4th). Mode of giving notice

Delivery by Federal Express, with return receipt, is registered mail within the meaning of G.S. 20-305 and plaintiff gave proper notice of its objection to

NOTICE — Continued

defendant's proposed relocation of an automobile dealership within the statutory period. **Nissan Motor Corp. v. Fred Anderson Nissan**, 748.

NUISANCE

§ 5 (NCI4th). Noise and disturbance

There was ample competent evidence to support the trial court's decision that there is a reasonable likelihood that plaintiffs will prevail on their private nuisance claim. **Kaplan v. Prolife Action League of Greensboro**, 1.

PARENT AND CHILD

§ 24 (NCI4th). Factors to be considered in determining custody; sufficiency of evidence

The general rule in child custody proceedings is that a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child. **Petersen v. Rogers**, 712.

The trial court violated the adoptive parents' right to freedom of religion by inquiring extensively into the theological beliefs held by members of The Way in a proceeding to determine whether custody of a child should remain with adoptive parents or be placed with the biological parents after the mother revoked consent to the adoption. **Ibid**.

§ 104 (NCI4th). Willfully leaving child in foster care; lack of "substantial progress"; evidence held sufficient

The evidence was sufficient to withstand respondent father's motion to dismiss a petition for termination of parental rights on the ground that the father willfully left the minor children in foster care for more than eighteen months without showing that reasonable progress had been made in correcting the conditions that led to their removal. **In re Becker**, 85.

The evidence was sufficient to support the trial court's termination of a mother's parental rights for willfully leaving the minor children in foster care for more than eighteen months without making reasonable progress in correcting the conditions which led to their removal and for willfully failing to pay support for her children. **Ibid**.

§ 105 (NCI4th). Failure to pay cost of protective care; sufficiency of evidence

There was sufficient evidence to terminate respondent father's parental rights for willful failure to pay a reasonable portion of the cost of care for the children who had been placed in foster care by the DSS where the father had the ability to pay some child support out of unemployment benefits and a tax refund during the six months preceding filing of the petition despite his incarceration during part of this time and his alleged medical disability. **In re Becker**, 85.

PAYMENT OR TENDER

§ 27 (NCI4th). Pleading and burden of proving payment; affirmative defense

The trial court erred by placing the burden of proof to show payment, if any, on plaintiff in an action claiming that defendants have not paid any part

PAYMENT OR TENDER — Continued

of the purchase price of a tract of land and seeking to set aside the deed to defendants where defendants asserted that they had paid plaintiff; payment is an affirmative defense and the general rule places the burden of proving payment upon the party asserting it. **Heart of the Valley Motel v. Edwards**, 896.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS**§ 59 (NCI4th). Hearings by the Board of Dental Examiners**

The notice of hearing given to petitioner dentist by respondent Dental Board was sufficient to put petitioner on notice that he not only faced charges of willful misconduct but also of negligent behavior arising from allegations that he administered nitrous oxide to a female patient without the presence of a female assistant or other chaperon. **In re McCollough v. N.C. State Bd. of Dental Examiners**, 186.

§ 60 (NCI4th). Appeal and review of order of Board of Dental Examiners; sufficiency of evidence

The evidence was sufficient to support the Dental Board's finding and conclusion that a dentist's administration of nitrous oxide to a female patient while alone with her in his office constituted negligence in the practice of dentistry even though the patient was not injured. **In re McCollough v. N.C. State Bd. of Dental Examiners**, 186.

The Dental Board's 90-day active suspension and five-year conditional reinstatement of a dentist's license for violation of an unwritten standard of care was not arbitrary or capricious. **Ibid**.

§ 118 (NCI4th). Sufficiency of evidence of medical malpractice generally

The trial court correctly denied a hospital's motions for directed verdict and judgment notwithstanding the verdict as to all four claims in a medical malpractice action where the hospital did not attempt to distinguish between the different claims asserted by plaintiff and relied on the general claim that plaintiff's evidence was deficient as to proximate cause. **Dixon v. Taylor**, 97.

§ 149 (NCI4th). Jury instructions; duty or standard of care

The trial court did not err in a medical malpractice action in its instructions regarding the standard of care for a respiratory therapist. **Dixon v. Taylor**, 97.

PLEADINGS**§ 364 (NCI4th). Standard in determining motion to amend; discretion of court, generally**

The trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint where the motion to amend was filed over a year after the original complaint, and the requested amendment purported to add a seventh cause of action but the cause of action is ambiguous and no relief was requested. **Outer Banks Contractors v. Daniels & Daniels Construction**, 725.

The trial court did not abuse its discretion in an action arising from the financing of a time share resort by denying defendants' motion to amend the pleading to assert an additional counterclaim arising from the original financing agreement. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

PRINCIPAL AND SURETY

§ 48 (NCI4th). Action on public construction contract bonds generally

Neither a provision in the State's contract with the builder of an art museum nor the State's conditional acceptance of the building project discharged defendant surety from its obligation on a performance bond. **State ex rel. Museum Bldg. Comm. v. Travelers Indemnity Co.**, 330.

§ 52 (NCI4th). Limitations on liability on public construction contract bonds

The surety for the general contractor who built the State Art Museum is liable for the full amount of the judgment against the general contractor, including the amount of interest awarded therein. **State ex rel. Art Museum Bldg. Comm. v. Travelers Indemnity Co.**, 330.

PROCESS AND SERVICE

§ 15 (NCI4th). Failure to issue summons

The trial court did not err by dismissing plaintiff's negligence action and denying her motion for a new trial or relief from judgment where plaintiff had obtained an extension of time to file her complaint, her summons was returned unserved, plaintiff filed a complaint with a document entitled "Delayed Service of Complaint" within the allowed time, that action was voluntarily dismissed, plaintiff refiled her complaint, and the trial court allowed the motion to dismiss based upon the statute of limitations. **Latham v. Cherry**, 871.

PRODUCTS LIABILITY

§ 18 (NCI4th). Plaintiff's contributory negligence; misuse of product

In a products liability case where a soft drink vending machine fell on decedent, the trial court erred in granting summary judgment for defendants based on contributory negligence where there were genuine issues of material fact as to whether decedent placed money in the machine and was attempting to retrieve the canned drink for which he had paid or whether he was attempting to tilt the machine to steal a drink. **Morgan v. Cavalier Acquisition Corp.**, 520.

§ 28 (NCI4th). Business equipment generally

The trial court erred in entering summary judgment in a products liability case for the manufacturer of a soft drink vending machine which fell on decedent where genuine issues of material fact existed as to whether the manufacturer was negligent in the design and servicing of the machine and in its failure to give notice of a latent defect in the machine. **Morgan v. Cavalier Acquisition Corp.**, 520.

The trial court erred in granting summary judgment in a products liability case for defendant bottling company which owned a soft drink vending machine that fell on decedent where a genuine issue of material fact existed regarding the bottling company's negligence in failing to respond to information about defects in the machine and failing to bolt the machine to the wall or place warning stickers on it. **Ibid.**

Plaintiff's forecast of evidence in a products liability case presented genuine issues of material fact as to gross negligence by the manufacturer and owner of a soft drink vending machine which fell on decedent. **Ibid.**

§ 35 (NCI4th). Pesticides and insecticides

The trial court did not err by granting summary judgment for defendants in an action arising from the loss of a crop where plaintiffs alleged that defendants

PRODUCTS LIABILITY — Continued

negligently failed to warn plaintiffs about the carryover effect of prior chemical use. **Hopkins v. Ciba-Geigy Corp.**, 179.

State common-law tort claims based on inadequate labeling are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act if the label complies with FIFRA. **Ibid.**

PUBLIC OFFICERS AND EMPLOYEES**§ 68 (NCI4th). Personal liability; civil liability**

The trial court did not err by granting a dismissal under G.S. 1A-1, Rule 12(b)(6) where plaintiff brought this action against the state employees involved in suspending his driver's license in their individual capacities seeking compensatory and punitive damages. **White v. Williams**, 879.

RAILROADS**§ 3 (NCI3d). Extent of easement for rights of way and use of facilities**

G.S. 1-44.2, entitled "Presumptive ownership of abandoned railroad easements," is unconstitutional as it applies to fee simple landowners in possession of disputed property because it fails to provide them with adequate notice, opportunity to be heard, and just compensation. **McDonald's Corp. v. Dwyer**, 127.

RAPE AND ALLIED OFFENSES**§ 4 (NCI3d). Relevancy and competency of evidence**

The trial court erred in allowing a doctor who examined a sexual assault victim to testify that she suffered from "Accommodation Syndrome" without giving the jury an instruction limiting consideration of this evidence to corroborative purposes. **State v. Black**, 284.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

Defendant's authoritative position as a stepparent and evidence of the victims' fear of defendant was sufficient for the jury to find constructive force in a prosecution of defendant for second-degree rape of his stepdaughters. **State v. Black**, 284.

The evidence was sufficient to show that there were two sexual assaults on the victim even though the victim at one point contradicted himself and indicated that there was only one incident. **State v. Harris**, 445.

§ 6 (NCI3d). Instructions

The trial court's instruction that the jury "may find" the existence of constructive force in intrafamilial situations was not error. **State v. Black**, 284.

§ 19 (NCI3d). Taking indecent liberties with child

A prosecution for indecent liberties was not required to be dismissed because the State failed to produce any evidence of defendant's age since the jury could reasonably infer from its observation of defendant and other evidence that defendant was at least sixteen years old and that he was five years older than the victim. **State v. Bynum**, 845.

ROBBERY**§ 4.5 (NCI3d). Sufficiency of evidence and nonsuit; cases involving aiders and abettors in which evidence was sufficient**

The trial court did not err by denying defendant's motion to dismiss robbery charges where, although defendant contended that he was merely present and not an active participant in the robberies, the evidence was sufficient to support a jury finding that defendant acted in concert or aided and abetted two other men. **State v. Everett**, 775.

§ 5.4 (NCI3d). Instructions on lesser included offenses and degrees

The trial court erred in an armed robbery prosecution by not instructing on common law robbery where there was evidence that the pistol in question was without a firing pin at the time of the robbery, but the evidence was not so compelling as to prevent a permissive inference of danger or threat to life or to require that an instruction on armed robbery be excluded. **State v. Everett**, 775.

RULES OF CIVIL PROCEDURE**§ 11 (NCI3d). Signing and verification of pleadings; sanctions**

Although the Court of Appeals declined to adopt a bright-line rule that when an attorney forecasts substantial evidence and survives a motion for summary judgment, the allegations presented in the complaint are necessarily well-grounded in fact and not a proper basis for imposing Rule 11 sanctions, plaintiff's attorney made a reasonable inquiry into the factual basis for the allegations contained in the complaint in this case and sanctions imposed against him, including a written reprimand and attorney's fees, were not warranted. **Pugh v. Pugh**, 118.

§ 15 (NCI3d). Amended and supplemental pleadings; generally

The trial court erred by failing to rule on defendant's motion to amend her answer prior to granting summary judgment for plaintiff, but defendant was not prejudiced by this error where her answer could not have been considered by the trial court in ruling on the summary judgment motion because it was not verified. **Coble Cranes & Equipment Co. v. B & W Utilities, Inc.**, 910.

§ 37 (NCI3d). Failure to make discovery; consequences

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under Rule 37(d) for failure to make discovery. **Goss v. Battle**, 173.

§ 41 (NCI3d). Dismissal of actions generally

Plaintiffs' voluntary dismissal of their claim against defendant Ciba-Geigy did not constitute an adjudication on the merits pursuant to G.S. 1A-1, Rule 41(a)(1) where plaintiffs filed their initial action against Lebanon Chemical Corporation and Ciba-Geigy and plaintiffs filed a first notice of voluntary dismissal as to Lebanon Chemical and a second as to Ciba-Geigy. **Hopkins v. Ciba-Geigy Corp.**, 179.

§ 55.1 (NCI3d). Setting aside default

The denial of defendants' motion to set aside entry of default was not error where defendants filed no answer and made no attempt to defend their case after their attorney withdrew until they filed their responsive pleading to plaintiff's motion for default judgment two months later. **RC Associates v. Regency Ventures, Inc.**, 367.

RULES OF CIVIL PROCEDURE — Continued**§ 60 (NCI3d). Relief from judgment or order**

The trial court is not required to make findings of fact when ruling on a Rule 60(b) motion for relief from judgment unless findings are requested by a party. **Nations v. Nations**, 211.

The trial court did not abuse its discretion in denying defendants' motions for relief from partial summary judgments for plaintiff where defendants alleged the existence of genuine issues of material fact but had a full and fair opportunity to argue the existence of issues of fact at the summary judgment hearing and to argue in this appeal that the summary judgments should not have been granted. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

§ 60.2 (NCI3d). Grounds for relief from judgment or order

The trial court properly denied defendant's Rule 60(b) motion to set aside an equitable distribution judgment where the alleged errors were issues which could have been raised in defendant's prior appeal to the Court of Appeals. **Nations v. Nations**, 211.

While G.S. 1A-1, Rule 60(a) allows the trial court to correct clerical mistakes, it does not grant the trial court the authority to make substantive modifications to an entered judgment. By changing the incorrect date of entry of a judgment to a date other than 13 December 1991, the date it was signed, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal and plaintiff's notice of appeal was dismissed as untimely. **Food Service Specialists v. Atlas Restaurant Management**, 257.

SEARCHES AND SEIZURES**§ 3 (NCI3d). Searches at particular places**

Officers had a justifiable basis to approach defendants' residence where an informant told them that marijuana was being grown in the basement of the residence and officers went there to inquire further into the matter. **State v. Wallace**, 581.

§ 10 (NCI3d). Search and seizure on probable cause

Officers had probable cause to believe criminal activity was taking place in a house because of information provided by an informant and a statement made by an occupant of the house that there might be some marijuana or marijuana seeds and drug paraphernalia that he would like to dispose of before he consented to a search, but there were no exigent circumstances justifying a warrantless entry into the residence. **State v. Wallace**, 581.

§ 12 (NCI3d). "Stop and frisk" procedures; investigatory stops

An SBI agent was not entitled to approach and detain defendant for investigative purposes while defendant was sitting in his car in the parking lot of a nightclub where officers went to the nightclub with a search warrant, there was no warrant to search the exterior premises and no evidence that police had a reason to suspect that drug sales were taking place in the parking lot, and the agent stated merely that he thought it suspicious that defendant was backed into the parking lot with his door open talking to a person who was standing beside the car. **State v. Brooks**, 558.

The stop of defendant by two drug interdiction officers at a train station was consensual and did not constitute a seizure, and the stop of the car in which defendant left the train station was a lawful investigatory stop pursuant to a

SEARCHES AND SEIZURES — Continued

reasonable suspicion of criminal activity based on discrepancies between defendant's statements and her actions, but the search of defendant's person at the police station was not based on probable cause and the seizure of cocaine found on her person should have been suppressed. **State v. Pittman**, 808.

The trial court properly granted defendant's motion to suppress in a DWI prosecution where the officer did not articulate any specific facts which would lead a reasonable police officer to suspect that the defendant was engaged in criminal activity; although the State argued that an officer need only be able to articulate or verbalize the suspicion which precipitated the seizure, that is not the law in this state. **State v. Watkins**, 766.

§ 21 (NCI3d). Application for warrant; hearsay; tips from informers

An informant's tip that marijuana was being grown in the basement of a residence, standing alone, was insufficient to constitute probable cause to issue a search warrant. **State v. Wallace**, 581.

§ 25 (NCI3d). Application for warrant; cases where evidence is insufficient; generally

Any search pursuant to a warrant is not a genuinely independent source of information sufficient to remove the taint of an earlier unlawful entry if the warrant was either prompted by what officers saw in the initial unlawful entry or if the information obtained during the entry affected the magistrate's decision to issue the warrant. **State v. Wallace**, 581.

STATE

§ 2.2 (NCI3d). State buildings

The State was acting in its governmental capacity in constructing an art museum so that no time limitation applied to preclude the State's action against defendant surety to recover on a performance bond. **State ex rel. Art Museum Bldg. Comm. v. Travelers Indemnity Co.**, 330.

§ 8.3 (NCI3d). Particular tort claim actions; prisoners

The evidence in an action by an inmate who slipped and fell on an unsecured drain cover in the kitchen of Central Prison supported the trial court's findings with regard to repair of the drain cover, the availability of tamper-resistant screws, and completion of the repair. **Brewington v. N.C. Dept. of Correction**, 833.

§ 10 (NCI3d). Appeal and review of tort claim proceedings

When a claimant appeals to the Industrial Commission on the basis of a general allegation that the hearing commissioner erred in finding that defendant was not negligent and that such decision was not supported by the evidence, the Commission may respond to such appeal by reviewing the record and, when appropriate, affirming and adopting the decision and order of the hearing commissioner. **Brewington v. N.C. Dept. of Correction**, 833.

§ 12 (NCI3d). State Personnel Commission authority and actions

An applicant for State employment whose grievance against the State alleged discrimination based on his age and veteran's preference had thirty days after he received notice that another applicant had been placed in the position to file his petition for a contested case hearing with the Office of Administrative Hearings. **Clay v. Employment Security Comm.**, 599.

TAXATION

§ 31.1 (NCI3d). Sales and use taxes; particular transactions and computations

Items such as matches and food offered at no charge to patrons of restaurant bars and to restaurant managers are not subject to use taxes. **In re Rock-Ola Cafe**, 683.

TELECOMMUNICATIONS

§ 1.1 (NCI3d). Regulation and control of telephone companies; particular matters

A Utilities Commission order authorizing only county seat polling rather than countywide polling with regard to a request for Extended Area Service (EAS) was not immediately appealable where the areas, if any, which will receive such service have not yet been determined. **State ex rel. Utilities Comm. v. Public Staff**, 251.

The evidence supported the Utilities Commission's finding and conclusion that cellular telephone service is competitive in North Carolina as a whole although some rural service areas had no carrier or only one carrier. **State ex rel. Utilities Comm. v. N.C. Cellular Assn.**, 801; **State ex rel. Utilities Comm. v. Attorney General Thornburg**, 903.

The evidence supported the Utilities Commission's finding and conclusion that deregulation of cellular telephone service is in the public interest. **Ibid.**

The Utilities Commission did not enlarge the scope of the proceeding without notice by its conclusion that bundling is in the public interest so long as consumers had the right to purchase service and equipment independently where it is clear that the Commission was not deciding whether bundling itself is in the public interest but only whether bundling should be permitted without regulation. **State ex rel. Utilities Comm. v. N.C. Cellular Assn.**, 801.

The Utilities Commission erred in deregulating cellular service resellers because only providers licensed by the FCC may be deregulated. **Ibid.**

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Plaintiffs seeking a preliminary injunction against abortion picketing at a doctor's residence did not establish a likelihood of success on the merits on an intentional infliction of emotional distress claim. **Kaplan v. Prolife Action League of Greensboro**, 1.

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§ 3.1 (NCI4th). Motions for continuance; discretion of trial judge

The trial court did not abuse its discretion by denying defendants' motion for a continuance of a summary judgment hearing. **Berkeley Federal Savings and Loan Assn. v. Terra Del Sol**, 692.

§ 13 (NCI3d). Allowing the jury to visit exhibits or scene

The trial court did not err by permitting an exhibit to be taken into the jury room during a medical malpractice trial where one defendant's attorney had stated in the absence of the jury that he objected to any exhibits being taken into the jury room, the jury returned during deliberations and asked to take an exhibit into the jury room, and the defense counsel who had objected stated that he had no objection. **Dixon v. Taylor**, 97.

UNFAIR COMPETITION**§ 1 (NCI3d). Unfair trade practices in general**

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